

COMMENTARIES
ON THE
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COMMENTARIES

ON THE

LAW OF SCOTLAND,

AND ON

THE PRINCIPLES OF MERCANTILE JURISPRUDENCE.

BY

GEORGE JOSEPH BELL, ESQ., ADVOCATE,

PROFESSOR OF THE LAW OF SCOTLAND IN THE UNIVERSITY OF EDINBURGH.

SEVENTH EDITION,

BEING A RE-PUBLICATION OF THE FIFTH EDITION

WITH ADDITIONAL NOTES,

ADAPTING THE WORK TO THE PRESENT STATE OF THE LAW, AND COMPRISING ABSTRACTS OF THE MORE
RECENT ENGLISH AUTHORITIES ILLUSTRATIVE OF THE LAW OF SCOTLAND.

BY

JOHN M'LAREN, ESQ., ADVOCATE,

SHERIFF OF CHANCERY.

VOLUME I.

T. & T. CLARK, 38, GEORGE STREET, EDINBURGH.

MDCCCLXX.

PREFACE.

IN preparing this edition, the Editor, in compliance with what he believes to be the general wish of the Profession, has re-published the text and notes of Professor Bell without alteration, and has added notes adapting the work to the present state of the law. He deems it right to state, however, that in revising the second volume he has entirely omitted the author's chapter on the now repealed Bankruptcy Acts of King George the Third, and has substituted for it Mr. Shaw's chapter on the Bankruptcy Acts of the present reign, which embraces Professor Bell's observations in so far as applicable to the present state of the law. Considerations of utility imperatively demanded this sacrifice of a portion of the original text; and in making it, the Editor believes he has in no degree deviated from the spirit of the plan of publication announced in the title-page of the work.

The Editor is aware that some members of the Profession, whose opinions are entitled to the greatest respect, would prefer to have the Commentaries entirely re-cast, according to the method of which Mr. Sergeant Stephen's Blackstone is a successful example. But he believes that, although the Commentaries of Professor Bell must eventually give place to more matured expositions founded on their basis, the Profession is not sufficiently prepared, nor is the science of Mercantile Jurisprudence in Scotland sufficiently advanced, for this method of treatment. The editorial matter, although consisting to a large extent of statements of principle which might without impropriety have been transferred to the text, has therefore been thrown into the form of notes. In this shape the continuity of the new matter is of course very much broken; but, on the other hand, the reader has the advantage of being able to read the original text apart from the additions engrafted upon it.

The Editor desires to acknowledge assistance kindly rendered by professional

friends. His thanks are due in an especial manner to Mr. J. A. Dixon of Glasgow, who kindly placed at his disposal a series of most instructive notes, the fruit of much private study and research, on the subjects of Sale, Guarantee, and Agency. The Editor has frankly availed himself of the permission thus accorded to him, and the examination which he has made of the sources of authority referred to in Mr. Dixon's contributions has fully satisfied him of their accuracy and value.

In preparing the work for the press, references to Morrison's Dictionary of Decisions have been substituted for the old references to the Folio Reports. The places of the original reports can always be found from the Reports in the Dictionary, and from Tait's Index.

5 RUTLAND SQUARE, EDINBURGH, *September* 1870.

PREFACE TO AUTHOR'S EDITIONS.

A LITTLE after the middle of the seventeenth century, the Law of Scotland was reduced to a regular system in the admirable Institutions of Lord Stair—a work so well digested in all its parts, so liberal in principle, so good in arrangement, so distinguished for sound judgment and excellent adaptation to the business and concerns of men, that it would seem almost beyond the age in which it was written, were it not in truth a digest of the judgments of the Court of Session reduced to order, according to the spirit and arrangement of the Roman jurisprudence.

A new Institute was published nearly a century afterwards—a posthumous work, prepared from the lectures of Mr. Erskine, who filled the chair of Scottish Law in the University of Edinburgh. In this work the actual state of the law at that time is exhibited with a conciseness and perspicuity surpassed only by Mr. Erskine's previous work on the Principles of the Law of Scotland.

A very remarkable change has since taken place in our national jurisprudence. In particular, the trade of Scotland has been extended, and with it the principles of Mercantile Law have grown up, and very rapidly advanced towards maturity. The Roman law, indeed, has furnished the great principles on which Mercantile Jurisprudence has in modern Europe been grounded, and in that learning the older Scottish lawyers were eminently skilled. But although the habits and the education of our lawyers prepared them for cultivating with advantage the principles of Mercantile Jurisprudence, it has happened, from particular circumstances, that, as a branch of law, this, till about half a century ago, has been comparatively neglected in Scotland.

Towards the end of the century before the last, there was some appearance of a growing attention to this department of law, proceeding partly from the influence

of foreign example, chiefly, perhaps, from the circumstances of the country. In that part of their professional studies which depended on the Roman jurisprudence, our lawyers received or finished their education on the Continent. In France particularly, they were accustomed to pass some part of their youth, and to attend the sittings of the Parliament of Paris, after the model of which the Court of Session was formed. The French 'Plaidoyez' were their models in forensic eloquence; and Sir George M'Kenzie, in his inaugural oration on opening the Library of the Faculty of Advocates, seems to speak the fashionable language of his day when he glories in the 'Roman eloquence' of France and Scotland, compared with the dry and abstract arguments of the lawyers of other countries. About the middle of the seventeenth century, the attention of the lawyers of France was strongly called to the doctrines of Mercantile Jurisprudence; and, first, the Ordonnance of 1667; afterwards, that which was proposed and accomplished by Colbert in 1673; and, finally, the still more celebrated Ordonnance de la Marine of 1681, gave a splendour to Commercial Law which could not fail to make an impression upon the lawyers of Scotland. With this example, the advancing state of Scottish commerce co-operated in preparing the way for a growing attention to the subject. The spirit infused into the country by that bold speculator who projected the Bank of England, and who, after having first meditated the establishment of an Indian trade in Scotland, proposed afterwards the magnificent scheme of a settlement on the Isthmus of Darien, excited to an excessive height the commercial enterprise of his countrymen. The laws of commerce necessarily rose into notice; and we find, accordingly, that some attention was paid to Commercial Law in Lord Stair's time.

But this dawning of Mercantile Jurisprudence was soon overcast. The failure of the Darien Expedition, and of all the splendid and premature schemes which had been formed for the advancement of Scotland, effectually checked mercantile enterprise; and the Union with England gave to the spirit of the country a direction entirely new.

The Union was soon followed by two rebellions, which not only disturbed the tranquillity, and interrupted the natural advancement of industry, wealth, and commerce, but produced a similar effect on the progress of the law. The numerous forfeitures which followed the rebellions of 1715 and 1745 gave rise to a multitude of difficult questions of high interest relative to the connection of superior and vassal, the nature and efficacy of destinations in deeds of entail, and the force of

real securities over land. All the learning of the Feudal Law came more immediately to be called into use, and the professional success, as well as the character of a lawyer, was estimated chiefly according to his skill in the law of heritable property. The jurisprudence of mercantile dealings, fitted for times of a different complexion, was almost entirely abandoned. In the work of Mr. Erskine, published after this era, there is very little to be found concerning Commercial Law; and the valuable learning concerning contracts, and the principles of Mercantile Jurisprudence in general, to be found in the Institutions of Lord Stair, shrinks in the Institute of Mr. Erskine into a very narrow compass.

After the agitation of the rebellions had ceased, and the confidence of the country in the continuance of public tranquillity began to be restored, there appeared something like a revival of the spirit of trade. The improvement of land and the encouragement of manufactures were promoted by the institution of a Board of Commissioners for the management of the forfeited estates which had been annexed to the Crown. Instructions were given that, in the administration of this trust, those Commissioners should be careful to hold out liberal encouragement to industry; and to the sound discretion with which this duty was exercised may in a great measure be ascribed the commencement of that agricultural improvement which soon sprung up in Scotland. A bank was instituted, the professed object of which was to aid the proprietors of land in their exertions; but the slow returns from such an employment of capital, with some other failures in the management, or rather in the conception, of the true nature and uses of a bank, led to the ruin of the establishment.

The country had been essentially benefited by the exertions which had been made, and not only agricultural improvement, but commercial enterprise were greatly promoted; but still there was little of the spirit of Mercantile Jurisprudence. The merchants were left to struggle with all the evils of our old law, little suited to the occasions of commercial intercourse; and a proposal, made by merchants, to introduce a system of Bankrupt Law similar to that of England met with the most determined opposition from our lawyers. The wide-spread ruin which followed on the fall of the Douglas Bank tended to allay this opposition, and to satisfy even lawyers that the old maxims and rules, and the forms of diligence of our ancient law, were in many respects ill adapted to commercial intercourse in the shock of extensive bankruptcies; and gradually the nation was reconciled to the passing of the first Bankrupt Law in the year 1772.

It is from that time only that the rise of the Mercantile Law of Scotland is to be dated, and that the attention of our lawyers and judges began to be directed judicially to commercial dealings.

It may naturally be imagined that the most obvious and best course would have been to adopt at once the Mercantile Law of England, which had already made great progress towards perfection. But there is some soul of good in things evil: national jealousy, and the repugnance which still prevailed to an acknowledgment of superiority on the part of England, prevented any premature attempt to assimilate the jurisprudence of the two countries, even in relation to those transactions in which there was a perpetual intercourse of trade between them.

When, in these circumstances, the present work was begun, now nearly thirty years ago, it was with hesitation and difficulty, and with much cautious disquisition, that I could venture to approach some of the doctrines of Mercantile Law; and it has been only in the course of five successive editions of the book that I have been able, on the one hand, to dismiss much reasoning that, by the authoritative recognition of the principle, had become unnecessary, and, on the other, gradually to extend my Commentaries to other questions as they rose into importance, or as room was left for their discussion by the abridgment of what had become familiar and established.

From what has been said concerning the history of Scottish jurisprudence, it may be inferred that, in searching for materials by which to illustrate the principles of Mercantile Law, much aid could not be derived from our own books. A considerable share of the attention of persons educated for the Bar in Scotland has necessarily at all times been directed, in the course of studying the civil law, to the great principles which regulate contracts; and there never has been occasion to discuss questions of this sort, on which the judges and lawyers of Scotland have been found deficient in the learning, or unskilled in the principles, which ought to rule such determinations. But unfortunately those learned and able arguments, so often delivered by the judges on questions of general jurisprudence and of Mercantile Law, had for a long time been known only to those who heard them delivered, or to others by an obscure tradition; and what might have enlightened the law, and done honour to the judicial establishment of Scotland, had been lost in the imperfect reports made of adjudged cases. In those reports, not only the decisions were not preserved in the language of the judges who pronounced them,

but the very grounds on which they were made were kept out of view, and nothing preserved but a mere skeleton of the case, and of the arguments of counsel, accompanied with a transcript of the formal words of judgment.

In this dearth of materials afforded by the books of the Scottish law, it was natural, or necessary, to look abroad for aid—to the writings of foreign lawyers, and the decisions of foreign courts; and the occasion was such as to justify the use of such authorities.

The Law-merchant is universal. It is a part of the law of nations, grounded upon the principles of natural equity, as regulating the transactions of men who reside in different countries, and carry on the intercourse of nations, independently of the local customs and municipal laws of particular states. For the illustration of this law, the decisions of courts, and the writings of lawyers in different countries, are as the recorded evidence of the application of the general principle; not making the law, but handing it down; not to be quoted as precedents, or as authorities to be implicitly followed, but to be taken as guides towards the establishment of the pure principles of general jurisprudence.

This general Law-merchant is in England said to form part of the common law; and it is so much a part of that law, that it requires not to be proved by witnesses, like matter of foreign regulation, but is noticed judicially by the Court. The same precision in the laying down of this doctrine is not to be found in Scotland, because in our books little attention has been given to the subject, and the dicta of our judges have perished. But the same principle operates as in England; and our courts are daily in the habit of proceeding on this Law-merchant as fully authoritative in Scotland, and of allowing the decisions of courts and the writings of lawyers to be cited in illustration of it.

But, in mentioning foreign authorities and decisions as coming in aid of our own imperfect materials, it is necessary to distinguish in a particular manner those of England. Not only from the extent and variety of her commerce, but from the fortunate circumstances which marked the progress of this part of her jurisprudence, the English books afford valuable aid in cultivating the subject of Mercantile Law.

During the troubles which agitated and depressed this country, England was

triumphantly proceeding in her great career of commercial prosperity; and the progress of her jurisprudence, which might naturally be expected to accompany that of her trade, was happily directed by the successive wisdom and learning of many great men. It has been objected to the judicial decisions of some of those judges, that they did not sufficiently study to form precedents for future cases. But there had gradually been accumulated a rich collection of materials, when Lord Mansfield, in the middle of the last century, was appointed Lord Chief Justice of the King's Bench. This eminent man, who has been called the father of the Commercial Law of England, devoted his splendid talents, during an uninterrupted period of thirty years, to the great duty of constructing, in a series of judicial determinations, a system of Mercantile Jurisprudence. The spirit with which he proceeded has thus been stated by one who enjoyed much of his confidence, the late Mr. Justice Buller:—‘Within thirty years the Commercial Law of this country has taken a very different turn from what it did before. Before that period, we find that in courts of law all the evidence in mercantile cases was thrown together; they were left generally to a jury, and they produced no established principle. From that time we all know the great study has been to find some certain general principles which shall be known to all mankind, not only to rule the particular case then under consideration, but to serve as a guide for the future. Most of us have heard these principles stated, reasoned upon, enlarged, and explained, till we have been lost in admiration at the strength and stretch of the human understanding.’

This design, so far most happily accomplished by Lord Mansfield, has been steadily kept in view by the judges who have succeeded him in the courts of England: Lord Kenyon, Lord Ellenborough, Lord Eldon, while he sat in a court of law, and during the long period of his presiding in the House of Lords. The arguments which have been delivered from the Bench, for nearly a century, by so many eminent men, are reported to us so faithfully, that we have before us as materials of study the whole of what has been laid down by the judges of England upon Mercantile Jurisprudence.

But in the use of those materials a task of great delicacy remained to be performed. England and Scotland were, by the Articles of Union, placed so entirely on the same footing in all the regulations respecting trade, that the system of Mercantile Jurisprudence in the two countries is truly to be considered as the same; and of late years the judgments of Westminster Hall and those of

the Court of Session have in both countries been allowed to be quoted as the decisions of British courts upon the Mercantile Law of Great Britain. Still much caution is to be observed in the adopting of English judgments as authorities in Scotland; and I state this, the rather that I think there has appeared of late some danger lest the purity of this part of jurisprudence, and the integrity of our own system of law, should be impaired by too indiscriminate a use of English authorities. In a large proportion of cases which come into courts of justice, the relation, and consequent rights of parties, stand on such a footing that the Law-merchant and the municipal law or local custom are in a manner blended together, and it is difficult to discriminate on what precise ground the decision has proceeded amidst these elements of judgment. Even the peculiar forms of trial and science of pleading, as embodied in a decision, may often lead to mistake, and a judgment may appear to be given on a general principle of jurisprudence, which turns entirely on a point of form. There is evidently, therefore, great hazard in transferring the decisions pronounced upon cases of this description in one country to the practice of another system; and unless the separation be carefully made, rules of foreign municipal law may be incautiously imported, and an adulterate precedent adapted as authority in Mercantile Law, for the illustration of which we look into those cases. Of those dangers arising from the peculiarities of municipal law, the lawyers of England have been more fully aware than we are accustomed to be in this country. To avoid them was one great aim of Lord Mansfield in his determinations of mercantile cases; and every one who has conversed much with lawyers of the higher class in England must have seen the same wise caution distinguishing all their inquiries into the nature and foundations of legal doctrines, and the weight of authorities and decisions.

In observing this caution, and in attempting to extract from various and sometimes discordant materials the pure doctrines of the Law-merchant, while the task I had undertaken appeared to promise usefulness, it was also a task of great difficulty. Many of the English cases have by Lord Mansfield, and upon the model which he began, been decided with so much care in the determination of the principle, that they are as lights in this obscure path. Others contain so strong an infusion of common law intimately blended in the judgment, that without a careful comparison of them with the great principles of jurisprudence delivered in the Roman law, and recognised in the Scottish authorities, or commented on by foreign writers of credit, there was much hazard of impairing what it was my design to clear, and of substituting, in the place of mere obscurity, corrupted doctrine and

mistaken principles. But I trusted that amidst the delicacies of the undertaking, and the chance of failure, some benefit might arise. While I did not profess to embrace the whole details, or deliver a digest of the Mercantile Law, but merely to investigate questions of this description which presented themselves, I was satisfied that what appeared to me so embarrassing after so much study, must to those whose researches were only occasional, and undertaken with a view to the discussion or decision of a particular question, present difficulties no less formidable, and that a free examination of the principles of Mercantile Law, as illustrated by the decisions and legal authorities of England as well as of Scotland, might contribute in some degree to the improvement of this great system in both countries. I ventured to expect that, if the design were properly executed, it might enable the lawyers of England to become better acquainted with our jurisprudence than hitherto they had found to be practicable. Some of that learned body I have been mortified to find ignorant on this subject, and in no degree aware of the admirable principles and comprehensive views by which the law of Scotland is distinguished. Others, again, whose opinions will finally prevail, have a very different sense of this matter. Lord Bacon long ago said: 'I have read, and read with delight, the Scottish Statutes, and some other collections of their laws;—with delight, I say, partly to see the brevity and propriety of speech, and partly to see them come so near our own laws.' And in the present day men of the first eminence in the law of England have expressed their high admiration and respect for the law of Scotland, and make no scruple to profess the care with which they are accustomed to examine into its doctrines in preparing to determine questions of general jurisprudence, or in deliberating on suggestions fit to be made to the Legislature for the improvement of the English law.

The hope of producing a work which might be of some use in opening a fuller communication between the laws of the two countries, in promoting a free examination of the difference between them, or in showing how completely they coincide in some points of importance to both, carried me through many difficulties. I am happy to say that I have succeeded in this great object beyond my most sanguine expectations; and that, with whatever imperfections this work may be chargeable, I have at least the comfort to think that it has been instrumental in introducing the lawyers of England and of Scotland to a more intimate knowledge of the contrasted excellences of their respective systems of jurisprudence.

But this book was not meant to be a commentary on Mercantile Law alone.

In every branch of the law there has been a very remarkable progress since Mr. Erskine's time. The necessity even for a new Institute has been strongly felt; and one of the schemes for improving the jurisprudence of Scotland, which the Bar has often contemplated, was that there should be drawn up, by the co-operation of men of talent and high authority, a modern digest or code of the law. At other times, we have cherished the hope as less visionary, that a very eminent person, peculiarly qualified for so great an undertaking, and in possession of invaluable materials for the purpose, might be induced to think that he should best discharge that debt which every man is said to owe to his profession, by the publication of an Institute. Had a work of such surpassing usefulness as the Bar were prepared to expect from that quarter made its appearance, the field of these commentaries would have been much narrowed. And although there might still have been some questions of heritable right and competition, on which a commentary might have been useful, as requiring an examination more in detail, a discussion somewhat less abstract than it is fit or possible to deliver in an institutionary work, I should have abstained from much of that discussion which in the want of any modern Institute I have thought necessary for completing my view of the laws which regulate the connection of debtor and creditor.

In the whole course of these extensive labours, I have accustomed myself to examine all the cases and authorities with the greatest freedom, but I hope with that respect and deference which become an individual. In questions of Mercantile Law, I have been actuated by a sincere desire to find the governing principle of universal jurisprudence, or to discriminate the peculiarities that may justify a determination in one part of the empire, which may not perhaps be entitled to prevail in another. I have been encouraged in my labours by the greatest authorities of my own time in both parts of the island; and I am proud to acknowledge the highest gratification that the author of such a performance can have bestowed upon him, in the recorded approbation of the Scottish Bar, and in the public notice with which both Scottish and English judges have from the bench been pleased to distinguish this work.

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COMMENTARIES

ON

THE LAW OF SCOTLAND.

INTRODUCTION.

THE design of this work is to present a view of the Civil Jurisprudence of Scotland in its practical application to the ordinary business of life. With this intention, the several rights and obligations will be explained on which a demand, or action, for debt may be grounded; the estates or funds described, out of which they may be satisfied; and the various grounds of preference by which particular claimants may be distinguished from the general mass brought under review, as in relation to that state of insolvency on the part of the debtor, which places in the keenest rivalry, and under the most vigilant examination, the pretensions of each creditor to a share of the inadequate fund.

In conducting an inquiry which comprehends so great a variety of matter, it is my intention, in the FIRST BOOK, to take a general review of the Law of DEBTOR and CREDITOR; chiefly for the purpose of describing generally the means which are by law provided for compelling the payment of debt when prosecuted by an individual creditor, and to serve as an introduction to the more detailed consideration of the effect produced by rivalry and the inadequacy of the funds of payment.

The various kinds of estate of which creditors may avail themselves for the payment of debt, will form the subject of the SECOND BOOK; with the several questions which may arise out of the ambiguous states of possession in which property may be placed at the moment of insolvency.

The inquiry will naturally be directed, in the next place, as the subject of the THIRD BOOK, to the rights of personal creditors; in which it is proposed to explain the general principles of PERSONAL OBLIGATION, and CONTRACT, with the grounds of action or claim of

debt which arise from them ; and this part of the work will admit of an ample commentary on the doctrines of **MERCANTILE** and **MARITIME CONTRACTS**, which have been more imperfectly explained, either in separate treatises or in the writings of our institutional authors, than any other part of Scottish jurisprudence.

In the **FOURTH BOOK** will be presented a view of the several grounds of **PREFERENCE AMONG CREDITORS**, whether resting on securities over the heritable or moveable estate, or on the peculiar footing of privileged debts.

Having in this way considered the relation of creditor and debtor in the abstract, without regard to their characters as individual or social, that distinction will next demand attention. The great operations of mercantile business are conducted by Partnerships, either avowed and acting under an appropriate name or firm, or secret with sleeping partners, or momentary, as in joint adventure. In the **FIFTH BOOK** I shall give a full view of the **LAW of PARTNERSHIP**, and of the several very important aspects in which it has lately presented itself to public consideration.

In the **SIXTH BOOK** I shall proceed to consider the **BANKRUPT LAWS** ; and, after an inquiry into the description and character of insolvency and of bankruptcy, the peculiar regulations will be explained by which, in contemplation of bankruptcy, debtors have been prohibited from granting securities voluntarily, and creditors stopped from acquiring preferences by means of execution, with a view to prevent the fraudulent concealment of funds, and the creation of partial preferences. A digest will be attempted of the rules of **RANKING** and **DISTRIBUTION**, by which the estate of the debtor is applied in extinction of his debts. And afterwards will be explained the history, nature, and effects of those institutions by which the estate and person of the debtor are placed under the control of creditors, when he is unable to discharge his obligations, and by which the sale and final distribution of his estate are effected. This includes an explanation of the process of **SALE** and **RANKING**, **MERCANTILE SEQUESTRATION**, and **TRUST DEEDS** for creditors, with the law of **IMPRISONMENT** and **CESSIO BONORUM**.

The work will be concluded by a review of the **MUTUAL RELATIONS OF THE SCOTTISH AND FOREIGN LAWS** relative to **DEBTOR** and **CREDITOR**.

BOOK I.

GENERAL REVIEW OF THE LAW OF DEBTOR AND CREDITOR IN SCOTLAND.

IT may be useful, in commencing an inquiry into the practical jurisprudence of Scotland, as exhibited in the competition and contests of creditors, shortly to review the general doctrines of the Scottish Law of Debtor and Creditor in the two states of Solvency and of Bankruptcy.

CHAPTER I.

OF EXECUTION FOR DEBT, OR DILIGENCE REAL AND PERSONAL.

THE several writs of execution provided by law for enforcing the payment of debt, are directed either, first, against the ESTATE of the debtor, for the purpose of having it transferred to the creditor in satisfaction of his debt, or converted into money, and the price paid to the creditor; or, secondly, against the PERSON of the debtor, with the intention of indirectly, but often more effectually and rapidly, compelling him to find the means of payment.

In the law of Scotland, all harsh and sudden proceedings for the recovery of debt have been restrained by a spirit of forbearance towards the debtor, happily enough combined with precautions for the safety of the creditor.

Execution for debt proceeds by writs under the King's signet, issued in virtue of special warrants from the Supreme Court.¹

The regular system of judgment and execution established in the Roman law,² was, in the kingdoms of modern Europe, much interrupted. But without stopping to explain the

¹ [Every decree of a Court (unless in declaratory actions) now contains a warrant on which execution may proceed. 1 and 2 Vict. c. 114, secs. 1, 2. See Bell's Prin. 2270 sqq.]

² In Rome, judgments were carried into execution under the immediate superintendence of the judge who pronounced them, or of the judge or magistrate within whose jurisdiction the subject of execution lay. For this purpose, at the distance of four months after sentence (which period was allowed for voluntary obedience), an action was instituted called ACTIO JUDICATI; in which the judge first issued his warrant to seize, as a judicial pledge, the moveables, and within eight days to sell them for payment of the debt; and

afterwards, if there was a deficiency of moveables, he authorized the immoveable property to be seized, and delivered in pledge to the creditor, or put under the care of a factor or curator. At the end of two months, if the debt was not extinguished, he authorized the land, etc., to be sold publicly, and the debt to be paid from the price, the balance being delivered over to the debtor.—Dig. lib. xlii. tit. 1, De Re Jud. l. 15 and 31; Cod. lib. viii. tit. 34; De Jure Dom. impetr. l. 3. At first there seems to have been no remedy where no purchaser made offer for the lands; but afterwards an alternative was introduced, by which the property might be adjudged over to the creditor to the value of his debt.—Cod. lib. viii. tit. 23, Si in causa Jud. pig. l. 2 and 3.

feudal jurisdictions—the power of barons, counts, and sheriffs to hold courts and give judgment—or the confusion and surcease of justice which arose from the repledging of defendants [4] by powerful lords, it may be sufficient to say, that the increasing power of the Royal Courts, and, both in England and in Scotland, the delegation by brieves issued from the King's Chancery to sheriffs or other officers to try the cause by jury, redeemed the course of justice from those interruptions, and gradually established a more uniform course of jurisprudence. Those brieves, while they constituted only a jurisdiction for the special occasion, contained also a warrant by which the jurisdiction which they created might be fully executed. This warrant at first authorized the attachment and seizure of the moveables of the debtor, in order to enforce attendance, and to be the subject of execution; and the execution was afterwards extended to land. But the constraint of the person was permitted only in the recovery of merchant debts; or gradually established by indirect forms of proceeding, as for rebellion against the commands of the Church and of the King.

In the fifteenth century a great revolution took place in the judicial policy of Scotland. The Court of Session was instituted after the model of the Parliament of Paris; the brief of distress fell into disuse; the principle of the Roman and French jurisprudence was adopted; and judgments were executed by means of special writs issued on judicial warrant, and analogous to the Roman *Actio Judicati*.

Generally speaking, those warrants are decrees, either pronounced in the course of an action, or issued summarily in virtue of the consent of the debtor. To explain fully the law relative to decrees of the former kind, would require a review of the several courts of civil jurisdiction, and of the several forms of action by which payment of debt may be demanded; a discussion by much too extensive to be entered on here, and which is not necessary to this introductory view. The decree by consent, called a Decree of Registration, may generally be described as directly grounded on the registration of an obligation or contract in the books of a court of competent jurisdiction, by virtue of a previous consent incorporated in the obligation or contract. Proceeding on such consent, a fictitious judgment is given forth by the clerk of court, authorizing all usual and necessary writs of execution, as if by authority of the judge.¹ Analogous to this, though perhaps more operose in its form, is the English warrant of attorney to confess judgment; and the greater simplicity of the Scottish consent to registration for summary execution, has enabled the Legislature to declare that, by legal construction, such consent shall be implied in bills of exchange and promissory notes, whereupon protests for non-payment may be recorded to the effect of having a decree of registration issued; and in this way the necessity is avoided of an action on those instruments of trade which are in daily use, and creditors have immediate access to the most summary execution.²

The judgment or decree has of itself no effect whatever on the debtor's funds. It does not, as in England, bind the land from its date, however quickly execution may follow;

¹ The form of the clause of registration incorporated in bonds or contracts is this:—‘And I consent to the registration hereof in the books of Council and Session, or other judges' books competent, that letters of horning on six days' charge, and all other execution needful, may proceed upon a decree of the Lords thereof, to be interponed hereto, and to that effect constitute

my procurators.’ The procurator so appointed did, in the original process, appear judicially and give consent to the decree; but the decree now proceeds summarily, and of course. On registration, an extract of the bond is given out, accompanied by a decree for execution. [A short form of the clause of registration applicable to all deeds of whatever nature was introduced by 10 and 11 Vict. c. 48, re-enacted

by 31 and 32 Vict. c. 101, secs. 8, 138; and somewhat anomalously, deeds requiring to be registered in the Register of Sasines may be recorded *there* for preservation and execution, provided the prescribed warrant of registration shall specify that they are to be so recorded. 31 and 32 Vict. c. 64, sec. 12.]

² By statute 1681, c. 20; 1696, c. 36; and 12 Geo. III. c. 72, secs. 41 and 42, a regular protest of a bill for non-payment or non-acceptance, or of a promissory note for non-payment, shall be a warrant for a decree of registration authorizing the king's writ of execution. The execution can proceed only on a previous charge to pay within a certain number of days; and if there be any good defence, it is competent to stop the execution by applying to the Supreme Court for suspension, on bail to pay the debt if the ground of suspension be bad.

neither are the moveables held, as in the hypothecary law of the Continent, to be attached or affected till a writ of attachment is actually executed.

The writs executorial, or diligences, as they are called, by which judgments are put [5] in execution, or payment of debts enforced, may be distinguished into two classes: one intended to enforce payment out of the estate, or by constraint of the person; the other to provide for intermediate security till this more complete execution can be accomplished.

1. EXECUTION OR DILIGENCE FOR COMPELLING IMMEDIATE PAYMENT.—Diligence, or execution for payment of debt, may proceed against the estate of the debtor as soon as judgment in a suit, or decree of registration, is given out: or, even without such a decree, a warrant for certain writs may be obtained on exhibiting to the judge a valid and formal contract or obligation in writing.¹

Against the LAND or other HERITABLE ESTATE of the debtor, his creditor may proceed by two forms of diligence: one directed only to the purpose of laying an embargo on the debtor's power of alienation to the creditor's prejudice; the other being a judicial transfer of the estate in payment of the debt. The former is called INHIBITION, the latter ADJUDICATION.

INHIBITION is a writ in the King's name, by which the debtor is prohibited from disposing of his land or heritable property to the disappointment of the inhibiting creditor, and even from incurring new debts, by which his land may be affected to the inhibitor's prejudice. This inhibition against the debtor is accompanied by a prohibition to all dealers and others to take conveyances from, or give credit to the debtor, relative to or grounded on the property comprehended in the inhibition. The writ is entered in a public record, where it may be examined by all the world, as forming an embargo on the credit and powers of the debtor. The effects of it will require a very minute consideration hereafter: at present it may be sufficient to observe, 1st, That as a mere prohibition this diligence confers no right on the creditor to enter on possession of the debtor's estate, but merely to challenge debts and overturn conveyances made in contempt of the writ; and 2^{dly}, That other creditors, whose debts are not within the prohibition, may, by the more active diligence of adjudication, acquire a right, as by transference, to the debtor's property, notwithstanding the existence of an inhibition. The debtor cannot be relieved from the embargo of an inhibition grounded on a debt which is already due, but by paying the debt. It is otherwise with inhibition in security of a debt not yet due, or still in litigation.—See below, p. 7.

ADJUDICATION.—This diligence proceeds in the proper form of an *Actio Judicati*,—the creditor producing his decree, or a written and formal obligation in proof of his right to demand execution; and the summons, which is to the Court of Session, concludes for having the debtor's lands adjudged to the creditor, redeemably. The judgment is alternative: either such a portion of land is, with the debtor's consent, adjudged to the creditor as may be found equivalent to the debt;² or, if the debtor do not choose to concur, a general adjudication of his whole lands is pronounced. It may be sufficient to say of this diligence, that from the moment the summons is executed it creates a lien over the land, called in law language litigiosity; so, at least, as to prevent the debtor from voluntarily alienating to the prejudice of the creditor: That, if the subject be simply heritable, the decree of adjudication completes the creditor's right; if it be of a feudal nature, the decree of adjudication is completed and carried into execution by the common feudal forms of infeftment. Adjudication, when thus completed, resembles a mortgage; it entitles the creditor to enter into possession,

¹ Inhibition or adjudication for attaching the heritable estate may be grounded on a written obligation, without a decree of constitution; or letters of arrestment for attaching moveables and debts may be obtained on a document of the same description.

² [The conclusion for special adjudication is now unnecessary, 31 and 32 Vict. c. 101, sec. 59; and is unknown in practice.]

and to recover the rents; the estate being redeemable within ten years in the general adjudication, and five in the special. During this term of redemption the creditor must, [6] when called upon, account for what he actually has drawn, or might have drawn, and renounce his infestment if the debt has been paid off. If any part shall still remain due, it must either be paid off, and the estate redeemed, or the power of redemption may be foreclosed by an action for declaring the term expired.¹

The PERSONAL ESTATE of the debtor is taken in execution by POINDING, or by ARRESTMENT IN EXECUTION.

The warrant to poind or to arrest in execution may be granted by an inferior judge, who has pronounced decree, or in whose books the obligation has been registered for execution; or by the Court of Session, a warrant for letters of horning, poinding, and arrestment may be granted, on which they are issued at the signet.²

POINDING in the Scottish law, originally a part of the execution under the brieve of distress, gradually became unjust and oppressive. It was only when reformed in the reign of his late Majesty that it regained its original purity. It consists at present of an adjudication of goods belonging to the debtor, followed by a public sale, under the judicial superintendence of the sheriff of the county; the price being applied in payment of the debt due to the poinding creditor.

ARRESTMENT IN EXECUTION may be described as a lien created by attachment over money due to the debtor, or over moveable property of the debtor in the hands of a third party. The property or money thus attached is made effectual to the creditor by means of an action of forthcoming against the holder of the fund. To this action the debtor is made a party; and the object of the action is, that the arrestee should be ordained to deliver up to the arrester the debtor's property, or to pay to him the debt.³

By execution against the DEBTOR'S PERSON, he is indirectly compelled, by the terror of

¹ In England, as in every other feudal kingdom, land was for a time banished from commerce; and the only execution competent against the debtor's estate, was distress by seizure of moveables. The writ of *LEVARI FACIAS* entitled the sheriff to levy the rents and profits of the debtor's lands, as well as his common moveables; and, if necessary, another writ (*VENDITIONI EXPONAS*) was issued to authorize their sale. But it was not till the thirteenth century that land was in any degree open to execution for debt in England. In the reign of Edward I. a new kind of execution was introduced, which is thus explained by Sir William Blackstone: 'When the restriction of alienation began to wear away, the consequence still continued; and no creditor could take possession of lands, but only levy the growing profits; so that if the defendant alienated his land, the plaintiff was ousted of his remedy. The statute (13 Edward I. c. 18), therefore, granted the writ of *ELEGIT*, by which the defendant's goods and chattels are not sold, but only appraised, and all of them (except oxen and beasts of the plough) are delivered to the plaintiff, etc. If the goods are not sufficient, then the moiety, or one-half of his freehold lands which he had at the time of the judgment given, are also to be delivered to the plaintiff to hold, till out of the rents and profits thereof the debt be levied, or till the defendant's interest be expired.' 3 Blackst. 318. Thus the *ELEGIT* differs materially from our adjudication; for the estate or right which the creditor acquires in the real property of his debtor, is not, as ours, a right of property, redeemable like a mortgage, but merely a conditional right of possession, ceasing with the payment of the debt, but affording no means of carrying the real right of property to the

creditor himself. [Stephen's Com. iii. 688, i. 316. Now, by 1 and 2 Vict. c. 110, sec. 11, on an *elegit* the sheriff delivers execution of *all* lands of the debtor, or held in trust for him at the time of entering up judgment, or over which, then or afterwards, he, or a trustee for him, has any disposing power for his own benefit. Still, however, the tenant in *elegit* has only a conditional estate defeasible when the amount of the judgment debt is levied.]

² [See above, p. 3, note.]

³ The original writs for execution against moveables in England were the *LEVARI FACIAS* and *FIERI FACIAS*. The former contained at first a power only to levy the goods, not to sell them; though, afterwards, the Supreme Courts came to insert in the writs of *levari facias* issued by them a power of selling. The *fieri facias* contained a power of levying the goods and debts, and 'making' of them to the avail of the debt. In the execution of these writs, the sheriff made the goods be valued, fixed an upset price upon them, and exposed them to sale. But here his power ended if no purchaser appeared; and a new writ, called *venditioni exponas*, was necessary to authorize a sale for what the goods might bring. The *elegit*, as applicable to moveables, introduced the power of appraisement, in case of the property not finding a purchaser. The *fieri facias* and the *elegit* are now the great writs of execution against moveables in England, and under them the purposes of our poinding and arrestment are accomplished; debts being levied under them, and goods sold for payment, or appraised to the value, and delivered in satisfaction. [See 1 and 2 Vict. c. 110, sec. 12. Stephen's Com. iii. 684 sqq.]

imprisonment, to bring forth his means, or to call on his friends to assist him in discharging his obligations; and the creditor is enabled, during his debtor's imprisonment, to keep [7] a more successful watch on all his motions relative to the disposal of his funds.

Personal execution cannot proceed till after the debtor has been required by a charge on letters of Horning to pay the debt, and a certain number of days have been allowed him for obedience. His disobedience to this charge is followed by letters of Caption, which is a warrant for his imprisonment. When imprisonment does follow, it is held by the law to have no other object than to enforce payment and the discovery of funds; and thus execution against the person does not preclude execution against the property. Nor can an imprisoned debtor bid defiance to his creditors while he lives with extravagance in prison.¹

2. DILIGENCE FOR INTERMEDIATE SECURITY.—The diligences of the Scottish law would be imperfect if these delays were granted to debtors before personal execution could proceed, or before execution could be had against the effects by poinding, or against the land by adjudication, unless some means of security were provided against their taking advantage of the indulgence. But it has been contrived to reconcile indulgence with security in a way that seems to be unknown in England.

The two forms of execution already explained, of Inhibition and Arrestment, are easily adapted to the purpose of intermediate security. The creditor who has not yet obtained judgment for his debt, or whose debt is not yet due, is allowed to use INHIBITION IN SECURITY, where his debtor appears to be *vergens ad inopiam*; so that during the discussion of the action, or until the arrival of the day of payment, or until he shall be in a condition to take execution for enforcing payment, he may be secured against the insolvency of his debtor and the sale of his property. The only difference between the effect of inhibition in security and inhibition on a debt already due is, that the former may be recalled on security being given for the debt; the latter only by payment. In the same way the creditor may use ARRESTMENT IN SECURITY, which also differs from the arrestment in execution by being subject to recall, on security being given for the debt; whereas the other cannot be relieved but by payment.

In regard to personal execution, the delay given to the debtor to prepare for payment is reconciled with the safety of the creditor by means of a *MEDITATIO FUGÆ WARRANT*. This the creditor may obtain on judicially swearing to the truth of his debt, and to his belief of the debtor's intention to escape from the country; and on justifying this belief to the magistrate in presence of the debtor, by the statement of his grounds of suspicion, and by an examination of the debtor himself. Under this warrant the debtor may be imprisoned, to abide the course of his creditor's diligence, unless he shall relieve himself by finding bail to remain in the country.

CHAPTER II.

OF THE EFFECT OF INSOLVENCY ON THE DILIGENCE OF INDIVIDUAL CREDITORS.

GENERAL PRINCIPLES OF BANKRUPT LAW.—The diligences now enumerated were devised for the use of creditors considered individually, and suffer mutual restraint by rivalry,

¹ As imprisonment by the English law is not, like that of Scotland, a method merely of enforcing payment and the discovery of hidden funds, but a satisfaction for the debt, the creditor who has imprisoned his debtor can proceed with no execution against the property. While his right is satisfied

by the imprisonment of the debtor, the *fieri facias* and *elegit* must sleep; and consequently the debtor may in the meanwhile live in prison luxuriously and extravagantly, with his funds untouched by execution.

[8] joined with inadequacy of funds. At first the preference among rival creditors was regulated according to priority of execution; and the time is not long gone by when the threatened insolvency of a trader brought all his creditors upon him with a concurrence of diligence the most ruinous and deplorable. The policy of the laws relative to bankruptcy is at once to allay all this hurry and perturbation, to bring creditors as nearly as possible to equality, and to prevent the debtor from interfering to confer on favourite creditors a preference to which they are not justly entitled.

Independently of the peculiar rules of Bankrupt Law, creditors are insulated individuals, connected by no common interest, and not bound to co-operate in execution, or to take joint proceedings for the general benefit. Under the Bankrupt Law they are formed into a community. The inadequacy of the fund from which they are to be paid suggests the wisdom of mutual forbearance; a stop is put to the accumulation of expensive and separate proceedings; and the law, following the reasonable wish of the whole, or at least the equity of contending interests, prescribes a general plan for recovering and distributing the estate at the common expense. The proceedings against the person of the debtor suffer also a change under the Bankrupt Law. The right of imprisonment, which at common law belongs to the creditors of an insolvent debtor, is restrained by more comprehensive and liberal views; and although the debtor who is guilty of embezzlement or fraud is exposed to harsher constraints, and regulations more highly penal, he whose insolvency has arisen from innocent misfortune is relieved from prison, or discharged of his debts.

This peculiar system is not of rapid growth, but the mischances incident to trade necessarily lead to bankruptcies; and with the extension of commerce and the prevalence of the system of credit, the effect produced by such failures is extended over a country: '*Non enim possunt, una in civitate, multi rem atque fortunas amittere, ut non plures secum in eandem calamitatem trahunt.*' It is amidst those frequent insolvencies that the great principles of the Bankrupt Law are established—that men feel by experience the absurdity and unjust consequences of the old maxims—that they come to take a more candid, equitable, and enlarged view of the effects of insolvency upon the common interests of all, and to acquire a just sense of the benefit to be derived from unanimity and from common proceedings.

In codes of bankrupt law which thus grow up amidst the multiplying transactions of a commercial country, two great points may be taken as the fundamental principles into which the whole is resolvable. One is, that from the moment of failure the inadequate fund becomes the common property of the creditors; the other, that as insolvency may often proceed from misfortune alone, it is frequently just, and even expedient, to grant to the debtor freedom from that imprisonment which would render him useless and a burden, if, having failed from the mischances incident to trade, he is willing to give up everything to his creditors.

The first of these principles is the more extensive in its operation, and forms the groundwork of all the peculiarities to be found in the Bankrupt Law with respect to the right of the creditors, the powers of the debtor over the estate, and the peculiar processes by which the funds are collected, converted into money, and distributed.

Thus it is a direct consequence of this principle, that from the moment of insolvency the debtor loses the power of a proprietor, and becomes a mere *negotiorum gestor* for his creditors in the management of the common fund—that he is bound to make a fair disclosure of his estate—that he is deprived of the power of making alienations from motives merely of generosity, of affection, or of gratitude. This is the fundamental principle of all those regulations by which, in the bankrupt laws of various countries, provision is made for the examination of the bankrupt, for preventing direct or indirect embezzlement, and for annulling fictitious debts and voluntary conveyances without value.

[9] A second consequence of the general principle is, that although in the ordinary

case, a debtor is bound to pay his creditors at the appointed day, or to give security to those who are suspicious of his credit, and urgent for payment; he cannot, after insolvency, thus agree to favour any one, without doing injustice to the rest, by encroaching upon a fund which is common to them all. This, again, is the great foundation of those laws which have for their object the restraining of insolvent debtors from conferring preferences,—from making payments in contemplation of bankruptcy,—from delivering goods as the equivalent of payment, or granting deeds of security in favour of prior creditors over any part of the estate. And such laws are defective or perfect in proportion to the success with which this general principle may be reconciled with the rights of those who, ignorant of the debtor's condition, may have been induced to rely upon his credit.

A third consequence deducible from the above principle is, that as the debtor is stopped by the common right of the creditors from bestowing preferences upon individuals of their number, so those individuals themselves ought to be prevented from acquiring preferences by the use of separate diligence. With this view a judicial process is opened to the creditors for immediately vesting in them, or in trustees, the insolvent estate, to be managed for the general behoof, converted into money, and distributed at the common expense. The perfection of this set of regulations in any country must depend upon the simplicity of the process, the ease with which it may be obtained consistently with safety to persons not bankrupt, and the rapidity and economy with which the distribution under it may be accomplished.

Next, according to the general principle, each creditor is entitled to an equal share of the funds, unless, previous to the failure, a preferable real right have been created over some part of the estate or effects. It is not the design of the bankrupt law to take as a fund of division what does not belong to the bankrupt, or what may be exhausted and covered by real securities; but to allow, as far as may be consistent with those preferable rights, a perfect equality among the creditors.

And *lastly*, To make effectual the rights of the creditors, and give to each his due share in the distribution, modes of proceeding are invented for attaching and converting into money, quickly and at little expense, the estate and effects, and for accomplishing a division among those entitled to a share.

Thus the common interest of the creditors in the inadequate fund furnishes the principle which pervades and systematizes the whole regulations of the bankrupt law in relation to the estate of the debtor, his powers over it, and the mode of distribution.

The other great principle above alluded to bears reference rather to the condition of the debtor. It is a principle which ought to operate in the case of those who are not traders, as well as of those who are more directly exposed to all the dangers of commerce: for although the trader is chiefly liable to be overtaken by sudden misfortune, other men are not beyond the reach of mischance; and if a debtor, although no merchant, can vindicate his failure from suspicion, and is willing to deliver up his whole estate to his creditors, he ought at least to be freed from prison. The more frequent and unavoidable dangers of a merchant's condition, and the necessity of his acting much upon credit, entitles him, indeed, to some distinction; but this should consist, not in the punishment of other men, but rather in the absolute discharge of the fair trader from all his debts; while to other men should be granted the more limited remedy of freedom from jail.¹ It is a point even of public expediency, that an honest merchant who has failed should be enabled to recommence his trade unencumbered with the load of former debts, which he has already done everything in his power to discharge. And it is scarcely a hardship upon creditors to give this indulgence, since the chance of insolvency, so peculiarly incident to all mercantile [10] transactions, must, in all a merchant's dealings, enter into his calculations of risk.

¹ [The remedy of sequestration in bankruptcy is not now confined to traders.]

These seem to be the leading principles of the Bankrupt Law, considered in the abstract. The particular regulations of each state must of course vary with the general spirit of the common law, and with the peculiarities of its ordinary institutions. But, however numerous or perplexing the rules and institutions of any code may at first appear, in these points they will be found to centre; and the system may fairly be estimated as good or bad, in proportion as effect is given or denied to these general principles.

It might be interesting in this view to examine the systems of bankrupt law established in various nations; to inquire how far they accord with these abstract principles, and to what peculiarity any deviation is to be traced. But this is a large field of inquiry; and as it is of chief importance to understand the two systems of bankrupt law which are established in this island—to see how far they agree, and where they differ from each other—it may be proper in this preliminary inquiry to confine ourselves to a short contrast of the English and Scottish law in this respect.

EXAMINATION OF THE BANKRUPT LAW OF ENGLAND AND OF SCOTLAND.—That dread of the arbitrary maxims of the civil law, which has been the distinction and the boast of England, has not always been productive of happy results in municipal jurisprudence and regulation, though of incalculable benefit in the formation of the Constitution. In the department now under review, while the commerce of England was proceeding rapidly in its great career, the aversion from change still left creditors in full possession of all the old rights of execution, which the common law recognised, against the estates and persons of their debtors. So late as the sixteenth century, the power of imprisonment remained a sacred privilege of a creditor, and the preference over the funds by priority of execution was still the rule of the common law. It was in the thirty-fourth year of the reign of Henry VIII. that the first alteration was made upon the ancient jurisprudence. But this was an alteration suddenly proposed, in order to remedy evils which bore hard upon the rising commerce of the country, and could not in its full extent be applied to others than merchants, without overturning the whole system of the common law. To understand this fully, it may be proper to observe how radical an alteration was required in many essential points to provide for cases of insolvency.

There seem to have been three great inconveniences, which the rigid maxims of the English common law produced, in their application to the dealings of a commercial country. 1. There was no easy and simple method of procuring execution, or even intermediate security for debts by bill, etc., otherwise than in consequence of the judgment of a court, with all its necessary delays, and all the interruptions of vacations. This was to traders an evil of great magnitude, where their debtor was insolvent; for, during the interval, the debtor could not be prevented from enjoying his property, and sporting with the interests of his creditors. To remedy this was one great object of the English statutes of bankruptcy; and it was accomplished by authorizing a commission of bankruptcy to be issued, to which the effect of an immediate legal execution was given, so as to deprive the debtor of all power over his property, and carry it at once to his creditors, to be divided among them for payment. 2. Although originally imprisonment for debt was not, in England any more than with us, a part of the common law, it had grown up as the undoubted privilege of a creditor to take satisfaction for his debt by the confinement of his debtor's person; and against this confinement there was no relief but by payment of the debt. It could not fail to appear as a serious evil in a commercial country, that traders should be exposed to such a punishment, without any discrimination between extravagance or fraud and mere misfortune, and with no other limitation to the duration of the punishment than the caprice of the creditor: to afford relief against it formed another object of the bankrupt laws. 3. Although all fraudulent deeds are at common law ineffectual, it is a matter of no small difficulty to guard against the frauds which, upon the eve of bankruptcy, a debtor, and especially a merchant, may be enabled and tempted to commit. It

was with this view found necessary in England, besides subjecting traders to a new code of penal laws, to allow the creditors to take out the commission of bankruptcy in secret, that it might fall suddenly upon the debtor, and surprise him while his schemes of fraud were not yet accomplished. But the severity of these laws, necessary perhaps in one view, afforded many opportunities for oppression.

In all these particulars (and in many more, which it is not necessary to detail at present), a wide departure from the maxims and rights of the common law was, in cases of insolvency, found necessary for the occasions of an enlarged commerce. But it was not to be expected that a system which so completely outraged that law in particulars so important, would be suffered to reach beyond the range of necessity which gave it birth. And although by the first statutes of bankruptcy, in Henry VIII.'s reign, the Commission was not restricted, but made applicable to all ranks of men, when the law came to be renewed, in the 13th year of Queen Elizabeth, it was limited to merchants; and other persons were left to the rules of the common law, neither restrained by the energy nor favoured with the indulgence of this peculiar code. It has in this way happened that, till lately in England, no system of equality was devised for the creditors of those unconnected with trade, that no restraint was imposed upon execution by individual creditors, and that debtors unconnected with commerce continued exposed to perpetual imprisonment, at the will of their creditors.

The circumstances of Scotland, and the spirit of her common law, have been more favourable to the establishment of such regulations for insolvency as might safely be applied to all ranks of men. Our forefathers felt not that dread of the civil law by which our neighbours were actuated. Perhaps this might be accounted for from the peculiar circumstances of the nations at the time, and from the different ways in which that system was introduced into the two countries. But however this may be, the institutions and rules of our municipal law have been much improved by the influence of the Roman jurisprudence, holding it, as we have ever done, to be merely a body of general jurisprudence, the rules of which were to be adopted wherever they were sanctioned by views of expediency, and not inconsistent with our own institutions or peculiar customs. The law of execution for debt partook of this improvement; and instead of continuing fixed and unaltered, as in England, modifications and amendments were gradually admitted, according to the exigencies of an advancing people. In this way it happened, that when the commerce of Scotland called for regulations adapted to cases of insolvency, the general disposition of the common law accorded better than in England with the condition of the country, and prevented the necessity of violent remedies.

Instead of rigidly adhering, as the English had done, to the old rule, which required an action and judgment in every case before execution could pass, the decree of registration, or by consent, when introduced in Scotland, was by statute applied to bills of exchange as well as to formal bonds. This gave a rapidity of execution, the want of which had been felt in England, and which, we have seen, it was one object of the commission of bankruptcy to supply. The remedy of inhibition was adopted from the canon law, and that of the arrestment in security from the civil, as improved in the institutions of France, where that law was most successfully cultivated; and in this way we had already apt means for securing a creditor against his debtor's fraud during the dependence of his action, or the necessary delay of execution. We soon saw the justice also of the *Cessio Bonorum* of [12] the Roman law, which gave freedom to the debtor innocent of fraud, and willing to give up everything to his creditors. These were the three prominent evils which had called for so sudden an alteration of the law in England, and they were thus gradually remedied in the law of Scotland, while yet our commerce was in its infancy. When that commerce increased so as to require a law for insolvency, the only points still to be provided for were the suppression of frauds, and the equal, rapid, and economical distribution of the estate; and

in legislating on these subjects, what had already been accomplished enabled Parliament to make provision for other cases, as well as for those of traders.

Thus the progress of the Scottish bankrupt law has been gradual. We see little of that violent opposition between the common law and the new institutions which accompanied and restrained every interposition of the Legislature of our neighbouring country. The common and the statute law have been enabled to go hand in hand, till at last, instead of leaving every case of insolvency not strictly mercantile to the imperfect and unjust rules of the old common law, as applicable to the recovery of single debts, a double system of laws relative to bankrupts has been formed,—one branch of it applicable to all cases of insolvency; the other approaching nearly to the English institution, and applicable only to mercantile failures.¹

From this general idea of the progress of the two systems, it may be proper to proceed briefly to mark their characteristical and distinguishing features as compared with each other, and with the view we have already taken of the spirit of bankrupt law.

GENERAL VIEW OF THE ENGLISH BANKRUPT LAW.—The English code of bankrupt law was, from its first institution, intended to form a complete body of regulations for the insolvencies of traders.

When, in the reign of Henry VIII., the commerce of England had risen to sufficient importance to call upon the Legislature for a set of regulations that should free the trader from the evils of the old law, a plan was devised, and thus reduced to form. A commission was named, consisting of the first judges of the land, to whom very unusual and extensive powers were given. 'Their powers were, to take orders and directions, at their own wisdom and discretion, with the bodies of insolvents, and with their real and personal estate; and to cause the said estate and property to be viewed, rented, and appraised, and to make the sale thereof: or otherwise to order the same for the satisfaction and payment of the creditors, in proportion to the quantities of their debts.' They were also vested with very high powers for the prevention and punishment of frauds, concealments, etc. In the 13th year of Queen Elizabeth's reign this system was altered. Instead of the commission being given to the judges, it was, by a long succession of statutes, ordered to be entrusted to such wise, discreet, and learned persons as the Lord Chancellor should appoint. The whole code has, in the progress of two hundred years, been gradually ripened till it has grown at last into a complete system, having the triple object of preventing frauds, of dividing equally and expeditiously the estate of the debtor, and of discharging him from his debts in cases of fair insolvency. 1. Certain acts are defined as indicative of bankruptcy, the commission of which is, with the view of preventing frauds, declared to vitiate all the bankrupt's future transactions, and to entitle (with certain precautions) any creditor to take out a commission from Chancery for vesting the bankrupt's estate in the hands of the commissioners, who order his shop to be locked, and himself to be taken into custody. 2. The commissioners, as a court of delegation from the Lord Chancellor, are the judges before whom the affairs of the bankruptcy are conducted, the debts proved, the bankrupt examined, and the funds vested in assignees for division, the orders and decisions of the commissioners being subject to the review of the Lord Chancellor. 3. The immediate and active management is entrusted [13] to assignees chosen by the creditors themselves. And, 4. The creditors are formed into a deliberative body, to determine all questions of management, and to judge whether the bankrupt be entitled to a discharge, reporting their opinion to the commissioners and the Lord Chancellor.

Such was the general scope of the bankrupt laws of England as they lately stood. They have now undergone a thorough revisal, and in two successive consolidating Acts the whole of those laws have been digested into a system better adapted to the necessities of

¹ [There is now no such distinction.]

the extensive trade and manufactures of England.¹ In this reformation, the following seem to be the points of chief importance:—1. The description is enlarged of those who are subject to the bankrupt laws, many persons being formerly beyond the operation of those Acts who ought to have been included. 2. The description has also been enlarged of the Acts which place a trader within the operation of those laws. 3. The rule of the Scottish law has been adopted, which authorizes a trader who finds himself in insolvent circumstances to secure the equal distribution of his estate among his creditors.² 4. The settlement of insolvency, by means of a trust-deed, has been encouraged and secured against interruption by a commission of bankruptcy. 5. After the example of the Scottish law, contingent creditors have been admitted to the benefit of the distribution; and (besides a great number of other improvements) the Scottish composition contract has been adopted as a most useful improvement of the system.³ Other improvements are still contemplated: one in the tribunal by which bankrupt law is administered, another in the facilitating of extrajudicial arrangements between debtor and creditor.

Much as the English law has disregarded persons who are not traders, they have not been entirely overlooked. A debtor, although not a trader, was formerly entitled to the benefit of what was called the Lords' Act, intended as a remedy against the endless imprisonment of the common law. By this Act, a debtor in prison for a debt under £300 might petition the courts for liberation; and on stating his condition, his funds, and his debts, and conveying everything to his creditors, he might have been liberated. Had the law stopped here, it would have been analogous to our law of *Cessio Bonorum*; but the benefit of the whole remedy was destroyed by a declaration, that if the creditor, who had the debtor in execution, should object to his enlargement, and find security for payment of a maintenance to him (a weekly sum not exceeding two shillings and fourpence), he might detain him in prison. 32 Geo. II. c. 28.

The great difficulty of introducing a reform into any part of English jurisprudence, and of proposing relief to debtors that would not give occasion to unforeseen frauds, and great evil to creditors, did not deter Lord Redesdale and others from giving commencement to an institution which is still in a course of experimental legislation, and to the perfecting of which the attention of Parliament has been recently called.⁴ It is sincerely to be hoped [14] that all these exertions will be crowned with success, and that the great body of information already collected by the committee of the House of Commons on this subject, will result at last in some effectual provision for giving to England the benefit of a complete remedy for the imperfections and errors of the common law relative to imprisonment for debt.

GENERAL VIEW OF THE BANKRUPT LAW OF SCOTLAND.—In Scotland there was not at first any attempt to form a complete code of bankrupt law. The evils of perpetual imprisonment, and of fraudulent preferences by voluntary deeds or judicial diligence, first called

¹ This most useful reformation in English jurisprudence was commenced, in many important points, by Sir Samuel Romilly. The subject was then taken up more systematically by the merchants of London, on the suggestion of Mr. John Smith, and a very curious and important inquiry instituted, on that gentleman's motion, before a [Select] Committee of the House of Commons. In the Report from the Select Committee on the operation of the bankrupt laws—ordered to be printed, 11 July 1817; Minutes of Evidence, 16 March 1818; Report, 3 May 1818, and further Report of Minutes of Evidence, 8 May 1818—numerous proofs have been collected of the imperfection of these laws, and a great body of useful information brought together, with a view to their reformation. [The two latest statutes are those of 1861 and 1869, 24 and 25 Vict. c. 134; 32 and 33 Vict. c. 71, the existing Act.]

² [By the existing English Act, no debtor can be made a

bankrupt on his own petition, even with the concurrence of creditors to any amount.]

³ See Analysis of the Bill now depending in Parliament for the consolidation and amendment of the Bankrupt Law, by the Hon. Robert Henley Eden, 1823. Practical Treatise on the Bankrupt Law as amended by the New Act, by the same author, 1825. To this gentleman English merchants are indebted for the careful analysis and consolidation which has reduced to a single Act the whole system of their bankrupt law. [Digest of the Bankrupt Law, with reference to the New Act, 1 and 2 Will. IV. c. 56, by Lord Henley (R. H. Eden), 3d edit. 1832. Griffith and Holmes on the Law and Practice of Bankruptcy, 1867.]

⁴ See reports from Select Committee of the House of Commons on the Insolvent Debtors Acts, 53 and 54 Geo. III., printed 13 June 1816. See also 5 Geo. IV. c. 61.

for the attention of the Legislature, and were remedied, as it were individually, by particular regulations, long before any idea was entertained of establishing a system of laws for insolvency.

The first dawn of bankrupt law in Scotland is perceptible in a very remote age; for the *Cessio Bonorum* of the Roman law is found among the earliest vestiges of our jurisprudence. But though this remedy against perpetual imprisonment was established so early in Scotland, it was not till the seventeenth century that our commerce was sufficiently extended to turn the attention of the Legislature towards the frauds of bankrupts. The first statute which professed to regulate matters of this kind originated with the judges of the Court of Session. By an act or rule of that court, in July 1620 (which was adopted by Parliament, and makes the statute 1621, c. 18), all collusive donations by insolvent debtors to their friends and relations, directly or indirectly, were prohibited; as by such deeds, in the first instance, it is, that a debtor endeavours, on the eve of his failure, to save something for future subsistence, and to provide for those in whose welfare he is interested. In this law, provision was also made against the unfair interference of a debtor, to disappoint, by private conveyances, the diligence of his creditors already begun. This was done by declaring all such deeds subject to challenge by him who should thus be disappointed.

Towards the end of the century in which this law was enacted, cases of insolvency became more frequent, and, from the sums which they involved, infinitely more important than had hitherto been known in the country. Frauds were daily practised which the existing laws were found inadequate to repress. Where a debtor granted a deed of preference to a favourite creditor, although in the immediate prospect of bankruptcy, no remedy existed but a proof at common law that the debtor was insolvent at the date of the deed; and that the receiver knew this to be the case. These intricate points of inquiry gave occasion to many involved questions; and it was found in those investigations so difficult to come to any conclusive issue, that little progress was commonly made after vast expense and delay. The Court of Session, who found themselves daily called upon to decide questions of this kind, and saw the bad consequences which flowed from the want of a fixed principle in a matter of such importance, named a committee of their number to propose a remedy for it. This was in 1694; and the fifth statute, which passed in the Parliament of 1696, was the result of their suggestions. By that law an universal and precise rule was laid down; the character of bankruptcy was correctly defined; and, this point being fixed, a presumption of fraud was established against all deeds granted within sixty days before in favour of prior creditors.

Besides these provisions for the annulling of fraudulent deeds, a direct punishment was enacted against the bankrupts themselves. The statute of 1621 declared all bankrupts, etc., who should be guilty of fraudulent devices against their creditors, infamous, incapable of honours and dignities, benefices or offices, or of sitting as jurymen, or bearing witness in courts of justice. The statute of 1696 subjects all fraudulent bankrupts to trial by the Court of Session, and on conviction, to punishment, in the discretion of the court, short of [15] death; and the *Cessio Bonorum* afforded an indirect punishment of great efficacy, since the debtor could not hope for liberation, but by vindicating his honesty and fair dealing.

Thus, when the attention of the Legislature was first turned to the frauds of bankrupts, all that seemed to be requisite was to make such regulations as might give precision and force to the principles of common justice, in preventing the debtor from injuring the creditors, or unfairly preferring favourite individuals.

While those laws were required as remedies against frauds by voluntary deeds, the necessity began to be felt of introducing equality among creditors doing diligence against the estate. It may appear, at first sight, that the natural, as it certainly is the best remedy for inequalities among creditors, would have been, as in England, a judicial process for attaching and distributing the whole estate; but this remedy was not at that time adopted

in Scotland. As the laws against preference by voluntary deed had been introduced in the shape of partial remedies, unconnected with any general process of division; so it happened also with respect to the laws against preference by diligence or legal execution.

The method adopted for equalizing the claims of creditors doing diligence, was so very peculiar, that it is not easy to make it be understood in so brief a summary. It was first introduced in diligence against land, which in those early days appeared of chief importance, and perhaps to this is owing its peculiar nature. The Legislature in Scotland was always averse to authorize such proceedings against land for debt as might irrevocably carry off his estate from a landholder; and on this account, adjudication, the diligence against land, was qualified by a power of redeeming the land, by payment within a limited term. While this term continued unexpired, it was impossible to sell the land for payment without the debtor's consent; and the creditor who first adjudged, of course, excluded posterior adjudgers. In cases of insolvency this was a great grievance. But the Legislature could not be prevailed on to sanction any proceedings more peremptory. To remedy the evil, it was declared that all who should adjudge within a year should be held as equal in right. This was called the *pari passu* preference. It was manifestly a very imperfect remedy, till some means should be provided for bringing the land to sale. But at last the Legislature yielded so far as to allow a judicial sale of land for payment of debt, where the creditors were in possession, and the debtor bankrupt.

Still the old maxims regulated Execution against moveables, and the rule of preference rested upon mere priority in diligence. Not only was opportunity thus given for constituting fraudulent preferences, and for collusion with debtors; but from the overstrained anxiety of creditors, upon the slightest alarm, to secure for themselves a preference, much unnecessary expense was incurred, to the prejudice both of the creditors and of the debtor. It was not till the year 1754—notwithstanding the precedent in the case of adjudications—that even partial measures were adopted for securing equality among creditors doing diligence against the moveables. The Court of Session made an Act of Sederunt in that year, establishing an equality of preference among all pinders and arresters within a certain period of bankruptcy. But this was a mere experiment; and upon the expiration of the Act, which was in force only for four years, it was not renewed. This part of the law, therefore, fell back into its old state of imperfection: priority gave preference; and on the slightest alarm, creditors poured in with diligence against the unhappy debtor, and the most unjust preferences took place among the creditors. In this most imperfect state the law continued till the year 1772, when the first sequestration law was passed. It proved a salutary remedy at a very critical moment.

This was the first attempt to form anything like a general code of bankrupt law in Scotland. Instead of a commission of bankruptcy, as in England, a form of sequestra- [16] tion was adopted, under which the Court of Session sequestered the whole personal estate of the debtor, to be managed and sold by a judicial factor, and fairly divided among the creditors; and it was declared that no diligence against moveables by arrestment or pinding, within thirty days previous to the petition for sequestration, should give any preference, in the event of a sequestration taking place, the pinder being bound to deliver the goods pinded, or the price of them, if sold, and the arrester to deliver the arrested goods or debt to the factor, in order to be distributed among the creditors.

But this first attempt to form a general code of bankrupt law for regulating the disposal of the personal estate was extremely imperfect. Like the first plan of the English commission in Henry VIII.'s time, it included all ranks of men; and as in England it was thought proper to restrict their new code to traders, so it appeared to be necessary, in the renewal of the Scottish law, to separate the trading and manufacturing part of the community from other men. But in doing this, the Legislature did not altogether neglect the bankruptcy of those unconnected with trade, nor leave them to struggle with the evils of

the old law. They felt that traders are often deeply interested as creditors, and their credit much involved with men who themselves are not traders; and in altering the law a double remedy was introduced,—one for traders, simple like that of England; another for common bankruptcies, supplying what had formerly been left unprovided for in relation to the preferences by diligence against moveables.

First, In excluding from the sequestration the bankruptcy of men unconnected with trade, it did not occur that any new regulations for the heritable estate were requisite; but it was necessary to devise some means for preventing, in the execution against moveables, those preferences which had, prior to 1772, been the cause of so much anxiety to creditors and oppression to debtors. The plan adopted was nearly similar to that of the Act of Sederunt 1754. By 23 Geo. III. c. 12, the bankruptcy of the debtor (as under the statute of 1696, c. 5) was taken as the criterion of preference among arresters and poinders, instead of the date of presenting the petition for sequestration. All arrestments and poindings within thirty days before and four months after the bankruptcy, were put upon an equal footing; and by the statute 33 Geo. III. c. 74, the period is still further extended to sixty days prior to the bankruptcy.

There are several forms of action in which effect is given to these equalizing rules for diligence against moveables; but the most general is that of a multiplepoinding, or action of double distress, similar to the English action of interpleader, in which the holder of the funds calls into the field every creditor who has a claim upon them, that the order of preference may be determined by the court, the fund divided, and the holder of it discharged.

Secondly, The mercantile system of bankrupt law in Scotland, though differing in form, and also in many essential points, from that of England, is so far similar, that both seem to accord well with the great pervading principles of bankrupt law.

By the first statute in 1772, the plan of distribution, which included only the personal estate, was alternative. 1. By the sequestration of the common law a disputed estate is taken by the court under its own management, and a factor appointed, accountable to the court, for behoof of the parties interested. Upon this model it was provided that a petition should be presented to the Court of Session, praying that, after due notification to the debtor, his personal estate should be sequestered, and put under the management of a factor, who should be chosen by the creditors, and should act under the direction of the court in disposing of the estate; and the creditors were to be ranked and the price distributed by a judgment of the court. 2. As the expense and delay of those proceedings (which were all judicial) were very considerable, it was declared that the creditors might choose, at a meeting to be held after the sequestration had been awarded, whether to continue [17] the sequestration, or to appoint a trustee, and have the whole affairs managed extrajudicially. Many improvements were made upon this plan, both in 1783 and in 1793; but these it would be improper at present to detail. It may be sufficient to observe, that the whole estate, real and personal, heritable and moveable, is now included in the sequestration, and that the radical change made upon the spirit of the institution was the combination of the judicial and private alternatives of the first law into one consistent system of trust and of judicial control, so as to give all the advantages of a private trust with all the benefits to be expected from the superintendence of a court of law. The sequestration, as a general diligence, stops all individual proceedings, and gives an opportunity for having the estate managed in the meantime by a factor, till the creditors can appear and verify their claims, in order to elect a trustee. This election of the trustee finishes the sequestration properly so called, and the judicial trust begins. The trustee is vested with the estate, and is the manager and distributor of the fund. In his management he is assisted by three commissioners, elected by the creditors from their own body, as a committee of management, and their proceedings are subject to the constant superintendence of the whole creditors. In his character of distributor of the estate, he acts not as the English assignee does, but as

judge, in the first instance, subject to the review of the Court of Session. It is his business to bring up the bankrupt for examination before the sheriff of the county, to make proper states of the affairs, to state objections to the claims of the creditors, to rank the creditors on the fund, and to strike the dividend; and objections to his proceedings in these respects are discussed and determined summarily on petition to the Court of Session. When the time appointed for a final distribution comes, the creditors themselves determine whether the bankrupt is entitled to a discharge, or whether he is to be left to the remedy of the common law, the *cessio bonorum*, under which, without being discharged of his debts, he is relieved from imprisonment.

This system of bankrupt law has been established by a series of temporary or (if the expression be allowable) experimental statutes, and the subsisting Act is of the same description. To the wise precaution of proceeding thus gradually, it is owing that the Bankrupt Law of Scotland has reached its present excellence, and that practical wisdom and convenience have been kept so steadily in view in regulating the administration of this most difficult department. Instead of attempting at once to form a complete system, the progress of the institution has been slow and gradual, no improvement having been adopted till the course of experience naturally led to it. In reviewing the steps of these proceedings, it is pleasing to observe the happy combination of legal knowledge and mercantile experience that characterized all the consultations in which those laws were digested. Among the lawyers who took a share in the deliberations, there were men of eminent talents and profound knowledge; while those who acted as the deputies of the merchants were men of large views and great candour, who, though as traders they wished the system of English and Scottish law to approach as nearly to similarity as possible, were strongly impressed with the superiority of some of our own institutions. From the papers which are in my possession, there appear, throughout a series of consultations of nearly thirty years, a candour and unanimity in all the proceedings, and a sincere wish to combine, for the public benefit, the knowledge, experience, and foresight of the two professions.¹

In the revisal of our code of Bankrupt Law, which is now depending, and the result [18] of which I hope to be able before the close of this work to state, we shall in our turn be able to derive benefit from the new institutions and improvements introduced into the English system. And there is every likelihood that, by this course of legislation, progressive, candid, liberal, and free from national jealousy, we shall in both countries have the advantage of a code well adapted, and with the proper discriminations, to the occasions and to the jurisprudence of either nation.²

¹ This spirit would never have been maintained in all its vigour, had it not been for the exertions of Sir Ilay Campbell, lately Lord President of the Court of Session. When, upon the expiration of the first sequestration statute, a formidable opposition was made to its renewal, he was selected by the merchants, on account of his long experience, his eminent talents, and extensive knowledge of the law, to defend the Act, and the interests of the merchants, which seemed to be involved in its fate; and amidst the pressure of other important duties, he devoted much of his attention to the improvement of this branch of the law.

² [For a continuation of the history of the Scots Law of Bankruptcy, see the author's Commentaries on Recent Statutes (a supplement to the present work), chap. v., where there is a full commentary on the Act 2 and 3 Vict. c. 41, the bankrupt statute next in order of time. It continued in force till 1856, when it was superseded by 19 and 20 Vict. c. 79, the provisions of which will be noticed in their proper place in the course of the work.]

BOOK II.

OF THE SEVERAL KINDS OF ESTATE WHICH MAY BE ATTACHED FOR DEBT.

[19] In distinguishing the funds which, by law, may be attached for the payment of debt, two questions chiefly demand attention:—1. What part of the acknowledged estate and effects of a debtor is to be considered as responsible for debt, and open to the diligence of his creditors? and, 2. By what criterion are creditors to distinguish the right of their debtor in cases of ambiguous possession? Without being too curious about minute divisions of the subject, I shall, in distinct chapters, explain the several sorts of estate which may be made available to creditors.

The general rule is, that all the acknowledged property of a debtor is available to creditors, and may, by the operation of legal diligence, be converted into money, and applied in payment of debt. The property of land and other heritable subjects, whether of the nature of a perpetual estate or of temporary endurance, liferents, reversionary rights, servitudes, leases, faculties, and powers, may all be affected by the diligence of creditors, subject to certain exceptions, restrictions, and conditions. Incorporeal rights also, as heritable bonds, bank and Government stock, shares in public companies, patents, literary property, and debts, are responsible to creditors, under certain restrictions; and, finally, moveable property, wares, merchandise, money, may be applied by creditors to answer the debts of the owner. In the common course of life, and especially in a trading country, the great foundation of credit is the mass of commodities of a perishable nature which pass through a trader's hands, and form the subject of his dealings. But it is not unnatural to consider property in land as first in importance; and it may lead to a more systematic arrangement of the subject to take—

1. Estates in land, and connected with land.
 2. Incorporeal rights not connected with land.
 3. Moveables.
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PART I.

OF ESTATES IN LAND, AND CONNECTED WITH LAND.

ACCORDING to the prevailing spirit of modern law, land is considered as a commercial property. While the rules of its succession are clear and uniform, all undue restrictions on alienation

are discountenanced, and the rights of creditors in regard to it are ample and of ready access.

With one signal exception in the case of entails, the rules and proceedings of the [20] law of Scotland relative to this sort of property are simple, just, and efficient.¹ The obstructive wisdom of more modern times, called into action on occasion of political convulsion and rebellion, but with effects as salutary for the purposes of trade as if devised in the true spirit of commercial policy. The forms of voluntary alienation and security are plain, simple, and intelligible; the modes of execution by creditors are prompt, effectual, and equal in process and in operation; and although it has been doubted by some whether there ought to be, in public records, a complete disclosure of the state of a man's property as charged with debt, while by others it has been suspected that our system of records is fast tending to a state of inextricable confusion and practical uselessness, the fact is, that the whole landed property of Scotland is registered in volumes deposited in the Register House, and exhibiting at one view, to those desirous to purchase land, houses, or other heritable subjects, or meaning to lend money on the security of such property, or desiring to have a correct notion of their debtor's land estate as a ground of general credit, the extent of that estate, the conditions under which it is held, and the securities which may already have been created over it.

LEASES are inferior rights in land, with respect to which, although the same means of information do not exist, knowledge sufficiently accurate may be obtained to regulate the credit of the owner. Leasehold property is not recorded in a public register; but no lease of which the term exceeds a year can be effectual unless it be in writing, followed by possession, so that by inquiry at the tenant the whole conditions of the lease may be known.²

SERVITUDES on land are rights of a definite and known description; and, whether as burdens on the debtor's property, or as privileges augmenting its value, they may, on careful inquiry, be discovered by creditors.

CHAPTER I.

OF PROPERTY IN LAND, AS RESPONSIBLE FOR DEBT.

ALL the land of Scotland, so far as it belongs to individuals, is vested in them either in superiority or in property. The former, called *DOMINIUM DIRECTUM*, is available to creditors, as entitling the holder to draw feu-duties, or to reap occasional advantages on the entry of heirs, or of purchasers, or of creditors; or as giving a right to the elective franchise if the holding is immediately under the Crown, and the land extends to forty shillings of old extent, or £400 Scots of valued rent. The latter is the more valuable right of actual occupation and exclusive use, called by our lawyers *DOMINIUM UTILE*. Either of these rights may

¹ [Notwithstanding the excellence which the Scottish system of land rights had attained when the author wrote, important improvements were effected by the Legislature in 1847, 1848, 1858, 1860; and these, with others, were consolidated in one statute in 1868, by the Act 31 and 32 Vict. c. 101. Nor does it appear that the simplification of titles and the procedure relating to land has yet reached its furthest point.]

² It has been proposed to a certain extent to introduce a

system of registration applicable to this sort of property. Whether such a proposal shall be adopted may perhaps be explained in the Appendix to this work. It may only be observed in the meanwhile, that amidst the advantages proposed to be attained, the increase and complication of records would prove a serious evil. [By 20 and 21 Vict. c. 26, certain classes of leases for not less than thirty-one years may be recorded in the Register of Sasines, so as to be effectual against singular successors in the lands without possession.]

be sold for the benefit of creditors, or attached by diligence ; and although it is not necessary to enter here into the doctrines relative to the titles by which those rights are held, a short view of the leading principles which rule the transference of this sort of property may not be misplaced.

SECTION I.

OF THE VASSAL'S ESTATE, OR DOMINIUM UTILE.

[21] This is the most valuable estate in land known in the law of Scotland, though of less dignity in the scale of feudal importance. In the transference of land, the act of delivery, which is the badge of transference, is very peculiar in its form. In Scotland, in ancient times, land and houses were delivered by an actual entry of the acquirer into the possession; but for many ages past, the delivery of a part symbolically for the whole—of a little earth and stone of the lands for the lands themselves—has been established as the only legitimate mode of delivery. This symbolical delivery, or improper investiture (in the language of the Feudists), is with us called INFECTMENT, or SASINE, and has entirely superseded the proper investiture, or real delivery of the land itself. It is evidenced only by a notarial instrument, which stands connected with the whole system of registration, by which land rights in Scotland are kept so clear ; and actual possession of land, without sasine, is quite unavailing to pass the property.¹

Sasine, the *modus transferendi* of land, is obtained either directly under the precept of a feudal proprietor, himself infeft, or indirectly from that person's feudal superior on his resignation ; or by assignation, voluntary or judicial, to a warrant for infeftment not yet executed, in consequence of which assignation the warrant may be executed in favour of the assignee ; or, on the devolution of the right to an heir, according to the established law of succession, when the feudal superior grants his warrant for renewing the feudal investiture by sasine to the creditor or to the heir.

The instrument by which alone this requisite of sasine is established is itself made entirely to depend for its efficacy, against purchasers and creditors, on the act of registration within sixty days.² This system of registration will deserve particular attention hereafter. The expediency has been questioned, the practicability doubted as applicable to a country where many extensive and complicated money transactions take place ; but the rules of this act of completion are chiefly deserving of observation. See below, in the Fourth Book. See Index, *voce* Voluntary Security.

The right, whether voluntary or judicial, which is first duly completed by sasine recorded, carries the property. Although the purchaser of a feudal subject shall have entered into possession of the lands, and paid the price, a creditor of the seller, or the trustee for the whole body of his creditors, adjudging or receiving a voluntary conveyance from the bank-

¹ In *Stewart v Sandieman*, 1771, n.r., a person had bargained for a house, and received possession ; but the conveyances were not completed when he failed, unable to pay the price : the seller was found entitled to withhold, as in an uncompleted bargain. One judge (Lord Monboddo) was of opinion that the conveyance was complete, as possession had been delivered. The other judges were quite clear of the rule—'No sasine, no delivery of land ;' and that, till delivery, the bargain was voidable, for failure to pay the price. [By 8 and 9 Vict. c. 35, it was made unnecessary to proceed to the lands to give sasine ; but infeftment was effectually obtained by producing to a notary public the warrants of sasine and

relative writs, and expeding and recording in the Register of Sasines a notarial instrument, setting forth that sasine had been given in the form prescribed. Since 1858 it has been sufficient to record the conveyance itself in the Register of Sasines, with warrant of registration thereon, or even parts of it, as directed by the granter ; or in some cases a notarial instrument setting forth the right of the disponent or person in right of the conveyance. 31 and 32 Vict. c. 101.]

² [It is competent to register a conveyance, notarial instrument, or instrument of sasine, at any time during the life of the person in whose behalf infeftment is taken. 8 and 9 Vict. c. 35, sec. 3 ; 31 and 32 Vict. c. 101, sec. 142.]

rupt, and obtaining and recording the first infeftment, will acquire a preference, leaving the purchaser to his dividend as a personal creditor merely.

Even where the seller himself has not taken sasine, so that his right is only personal, this personal right is not conclusively transferred without sasine. If a second disponee, or the general creditors, on the seller's bankruptcy, obtain and record sasine before the right of the first disponee is so completed, they will take the property preferably to such first disponee, provided the title of the seller (as explained in the next paragraph) be so connected as to accresce to the previous conveyance.¹

Where a conveyance to land is granted by one who is not himself infeft, with pre- [22] cept, in consequence of which the disponee takes sasine, that sasine is ineffectual while the granter continues uninfeft; but a subsequent infeftment of the granter will complete the right of the disponee, it being held in law to accresce, or, by a retrospective relation, to accede to the previous conveyance. If, therefore, two conveyances shall have been granted, and both disponees are infeft, and the second, in order to make good his right, shall infeft the disposer, this infeftment will avail his competitor, and complete his previous infeftment.²

Among the general creditors of a proprietor of land not infeft, and where none of the competitors have obtained infeftment, the final settlement of the competition cannot be imagined to take place on such imperfect right; so that the question whether the first disposition would carry the preference never can occur. The trustee for the whole creditors, or some individual, would proceed to complete the feudal right by which the preference would be regulated.

SECTION II.

OF THE ESTATE OF THE SUPERIOR, AS AFFECTED BY CONDITIONS IN THE FEUDAL GRANT.

The effect of CONDITIONS in the feudal grant, from the superior to the vassal, may be of importance to creditors in two views: *First*, The creditors of the superior may have to

¹ It was at one time doubted whether the conveyance of a right to lands merely personal did not fully carry the personal right, which was all that belonged to the seller. When this question first occurred, the Court was of opinion that an assignation to an uncompleted real right was not effectual in competition with a right completed by infeftment (*Brown v Smith*, 1676, M. 2844). But opinions altered upon the question, and a simple conveyance, without sasine, came to be held completely to denude a disposer whose right was merely personal (*Rule v Purdie*, 1710, M. 2844; *Sinclair v Sinclair*, 1733, M. 2848). The question, however, came again to solemn trial in the well-known case of *Bell of Blackwoodhouse*. At first, judgment was pronounced finding that the conveyance to the personal right was a complete transference, and preferable to a subsequent adjudication even when completed by sasine; but upon a petition and answers, a hearing in presence was appointed, and afterwards informations. The judgment was altered, and 'the second conveyance, being an adjudication, was preferred, in respect infeftment was expedite upon the same, the other remaining personal' (*Bell v Gartshore*, 1737, M. 2848, 5 B. S. 198, 2 Ross' L. C. 410). It was a point, however, which was thought to be attended with very great difficulty. Elchies was against the decision, and some other judges. Elchies says, in reporting the decision, '*Me et quibusdam aliis renitentibus*;' and he adds: 'Arniston avowed that he had several times changed his opinion on this question even during the

dependence of the process, but now he was of the opinion of the last interlocutor; and we both thought that, notwithstanding that opinion, if one having a personal right should assign it, and thereafter be infeft, and then grant a second disposition, and infeft that second disponee, *he* would be preferred to the first. But he said, that if the second disponee should first acquire his disposition, and then infeft his author, the first disposition would be preferred. But I doubted of this last, because infefting the author vested the property in him, whereof he could not be denuded by the personal disposition. But in this case the author's infeftment would have accresced to Blackwoodhouse, since both he and Chatto were infeft, but erroneously' (1737, Elchies' Notes, pp. 103, 104).

But any doubts which were entertained before the above decision are now held to be settled; and according to the doctrine in this case of *Bell*, the law is laid down by Erskine, that no conveyance of a personal right to lands can so divest the disposer as to prevent him from granting a posterior deed that may, by prior sasine, be made the preferable. Ersk. ii. 7, 26.

² *Henderson v Campbell*, 1821, 1 S. 103. This doctrine requires attention in bankruptcy, for it may happen that a measure taken for the general behoof may rear up unexpectedly the security of a creditor, which otherwise would have been unavailing. [See below, B. iv. ch. i. sec. 1, § 3; B. iv. ch. i. sec. 2, § 4; B. vi. part ii. ch. v. sec. 11, § 1.]

inquire concerning the efficacy of such conditions and clauses in securing or in discharging the pecuniary rights of superiority; or, *Secondly*, The creditors of the vassal may have to [23] determine whether there be not vested in their debtor a real right, which the conditions of the charter may be ineffectual to defeat.

The right of the superior may be made available to creditors as a fund of payment, either (1) in consequence of affording a freehold qualification; or (2) by means of the annual duties; or (3) by the incidents, casualties, and fines which may fall to the superior.¹

I. ELECTIVE FRANCHISE.—The estate of superiority comprehending this right may be sold by creditors, and in particular circumstances it is of great value in the market. It consists of a clear right, as immediate vassal of the Crown, in any estate of the value of forty shillings of old extent, or of £400 Scots of valued rent.² But it is not the object of this inquiry to discuss the nature of that elective franchise, but to inquire into the pecuniary interests of the superior, in so far as they depend on the condition of the feudal grant.

II. FIXED RENTS.—These fixed rents are now either feu-duties or blench-duties, the latter being nominal, and mere acknowledgments of superiority; the former sometimes equivalent to a full permanent rent for the lands.

III. INCIDENTS OR CASUALTIES.—The casualties which are of importance in the present day are nonentry, relief, and composition for an entry.

1. NONENTRY DUTIES are due to the superior on the fee becoming vacant by the death of the vassal last infeft; and the duties payable are: 1st, The feu-duties in feu-holding, or the retour-duties or valued rent in blench-holdings, or £1 Scots for every £100 Scots of valuation in converted ward-holdings, previous to citation in the declarator; and 2^d, The real rents of the lands after citation. This last, being a severe penalty, is avoided by any reasonable ground of excuse for delaying the entry, and is generally compounded for the usual duties.³ The superior's action for making effectual his preference is a declarator of nonentry, grounded on his sasine. The heir is called for his interest.⁴ The conclusions of the summons are: 1st, To have it declared that the lands, from a particular term, have been in nonentry; 2^d, That the retour-duties or feu-duties of the same belonged from that time to the pursuer; 3^d, That the pursuer has right to poind the ground of the lands for the said duties until the heir's entry, and for a year's rent for relief. Decree declaring the nonentry entitles the superior not only to his remedy for the past, but also to enter into possession of the lands thenceforward, and to have the ordinary remedy of a proprietor against tenants and intromitters for the actual rents.

2. RELIEF is the duty which is paid to the superior for a renewal of the feu to an heir, and is generally taxed in the grant at double the amount of the ordinary duties. Where it is not so taxed, it would appear that a sum equal to a single year's duties, paid along with the duties of the year, is the legitimate charge.⁵

3. COMPOSITION for an entry to a singular successor is a charge of more importance. It

¹ The superior is secured in his feu-duties by his own charter and sasine; the vassal's right forming a burden on the superior's, under condition of payment of the feu-duties contained in the reddendo. But of this hereafter, in treating of the superior's preference in competition.

² See Wight, c. 2, p. 158, and Bell, on Elections, p. 46. [The qualification to vote has been entirely changed, first by 2 and 3 Will. IV. c. 65, and again by 31 and 32 Vict. c. 48. Feu-duties of the value of £5 a year still afford a county qualification.]

³ *Robin v Drummond*, 1823, 2 S. 359, where there was a doubt, and depending litigation, between the claims of two persons as vassals. [*Preston v E. Dundonald's Crs.*, 1799, Hume 770; *Hill v Kid*, 1812, Hume 771; *Hill v Merchant*

Maidens' Hospital, 1816, Hume 771; *Marshall v Mather*, 1835, 14 S. 30; *Wallace v E. Eglinton*, 1836, 14 S. 599.]

⁴ The apparent heir of the person last infeft, it is said, need not be called, where the action proceeds on a defect in the title of a singular successor. But that seems doubtful, and the better practice is to call him where he is known. *Haig v Forbes*, 1821, 1 S. 9, note. [It is not necessary, though it is usual, to call the heir, when the vassal has alienated his feu, and the disponent is in a position to take an entry at once. *Mags. of Dundee v Kidd*, 1829, 7 S. 801; *Mackenzie v Mackenzie*, 1838, 16 S. 1326; *Scott v Falconer*, 1863, 1 Macph. 1164; *Mags. of Hamilton v Swim*, 1854, 16 D. 437; *Bell's Prin.* 709.]

⁵ [See *Prin.* 716.]

amounts to a full year's rent of the subject, where it is not taxed by the charter.¹ This is a payment which is not to be regarded as a feudal casualty, but as a composition [24] resulting out of the statutes by which superiors have been forced to enter creditors and purchasers, contrary to the original spirit of the law of feus.²

The right of relief and composition due to the superior arose out of the nature of the feudal grant. By the original principles of the feudal law, the grant was personal. Neither heirs nor creditors had the least right to ask a renewal of the grant, and the gradual admission of the heir was secured or accompanied by a payment to the superior, which at first was valuable, at last fell to a double of the feu-duties or retour-duties of the land; while a stranger could obtain a grant only by personal favour, or at a high price. The admission of heirs into the destination was held to entitle the heir to demand an entry, but to import no discharge of the relief or fine; and where the destination was made to assignees, it was held that the superior was, by his contract, bound only to enter the vassal or his assignee, but not to change his vassal after he had once entered.³ The first interposition of the Legislature was in behalf of creditors. In 1469 it was provided, relative to execution on the brieve of distress, that 'the oure lord sall ressave the creditour, or ony uthir byar tenande to him, thay payande to the oure lord a ziere's mail, as the lande is set for the tyme.'⁴ This is confirmed by 1669, c. 18, where it is declared, that 'by several Acts of Parliament, and constant practick of the kingdom, there is one year's rent of all lands, etc., apprized, due and payable to the superior of the said lands and others, before he can be holden to enter and infest the compriser;' and the same is enacted as to adjudication. Although voluntary purchasers were not, under those laws, entitled to force an entry, they accomplished it by means of a bond, on which they adjudged. But on the successive rebellions which agitated Scotland in the beginning of the eighteenth century, the policy was adopted of breaking the spirit of clanship, by destroying the influence and power of feudal superiors, and extending the power of alienation. By 20 Geo. II. c. 50, it was provided, that any heir served and retoured to, or any one who shall purchase or acquire from, the proprietor last vest and seized, shall be entitled to force an entry from the superior by horning and other diligence, 'provided that no superior shall be obliged to give obedience to such charge, unless the charger at the same time shall pay or tender to him such fees or casualties as he is by law entitled to receive upon the entry of such heir or purchaser.'⁵

AMOUNT OF THE YEAR'S RENT.—Under these statutes doubts have been moved, both as to the rents to be included and as to the deductions to be made in reckoning the amount of the composition.

In a *land* estate it was held that the superior was entitled to demand a year's rent, as the lands were let to tenants at the time, deducting feu-duties, public burdens, and annual burdens, imposed with the superior's consent.⁶

To *houses* built in a village on ground feued the same rule was applied, with the

¹ It was held not sufficient to exclude the superior's demand for the full rent, that the original grant bound the superior to enter heirs or successors (*Thomson*, May 22, 1810, F. C.; *M'Lachlan v Tait*, 1823, 2 S. 267); although in the disposition preceding the charter the words were, 'each heir or singular successor,' the charter bearing '*cujuslibet hæredis vel successoris*.' [But if taxed in the charter, the benefit is not lost by omission in charters by progress (*Stewart v Russell*, June 3, 1813, F. C.); and an obligation to enter for a taxed sum may even be constituted by the superior's titles (*Learmonth v Govrs. of Trinity Hospital*, 1854, 16 D. 580). Where the lands are in the occupancy of the vassal, the actual value of the lands is the measure of the composition. *Lord Blantyre v Dunn*, 1858, 20 D. 1188.]

² [See per L. J.-C. Hope in *Stirling v Ewart*, 1842, 4 D. 684; per L. Brougham in same case, aff. 1844, 3 Bell's App. 128; *Edin. Gas-Light Co. v Taylor*, 1843, 5 D. 1325.]

³ *Stair*, ii. 4, 32. *Lady Carnegie v L. Cranburn*, 1663 (4th point of the case), M. 10375; *Ogilvie v Kinloch*, 1673, M. 10384.

⁴ 1469, c. 36. *Acta Parl.* vol. ii. p. 96, c. 12.

⁵ 20 Geo. II. c. 50, secs. 12 and 13. [This power to enforce an entry was extended by 10 and 11 Vict. c. 48, sec. 86; substantially re-enacted by 32 and 33 Vict. c. 116, sec. 4.]

⁶ *Aitchison v Hopkirk*, 1775, M. 15060, 5 B. S. 613, Hailes 612. This case was decided after careful inquiries into the practice, 1st, as to lands; and 2d, as to village property.

additional deduction of a reasonable sum for repairs to the houses and other perishable subjects.¹

Property subfeued as building ground in a city opened a question of unusual importance, in consequence of the extension of Edinburgh over lands held in feu, and subfeued to builders. The point had been raised and discussed by the anonymous com-[25] mentator on Stair (who is understood to have been Lord Elchies), p. 175, and was judicially determined in the case cited below, where it was decided by Lord Meadowbank, after great consideration, and his judgment affirmed by the Court, and by the House of Lords, that nothing more is demandable than the subfeu-duty.² It remains to be determined what shall be the effect of a subfeu for an elusory feu-duty, or one under the true value, in consideration of a price, which may be called a grassum. This point was questioned in the case cited above, Anderson against Marshall, but it was compromised. It has again been raised, and may be determined in time to be noticed in the end of the book.³

Teind.—In calculating the year's rent to be paid to the superior, the vassal is entitled to deduct the value of the teind; but a doubt arose whether, where the teinds were valued, the superior was entitled to insist on limiting the deduction to the valued teind, or whether the vassal might not follow the common rule of deducting one-fifth of the rent as the value of the teind. On the course of practice, as sanctioned by a decree in 1819, the Court recently held the vassal entitled to deduct one-fifth, notwithstanding the existence of a decree of valuation.⁴

Superiority.—An adjudger of a superiority is bound to pay only the feu-duty.⁵

Heirs of Entail and Corporations.—Doubts may arise in various cases, where the vassal comes either in an ambiguous character, or with peculiarities not contemplated in the original contract. Thus: 1. An heir of entail may be viewed either as a disponee or as an heir. The institute, who is not heir of line, appears to be entitled to no character but that of a singular successor, bound to pay a year's rent; a substitute, who is also heir of the original investiture, is entitled to enter on a mere duplication of the feu-duty.⁶ But it remains unsettled whether a substitute, not an heir of the original investiture, is to fall under the former or the latter rule, the superior not being entitled to have that point fixed in the original charter on the entail.⁷ 2. As a superior, where a corporation acquires right to a feudal estate, would, by entering the corporation as vassal, cut off all his future casualties, it has been held that he cannot be compelled to do so,⁸—leaving it as a matter for private compromise how the corporation is to remove the objection, whether by naming

¹ *Anderson v Marshall*, 1824, 3 S. 236. See the above case of Aitchison.

² *Cockburn Ross v Govrs. of Heriot's Hospital*, 1815, 18 F. C. 393, 3 Bligh 707, 6 Pat. 640.

³ [The effect of a subfeu for a large price, with elusory feu-duties, is to give to the superior a right to the feu-duty, with the interest of the grassum. It is not yet settled whether the superior is to have any casualty falling to his vassal from a sub-vassal in the year of the vassal's entry' (Prin. 721). *Campbell v. Hamilton*, 1832, 10 S. 734; see *Lord Blantyre v Dunn*, 1858, 20 D. 1188.]

⁴ *Reid v Fullarton*, 1819, n. r.; *Thomson v Simson*, 1825, 4 S. 224.

⁵ *Monkton v L. Yester*, 1634, 1 B. S. 201.

⁶ *M'Kenzie v M'Kenzie*, 1777, M. App., Sup. and Vass. 2, Hailes 760.

⁷ *D. of Argyle v E. Dunmore*, 1795, M. 15068. [The superior is bound to enter the heir of the former investiture, in terms of a new entail, on payment of relief, only reserving his right to claim a year's rent on the entry of the

first substitute who is not heir of the former investiture. *Mackenzie, cit.*; *M. Hastings v Oswald*, 1859, 21 D. 871. But when the superior has once received payment of the composition of a year's rent from any heir under the new investiture, this operates as an enfranchisement of all the subsequent disponees, who become entitled to be entered on payment of relief only. *Stirling v Ewart*, 1842, 4 D. 684; aff. 1844, 3 Bell's App. 128. *Adv.-Gen. v Swinton*, 1854, 17 D. 21. See also *Lockhart v Denholm*, 1760, M. 15047; *Duke of Hamilton v Baillie*, 1827, 6 S. 94.]

⁸ *Hill v Merchant Maiden Hospital*, Jan. 17, 1815, F. C. [*Hamilton v University of Glasgow*, 1716, Robertson's App. 172; *E. Mansfield v Gray*, 1829, 7 S. 642; *Campbell v Orphan Hospital*, 1843, 5 D. 1273 (where an entry to the office-bearers of a corporation, on payment of a composition without any reservation or stipulation, was held to entitle the corporation to complete a title by adjudication in its own name, and to discharge all claim for future composition); *Gardner v Trinity House of Leith*, 1845, 7 D. 286; *Learmonth v Trinity Hospital*, 1854, 16 D. 580.]

a trustee to hold for the corporation, or by stipulating to pay an entry on every revolution of a certain term of years.

OF THE EVASION OF CASUALTIES, AND THE REMEDIES.—The casualties of superiority are liable to disappointment, (1) by the vassal or purchaser contenting himself with possessing on the personal right, without taking an entry from the superior, or completing the feudal right by sasine; (2) by conveying the personal right, the purchaser not completing his right by sasine, but keeping the precept open, and selling again with a similar assignation; and (3) by subfeuing, by which the *dominium utile* may be transferred, without any immediate necessity of coming to the superior for an entry.

To preserve against these evasions this valuable part of the superior's right, various conditions have been introduced into the feudal contract, and various devices used to secure the entry of heirs and singular successors with the superior, and to prevent alienation by means of subfeus. The efficacy of such conditions next deserves attention.

[26] There appears in the books¹ a report, which seems to support the doctrine that a superior is not bound to enter a disponee whose author was not entered, unless the relief duties shall be paid for that author as if he had entered. The Court has again and again taken occasion to deny that decision as reported, and to recommend that it should be publicly understood that no such determination was given. It is, indeed, not law.

RETENTION OF CHARTER.—Superiors sometimes attempt to retain their vassal's charter, and refuse to deliver it till sasine be taken and recorded. This was incidentally held to be an illegal practice, unless in so far as the vassal approved or acquiesced.² But more recently the Court, proceeding on professional usage in cases of this sort, gave their sanction to the device, on the sole ground of practice.³ At the same time, it will be observed that the effect of such a device against third parties would be very questionable. If it were to happen, for instance, that a person, after having purchased land, and having had his charter made out, should fail, and that on sequestration the trustee for his creditors should offer to the superior full payment of the price, it appears that he would have right to demand delivery of the charter, with the precept unexecuted, so as to complete his title under the judicial conveyance to the precept.

STIPULATIONS.—But the chief reliance is placed on particular STIPULATIONS and CONDITIONS in the feudal grant. With respect to these, it is obvious that unless the condition can be made effectual as a real burden, the superior must trust to the personal obligation of his vassal, and to the remedy which he may have as a creditor on such obligation. The first point, then, to be ascertained is, What are the requisites of a condition by which the vassal's right shall be held as qualified in the hands of his creditors, or of purchasers?

1. *Personal Obligations*.—A mere obligation on the part of the vassal to enter within a certain time, by taking sasine on the charter, or not to dispone before he has himself entered, or not to subfeu so as to disappoint the superior of an entry, or not to sell till he has first offered the land back to the superior, can have no effect against third parties—purchasers or creditors. These are obligations merely personal, and can serve only as the ground of a personal action.

2. *Conditions of Grant*.—But if, instead of being thus expressed, the stipulation shall be made a condition of the grant, it may have a very different effect. It will qualify the vassal's right so long as that right remains *personal*; and it will qualify even the *feudal*

¹ *Gordon v Grant and Lumsden*, 29 June 1814, F. C.

² *Stewart v Burnside*, 1794, Bell's Fol. Ca. 75; M. 15027.

³ *M'Ritchie v M'Donald and M'Neill*, 1801, 2 Ross' L. C. 165, [where it is shown that this case is misapprehended by the author. It has been decided that a superior is not bound to grant to an heir an assignable charter, on which a stranger may be infeft without paying composition. *Mags. of*

Musselburgh v Brown, 1804, M. 15038. See Bell's Lectures on Conveyancing, vol. ii. 1054, 1055. A charter 'to heirs and assignees' means to assignees before infeftment, and does not of itself oblige the superior to receive as vassal a disponee from one infeft, without payment of composition. *Stair*, ii. 4. 32; *Ersk.* ii. 7. 5, notes. *Hamilton v Dunn*, 1853, 15 D. 925.]

right, so as to be effectual against purchasers and creditors, provided the condition shall enter the instrument of sasine, and so appear in the record. This, as to a clause of pre-emption, seems to have been taken for granted in one case;¹ and in another, more recent, the doctrine was confirmed, though doubts were entertained by the House of Lords, which leave the question still open.²

Mr. Erskine seems to hold, that without a clause of irritancy, the condition will not avail.³ But this doctrine seems to be questionable. Lord Stair entertains no doubt of the efficacy of the clause of pre-emption (or of the more sweeping clause *de non alienando*), by [27] force of the provision merely. On strict feudal principles, they are effectual as conditions of the grant, without a compliance with which the superior is not bound to give an entry to the heir of his vassal: and even if the breach of the condition is by a subfeu—though to a certain extent it will be effectual—yet the lands, by descending to the heirs of the vassal, will at last fall into nonentry; and so the necessity will recur of coming again to the superior, who will not be bound to grant an entry, unless the conditions of the grant have been complied with. There is a distinction between the feudal contract of superior and vassal and the prohibitions of an entail. In the former case the vassal's right cannot long subsist without his being compelled to recur to the contract with the superior; and the obligations incumbent on the vassal by the contract are conditional, and may be insisted on by the superior before he will consent to renew the title. In the latter there is no contract affording an immediate and direct remedy, but a perfect fee is bestowed on the heirs of entail, which will be effectual, if not 'irritated and resolved.'⁴

3. *Conditions not recorded*.—When the condition is omitted in the infeftment, and of course does not appear in the record, it will not affect third parties, neither purchasers nor

¹ See below, *Preston v Lord Dundonald's Crs.*, p. 27, note 6.

² *Campbell of Blytheswood v Dunn*, 1823, 2 S. 299. In that case a feu-contract was entered into, under condition that there should be no subfeu, that any conveyance to be granted should be presented for confirmation within twelve months, and that this conveyance should be made out by the agent of the superior. The Court held these conditions effectual in an action of declarator by the superior against the vassals. The case went to the House of Lords; and, on the motion of Lord Gifford, was remitted back (1 W. and S. 690) to have the opinion of the whole judges. (See 6 S. 679.) But the parties did not proceed further.

³ Ersk. ii. 3, 13; and again more fully at title 5, sec. 28, where he says, 'that, by our feudal rules, a clause declaring any sale of the lands that shall be made by the feuar, without offering them first to the superior, to be null, is not of itself sufficient to invalidate the sale, unless there be also a clause irritating the feuar's right in that event.'

The authority on which Erskine relies for this doctrine is *Stirling v Johnston*, 1757, M. 2342, 5 B. S. 223. Of that case I may observe, that it is very inaccurately reported in the Fac. Coll., vol. i. p. 14. The question arose with a stranger purchaser, and the condition was not inserted in the sasine. It occurred to me formerly that this decision determined only the point, that in whatever manner the condition becomes effectual, it can have no operation against purchasers unless it shall be entered on the record. But the notes of Lord Kilkerran justify Erskine's statement of the result. [This case is condemned as objectionable in every particular in *Tailors of Aberdeen v Coutts*, 1834, 13 S. 226; rem. 1837, 2 Sh. and M'L. 609; 1840, 1 Rob. 296. Although a distinction is said to exist in regard to conditions in feus between

those which are in their nature continuous and permanent, and have a natural and proper connection with the subject of the grant, and those which oblige to the performance of a single act, the former being (it is said) capable of being made real burdens, though not expressly declared to be such (see Shaw's ed. p. 750, note a; Bell's Prin. 861), the cases show that all conditions must be made real by the use of terms clearly expressing the granter's intention that they shall affect the subjects, and not the grantee and his heirs only. The only difference is, that in the former case this intention is more easily inferred. See *Tailors of Aberdeen v Coutts*, *cit.*; *Clark v Glasgow Insurance Co.*, 1850, 12 D. 1047; aff. 1854, 1 Macq. 668. *Baird v Mitchell*, 1846, 8 D. 464; 1851, 13 D. 982. *Campbell v Dunn*, *supra*.]

⁴ The clause of pre-emption is sometimes so conceived as to give to the superior the power of taking the subject at an appointed sum, as in the case of Annandale, and in Sir C. Preston's case; but when used at all of late years, it is as a mere privilege of having the refusal *on the same terms with others*. 'That it shall not be lawful, etc., to sell, alienate, or dispose the said subjects, etc., to any person, until they have first offered to sell the same to me or my foresaids, at the like rate they might get from any others' (2 Juridical Styles, 21). A difficulty may arise in the construction of the modern form of the clause, as the price is to be fixed by public competition at auction; and the sequestration law expressly requires the sale to proceed by auction (54 Geo. III. c. 137, sec. 52). Perhaps the Court, on a petition, would interfere to fix the upset price; and an offer to the superior at that rate would seem to make the sale valid. [The heritable estate of a sequestrated bankrupt may now, subject to certain restrictions, be sold by private bargain. See 19 and 20 Vict. c. 79, secs. 114, 115. See below, p. 28.]

creditors' adjudgers, pursuing a judicial sale of the estate: and therefore a singular successor, purchaser, or creditor may adjudge, unaffected by the condition; or an application by the superior on such a clause of pre-emption, to have the lands struck out of the sale, will be ineffectual.¹

4. *Declarator*.—If the lands be in nonentry, and the condition not expressed in the titles, the superior may, in a declarator of nonentry against his original vassal, conclude that the vassal shall be decerned so to make up his titles as to give effect to the condition; and the right will accordingly be made effectual by decree of declarator, entitling the superior to refuse an entry on other terms.² Where the title is so given, the condition will appear in the record, and so be effectual against strangers.

If the lands were feudally held under infeftment not containing the conditions, the creditors of the vassal so holding will not, after his death, be affected by such decree of declarator, but will be entitled to adjudge and bring to sale the lands, to the disappointment of the superior.

5. Although the fee be full, the superior may bring an action of declarator, in order to have the condition inserted in the future titles; but there is no obvious remedy by [28] which he may establish the condition in the titles before the next entry of an heir. Certainly the declarator alone can have no effect on the rights of creditors.³

STIPULATION LAWFUL.—But it is not enough that the stipulation is expressed conditionally, and that it makes its appearance in the sasine and in the record: it is further necessary that it be a legitimate stipulation. There were two conditions formerly much in use in feudal contracts, viz. that the vassal should be liable in the casualty of marriage, and that he should not sell without the superior's consent. These were abolished by Act of Parliament immediately after the Rebellion 1745;⁴ and considering the words of the Act, it was natural to contend that clauses of pre-emption and prohibitions to subfeu were also prohibited. But it has been settled that these clauses do not fall under the Act.

I. CLAUSE OF PRE-EMPTION.—This is a stipulation in favour of the superior of a right to have the first refusal of the lands, should the vassal be inclined to sell. Erskine is of opinion that a clause of pre-emption is effectual, notwithstanding the Act.⁵ And after a very full discussion of the question on several occasions, this opinion seems to have been fully admitted as law.⁶ The practical effect of this clause may deserve some attention. If

¹ So it would have been held in Sir R. Preston's case, had the right to the lands, on the one hand, been other than a mere personal right; or, on the other, had the condition not been entered in the titles. The opinions of the Court went very decidedly to this conclusion. See below, note 6.

² See the case of Sir R. Preston, *infra*, note 6.

³ Perhaps inhibition may be thought a good protection against future creditors, but would certainly leave the estate open to the adjudication of prior creditors.

⁴ 20 Geo. II. c. 50, sec. 10. 'And whereas there are certain lands in Scotland held by the tenure of feu, *cum maritagio*, or with clauses *de non alienando sine consensu superiorum*, it is hereby enacted, etc., that in all time coming, from and after 25th March, the casualty of marriage consequent on such holdings, and all such prohibitory clauses restraining the power of alienation, be taken away and discharged; and it shall and may be lawful, in like manner as is hereinbefore directed, etc., and to apply, etc., for an additional feu-duty,' etc.

⁵ B. ii. tit. 5, sec. 28: 'It would seem that such clause continues effectual, notwithstanding the statute, as it is quite different from a clause *de non alienando*.' See the next note.

⁶ 1. Mr. Cochran, a feuar of Kirkbrae from Sir George Preston, granted a bond, that whenever he or his heirs should

think fit to dispose of the subject, they should offer it to Sir George or his heirs for £307, 13s. 4d., [but he was not infeft.] The feu came into the person of the Earl of Dundonald; and on his affairs becoming embarrassed, an action of nonentry and declarator was raised for having the lands declared in nonentry, the titles made up under the condition, and the condition inserted in the charter and infeftment. There was a great deal of discussion on the efficacy of the bond, particularly as affected by the 20 Geo. II. But the Court decerned in the nonentry, and found that the tenor of the backbond in question ought to be inserted in all the subsequent titles and investitures of this piece of ground. **Sir Charles Preston v L. Dundonald**, 1781, M. 6569.

The effect of this decision, in a question with the vassal himself, was to hold the right of Lord Dundonald in nonentry qualified by the condition, and to give the superior the future benefit of the bond as a real qualification of the feudal grant.

2. The creditors of Lord Dundonald having brought an action of judicial sale of his estates, a warrant was issued for selling Kirkbrae. An application was then made by Sir Charles Preston to have those lands struck out of the sale, and his right to redeem them for the sum of £307, 13s. 4d.

the offer to the superior is to be made at a particular sum, the interests of parties may be [29] easily settled. The superior will be entitled, on offering that price, to have the lands struck out of a judicial sale or sequestration of the vassal's estate; or, by interdict, to interrupt a private sale, and afterwards by declarator to acquire the lands. But, on the other hand, the superior's creditors can make no use of the right, other than as augmenting the value of the superiority on a sale, unless the vassal be under the necessity of selling. If the offer is conditioned to be made to the superior at the same price as to others, it may be difficult to extricate the rights of parties.

II. PROHIBITION TO SUBFEU.—This may be considered as equally legitimate with a clause of pre-emption, being a condition, not for preserving the superior's influence, against which the Act was directed, but for maintaining and rendering effectual a valuable pecuniary interest. It is a stipulation that the vassal shall not have it in his power to alienate the feu, otherwise than by a conveyance with the proper warrants for holding only of the superior.

If such a clause be expressed only as a condition, a feu-right granted by the vassal will be effectual while the right of the vassal stands. It will fail only when the necessity arises of coming to the superior for an entry on the death of the vassal. The superior may

declared. The Court found 'that the right of pre-emption claimed by Sir C. Preston, in virtue of the backbond, is not a real burden on the lands of Kirkbrae, and consequently cannot be effectual against creditors; and therefore, that these lands must be sold for payment of the debts of Lord D.' An appeal was entered, and the House of Lords remitted to the Court of Session, 'to find whether the backbond given by Charles Cochran, 30th June 1750, as mentioned in the pleadings, is not a real burden on the lands of Kirkbrae, it having been found by the interlocutor, 20th December 1781, that the tenor of the backbond and obligation libelled on ought to be inserted in all the subsequent titles and investitures of the piece of ground in question, which, by the decree of the Court of Session, in a process of nonentry, remains in the superior's hands, together with the maills and duties thereof, and will so continue aye and until the lawful entry of the righteous heir; and also to find whether the terms of the said backbond, supposing it a real burden, are not sufficient to entitle the appellant (Sir R. Preston) to a pre-emption' [4 Pat. 331]. The Court of Session pronounced judgment: (1) That Cochran the vassal's right never was completed by infestment; (2) That, as a personal right, it was qualified by the condition in the backbond; (3) That the creditors could attach only that personal right so qualified; and (4) That the backbond never was entered in the title, as ordered; and therefore it was unnecessary to determine what effect, if inserted, it would have had. The words of the judgment are: 'The Lords find that Charles Cochran, who granted the backbond in question in favour of Sir George Preston, had only a personal right to the lands of Kirkbrae, which never was completed by infestment, either in his favour or in that of his successor, Lord Dundonald: Find that the said backbond never was inserted in the titles of the said lands, though ordered to be so by the interlocutor of this Court in 1781; therefore, find it unnecessary to determine whether, if the backbond had been so inserted in the titles, and infestment had followed, it would or would not have constituted a real burden on the lands: But find that the personal right in Charles Cochran and his successor, Lord Dundonald, did remain qualified by the condition in the said backbond in

favour of Sir George Preston; and that the adjudication led by the creditors of Lord Dundonald can only attach the said personal right, subject to the said condition: Find that such interest as Lord Dundonald has in said lands is properly comprehended in the summons of sale; and therefore find that Sir Robert Preston has now right to redeem said lands, on payment of the sum of £307, 13s. 4d., mentioned in said backbond, and decern accordingly.' *Sir R. Preston v E. of Dundonald's Crs.*, 1805, M. App. Pers. and Real, No. 2.

Although the judgment does not determine the effect of the backbond, and so the point is not precisely decided, yet the judges, in delivering their opinions, had no doubt of the efficacy of such a condition, if inserted in the titles; and L. Armadale, in particular, stated that his father-in-law, Lord J.-C. M'Queen, and Lord J.-C. Miller, were of opinion that such clauses constituted a real burden.

3. In *Irving v M. of Annandale*, 1767, M. 2343, the Court had in the same way decided that a clause of pre-emption does not fall under the Act of 20 Geo. II. And although this decision was, in *Farquharson v Keay*, 1800, M. App. Clause 3, thrown into doubt by an observation from the bench, the judges approved of the decision in *Irving's case*, in the opinions delivered in *Sir R. Preston's case*; and, in its turn, this decision of *Farquharson and Keay* was held questionable. [The cases cited, and that of *E. of Mar v Ramsay*, 1838, 1 D. 116, imply that the clause of pre-emption is not a contravention of the Act, although the question is said by Lord Corehouse to remain a matter of doubt. *Tailors of Aberdeen, cit.*, 1 Rob. 321. See *Lumsden v Lorimer*, 1841, 3 D. 1199; *Lumsden v Stewart*, 1843, 5 D. 501. The usual form of the clause simply gives the superior a right to have the subjects on the same terms as may be offered by another; and the proper mode of giving effect to such a condition is pointed out in *Montgomerie Bell's Lectures on Conveyancing*, i. 579. See also *Shaw's edit.* p. 750, where it is suggested, apparently by Mr. Bell himself, that when the sale is by auction, the superior may get intimation to attend and bid at the sale, receiving a deduction of the difference between his bidding and the next highest offerer. Professor *Montgomerie Bell's* method is much preferable.]

refuse; and so, the lands being in nonentry, the superior may, by decree of declarator of nonentry, destroy the subvassal's right. In the new town of Edinburgh, grants are generally made with a condition against subfeuing, and with a precept for a public holding only. But it is common for the vassal to sell with an alternative precept, and the feuar confirms the purchaser without any difficulty. A title so made up is quite unexceptionable in itself, though liable to the danger above pointed out.¹

If the condition be further guarded with irritant and resolute clauses, it seems that the subfeu may be challenged even before the necessity for a new entry with the superior arises.

GROUND-ANNUAL.—When the prohibition to subfeu is effectually created as a real burden on the right of the vassal, it is an important question, How the vassal can make the best advantage of the ground, where it is intended for building? This is done in two ways. Either he sells for a price the area and house built on it, and giving a precept for holding of the superior only, he leaves the purchaser to make up his title by entering with the superior;² or he constitutes a ground-annual or reserved rent by a form of grant, proceeding on the principle of a burden by reservation. In constituting a title to property [30] with a ground-annual, the grant is by a precept *à me*, to force the purchaser to enter with the superior. The disponent is burdened with the duty to the superior, and a sum to be paid annually to the disponent and his heirs or assignees; and this annual payment is declared to form a real burden on the land, which the disponent is to have right to recover by pointing of the ground. Generally a security for the ground-annual is constituted by procuratory and infestment.³ While a right of this nature is left merely on the condition and declaration of a real burden entering the infestment, there may be some doubt both as to the form of transferring, and the remedy for forcing payment of the annual duty; but where it is completed by an infestment in security, the right seems to be real beyond all question, with all the remedies which are applicable to an annuity secured on land.⁴

SECTION III.

LIMITED ESTATES IN LAND DEPENDING ON DECLARATIONS OF USES, OR ON RESERVATION OF BURDENS, OR OF FACULTIES.

These are conditions directly intended to limit or restrain the right to the land, as in a question with the person whose right is qualified, or with purchasers from him, or with creditors. It may be stated generally, that such limitation depends on one of two principles,—either on the effect of a condition qualifying the conveyance, or on the effect of a reservation out of the conveyance of part of the original right of the granter, there being in either case vested in the granter, or in another, a *jus quæsitum* sufficient to ground an action.

¹ [A disposition with an alternative precept not being intended to create a permanent base right, is not an infringement of a prohibition against subinfeudation (*Colquhoun v Walker*, 1867, 5 Macph. 773), which may also be referred to with regard to the effect of an irritant clause in guarding such a prohibition.]

² Sometimes in practice titles are made up on such a precept, as if it were an alternative precept; *ex gr.*, by base infestment confirmed. Such a title is vicious.

³ This is by contract. The proprietor, or vassal disponent, in consideration of the ground-annual and other prestations, and with and under the burden thereof, disposes, etc., declaring the annual duty redeemable at twenty years' purchase any time within ten years, and twenty-five years' purchase

thereafter; and grants a procuratory for resigning, to be held burgage, under burden of the ground rent. Then the purchaser binds himself to pay the ground-annual while not redeemed; and, in security, disposes with procuratory of resignation for burgage-holding.

⁴ [But, in the ordinary form of constituting a ground-annual, the first disponent remains personally liable for the ground-annual even after he has sold the subjects, in addition to the real burden on the subject. *Small v Miller*, 1849, 11 D. 495, revd. 1853, 1 Macq. 345; *Gardyne v Royal Bank*, 1851, 13 D. 912, revd. 1853, 1 Macq. 358; *King's Coll. of Aberdeen v Hay*, 1852, 14 D. 675, 1854, 1 Macq. 526; *Elmsley v Brown*, 1855, 2 Macq. 40.]

ART. I.—OF THE SETTLEMENT OF ESTATES IN TRUST—LIMITATION OF USES AND PURPOSES.

In many situations it is difficult to arrange or dispose of property without having recourse to the creation of a trust, that there may at once be compliance with the forms of feudal conveyancing, and a free exercise of the power of administration, for the accomplishment of the ends in view. This expedient is especially made use of for securing estates to unknown, or unborn, or very numerous parties—for distributing in shares, varying with circumstances, the property or the price of an estate—for dispensing with, or getting rid of, the inconvenient and unbending forms of ordinary conveyancing, calculated for common transactions of daily intercourse, but frequently unfit for anomalous, eventual, and mingled interests.

It is the object and operation of trusts, as applicable to lands and other feudal subjects, that in the person of the trustee there shall be vested a legal estate, so limited, and yet so complete, that, while the conditions annexed to it, or implied in its constitution, create a separate estate or interest, which forms a burden or condition on the trustee's right, the active powers of administration, or of transference, for the accomplishment of the intended purposes, are, in the person of the trustee, at once unembarrassed and free, and capable of being exercised with perfect safety to those in whom the radical interest resides. In [31] proportion as these objects are fully attained, the trust may be considered as perfect or otherwise.

The particular occasions for the employment of this expedient are: the settling of marriage contracts; the arranging of family settlements; the fixing of a plan for the administration of large estates, which shall not require, or shall exclude, the interference of the proprietor; the facilitating of the sale and distribution of land, or its price, among heirs or creditors; or, finally, the settling of a bankruptcy, with provisions for the benefit of the creditors, and a discharge of the debtor.¹ A system of operations by which arrangements so various and opposite may be accomplished, is of great importance in the practical jurisprudence of Scotland. And the points to be considered are: (1) The constitution of the trust; (2) The estate vested in the trustee; (3) The estate remaining in the granter, or vested in those for whom the powers are to be exercised; (4) The administration of the trustees; and (5) The extinction of the trust and reinvestment of the truster, or final conveyance to those who have the reversionary right.

I. CONSTITUTION OF THE TRUST.—Trust is referable to a combination of two contracts—Deposit and Mandate; the estate not being in the trustee for any use or purpose of his own, and the administration being ruled by the directions given by the maker of the trust. And this is a point of chief importance to be observed, that the object in view is not the beneficial interest of the trustee, but some purpose to be accomplished, in which a third party is interested,—an object to be attained by means of the interposition, the activity, sometimes the peculiar discretion, of the party selected. These points may be laid down:—

1. A trust cannot be constituted in the person of another without his consent, to the effect of obliging him to do any act, however innoxious to himself, or easy to be done.²

2. A failure in the nomination, the non-acceptance of the trustees, the death of the trustees named, or of one named *sine quo non*, or of any of the number named as quorum, will defeat the trust, where the power to be exercised is inseparably connected with the nomination.³ It will bar, or bring to a close, the administration, even where the interests

¹ The more particular consideration of trusts for insolvency will be resumed in the last book of these Commentaries.

² Yet it was held that one named as trustee without his knowledge, and in whose favour *sasine* was taken, relying on his acceptance, was bound to grant the deed necessary for

denuding, providing he was freed from all warrandice, and relieved of expense. *Dallas v Liechman*, 1710, M. 16191.

³ In the case of *Hepburn* (p. 31, note 4), the Court interfered, even where there was a discretionary power to be exercised. But in *Dick v Ferguson*, 1758, M. 7446, 16206, where

which form the object of the deed are still to be maintained.¹ But it will not extinguish interests in third parties intended, at all events, to be raised by the deed, and to subsist independently of the particular administration. It is held in such a case that the mandate was meant absolutely to be available to those whose interest is in contemplation;² and the radical right is to be made effectual against the granter's heirs (or the trustees, if so destined) by adjudication,³ while the Court of Session will supply what is necessary in the way of administration.⁴

3. Not only the death, but the incapacity, or even (where it essentially abridges his [32] power or fitness for the office) the bankruptcy of a trustee, will defeat a trust, or bring it to a close, so far as that person is concerned.⁵ But it forms no incapacity to act as a trustee that the person named is a married woman, though the husband has undoubtedly a power to prevent her acceptance of an office attended with responsibility.⁶ The nomination of a woman as a trustee seems to fall with her marriage; but where the appointment is made before marriage, and the truster survives that event, and is aware of it, without altering the nomination, he is held to continue it intentionally.⁷

4. Non-acceptance on the part of the trustees may defeat the trust, or at least the course of administration projected. But to abstain from acceptance is not to decline the trust, and a trustee so abstaining may afterwards assume his place.⁸ Where the trust, however, relates to an estate to be vested in the trustees by infestment, it would rather seem that a refusal to allow his name to be included in the infestment would be equal to a refusal to accept; and the infestment completed, with the omission of the name of any of the trustees, would, *prima facie* at least, be taken as proof of their non-acceptance.

5. Where trustees are named in a marriage contract, for the purpose of protecting the interests of the wife and children, the dissolution of the marriage—though it has the effect

there was a discretionary power in the trustees, the exercise of which was necessarily combined with the nomination, the trust was held to fall.

¹ See Stoddart's case below, note 7. See also *Drummond v M'Kenzie*, 1758, M. 16206. Practically, it is an advisable precaution, where a majority of the trustees are named as a quorum, that the number of trustees accepting should be defined by a declaration of non-acceptance on the part of those who decline, or who even in the meanwhile abstain from acting, reserving in this last case power to resume their place afterwards.

² *Campbell v Campbell*, 1752, M. 14703, 16203.

³ See *Gavin v Kirkpatrick*, 1826, 4 S. 629, N. E. 637. [*Dalziel v Dalziel*, M. 16204, App. Trust 1; *Black v Lorimer*, 1821, 1 S. 521, N. E. 481; *Crawford v E. Dundonald*, 1838, 16 S. 1017; *M. of Ailsa v Jeffray*, 1859, 21 D. 492; *Gordon's Trs. v Harper*, 1821, 1 S. 185, N. E. 175.]

⁴ The Court formerly interfered by naming a trustee, to act with all a trustee's powers. So in *Hepburn of Humby's Crs. v C. of Tarras*, 1699, 2 Fount. 60. The course afterwards was to name only a *curator bonis* (*M'Dowal's* case, below, next note; *Grant*, 1790, M. 7454). See also *Wotherspoon*, 1775, M. 7450. More recently it has been the practice to authorize a factor to take all necessary proceedings. In *Alexander*, 1824, 2 S. 745, N. E. 621, on the trustee's having declined, a factor was named, with power to carry the trust into effect. And in *Busby's*, 1823, 2 S. 176, N. E. 157, the Court, on a search of precedents, granted the special power there required to a factor to make up titles to certain heritable subjects. [In *L. Melville v Preston*, 1838, 16 S. 457, aff. 2 Rob. 45 (see 14 D. 1056); *M'Auslan*, 1841, 3 D. 1263; and *Glasgow*, 1844, 7 D.

178, trustees were appointed by the Court. But in general the Court refused to exercise such a power, if it belonged to it. *Lindsay v Lindsay*, 1847, 9 D. 1297; *Nicholson*, 1850, 12 D. 911; *Ferguson v Marjoribanks*, 1853, 15 D. 645; *Melville*, 1856, 18 D. 788. A judicial factor was generally and may still be nominated. But under 30 and 31 Vict. c. 97, sec. 12, the Court is empowered to nominate trustees where trustees cannot be nominated under any trust-deed, or when any sole trustee has become insane, or incapable of acting by reason of physical or mental disability. Trustees so nominated cannot assume new trustees, unless such power is expressly conferred upon them by the Court (sec. 13).]

⁵ In *M'Dowal v M'Dowal*, 1789, M. 7453, a trust was held to fall by the bankruptcy of the surviving trustee, where the interest of parties did not require its continuance, although, as a general proposition, bankruptcy was not held necessarily to defeat or terminate a trust. [*Robertson v Lamb*, 1829, 7 S. 573; *Cumming v Hogg*, 1834, 12 S. 508; *Cowan v Crawford*, 1837, 15 S. 398; *M'Pherson*, 1840, 3 D. 315; *Miller*, 1854, 16 D. 358.]

⁶ *Darling v Watson*, 1823, 2 S. 607, N. E. 519. Here it was also held, that where a husband and wife are named trustees, they are, *quoad hoc*, separate persons having separate votes. See also Stoddart's case, next note.

⁷ *Stoddart v Rutherford*, 30 June 1812, F. C. The point of a wife's capacity to be trustee was here fixed, and a distinction drawn between this and the case of tutory: the husband held to have power to bar acceptance, and the supervening marriage taken for granted as defeating the nomination.

⁸ See above, the case of *Darling*, note 6. [As to elective trustees, see *Adam v Grieve*, 1867, 5 Macph. 284.]

of restoring the wife and children to their separate *persona standi*—will not extinguish the trust;¹ nor will the death of such trustees during the marriage leave the wife and children unprotected.

6. Trustees may effectually be appointed not only by name, but by descriptive reference; and such reference may be either to office, as in nominating the trustees of a public charity,² or to an assumption or appointment by those expressly named, or to nomination by a stranger, or to the legal line of succession of the trustees named.

II. ESTATE IN THE TRUSTEE.—Estates were of old, in Scotland, vested in trust, chiefly in the disastrous days of rebellion and civil war, when, before engaging in any dangerous enterprise, a landowner made over his estate to a confidential friend, to be restored after the danger was over. In this use of trusts the parties necessarily confided in the honour and fidelity of the trustee. The secret compact could not be disclosed; and that equity on which the Prætorian jurisprudence in Rome interfered to enforce the duties of persons similarly entrusted (though for very different purposes), afforded the only ground of judicial interposition with us. This was the case of trust proper, in which Lord Stair says, ‘there is neither bond, condition, nor promise of reversion, or obligation to denude’ (Stair iv. 6, 1). [33] The progress was much the same in England, the confusions during the wars of York and Lancaster having given rise to the frequent use of trusts in that country. There the statute of 27 Henry VIII., called the Statute of Uses, had at one time nearly established the legal estate of the *cestui qui use*, and brought the whole of this department of jurisprudence under the administration of courts of law. But it was found necessary to have recourse to equity, and in this way the jurisdiction in trusts forms a great branch of that of the Court of Chancery. In Scotland, without any general statute to declare the legal estate of the truster, the gradual operation of our combined system of law and equity, with the aid of our public records, has led to the establishment of a safe, clear, and regular system of trusts, in which the rights of all parties may be vested in the trustee, as in deposit, with perfect security to those interested, and resting upon rules which guide the determinations of our courts with the same precision and uniformity as in other cases.

Taking a general view of this subject, the estate in the trustee will be found to stand in one of three situations: (1) An estate *ex facie* absolute, with no other than a verbal engagement by the trustee; (2) An estate vested in the trustee by a conveyance in absolute terms, the conditions and purposes of the trust being expressed in a separate deed; or (3) An estate expressly in trust, the purposes of the trust and the rights of those for whose benefit it is designed being stated as conditions and qualifications of the estate vested in the trustee.

1. The first of these cases was the most frequent when this expedient came to be used, in order to conceal or cover an estate from danger of forfeiture. But out of those trusts so many inextricable questions arose,³ and there was so much danger of fraud, that in 1696 provision was made by the Legislature against such arrangements. In the 25th chapter of the Acts of that year, on a preamble that ‘the entrusting of persons without any declaration or backbond of trust in writing from the person entrusted, are occasions of fraud,’ it was enacted, ‘That no action of declarator of trust shall be sustained as to any deed of trust made for hereafter, except upon a declaration or backbond of trust lawfully subscribed by the person alleged to be the trustee, and against whom, or his heirs or assignees, the declarator shall be intended, or unless the same be referred to the oath of the party simpliciter.’⁴

Under this Act, the only points which have required the determination of the courts

¹ *Hill v Hunter*, 1766, M. 16207.

² [*Edin. Royal Infirmary v Lord Advocate*, 1861, 23 D. 1213.]

³ See the case of *Higgins v Callendar*, 1696, M. 16184.

This case was the more immediate occasion of the statute.

⁴ 1696, c. 25. This Act also contains an enactment against blank bonds. See *post*, vol. ii. index, *voce* Blank Bond.

are these:—1. Where the trust arises, not from the act or conveyance of the truster, but results from the interference of the trustee (as *negotiorum gestor*, for example), the Act does not apply.¹ The principle of the Act cannot be extended to such a case. 2. It is not of itself sufficient to exclude the rule of the Act, that the trust arises from the deed of a party different from him who claims the benefit of the trust.² 3. The Act is in full observance to exclude a proof by parole, even though some circumstances of real evidence may support the plea.³

The effect of the trust, when it is proved by written acknowledgment, or by oath, and is not established by the words of the conveyance itself, is *personal*, so as not to limit the real estate created by sasine in the trustee, or to be effectual against purchasers from [34] the trustee,⁴ or against his creditors adjudging.⁵ But this holds only where the estate is vested in the trustee. While it continues a personal right (as where infeftment has not been taken on the trust-deed), the condition of trust, though personal, will limit the personal right effectually against purchasers and creditors, if insisted in before their right is completed. The beneficial interest may also, by means of declarator or by registration, be established as a real qualification of the trust-estate.

2. It is not now the practice to constitute a trust otherwise than by backbond, or by an express trust-deed limited *in græmio*. Where the conditions and purposes of the trust are expressed in a BACKBOND, they are, in so far as the extent and limits of the beneficial estate is concerned, not exposed to the doubts which are incident to proper trust; and in all questions with the trustee and his heirs they are effectual limitations of his right. Even with purchasers or creditors they will effectually qualify the personal right. But if the real estate be vested and complete in the trustee's person, they will not operate as conditions or qualifications of it, unless the backbond be recorded. By statute, all reversions (or rights to redeem an estate conveyed in absolute terms) are directed to be recorded in the Register of Sasines and Reversions, without which they are to have no effect in limiting the absolute right.⁶ And under these statutes, backbonds of trust will qualify the absolute estate in the trustee.

3. Where the conveyance of the estate is expressly a DISPOSITION IN TRUST for certain uses and purposes, and the precept and procuratory are so conceived, the completion of the title in the person of the trustee by sasine recorded with its conditions, while it vests the fee in him, leaves to the persons for whose behoof it is intended an effectual and secure estate, or *jus crediti*, as a real burden on the trust-estate. The consequences of this are important. 1. The creditors of the trustee have no right to attach the trust-estate for the trustee's debts. The estate in him is, in its nature and origin, a limited and qualified estate: it is, in regard to his own creditors, a mere formal right—a deposit for the benefit of others; and the estate in all its forms, and even the proceeds of it, if sold while they can be identified (as bills or bonds of the purchaser, lands exchanged or excambed for the original trust-estate, etc.), belong exclusively to those having right under the trust, and can neither be attached nor divided by the trustee's creditors. 2. The maxim of law, that a fee cannot be *in pendente*, is satisfied by the vesting of the fee in the trustee; so that, for persons yet unborn, or otherwise incapable of holding the fee, an effectual contin-

¹ *Spruel v Spruel and Crawford*, 1741, M. 16201. [See *Lindsay v Barmcotte*, 1851, 13 D. 718.]

² See *Duggan v Wight*, 1797, M. 12761; aff. in House of Lords, 1797, 3 Pat. 604.

³ *Duggan's case*, above. [See *Leckie v Leckie*, 1854, 17 D. 77; *Seth v Hain*, 1855, 17 D. 1117. As to the case of accidental or fraudulent destruction of the declaration of trust, see *Chalmers v Chalmers*, 1845, 7 D. 865.]

⁴ *Anderson v Dempster and Dudgeon*, 1702, M. 10523; and other cases in Dict. *voce* Personal and Real.

⁵ At one time it was held that adjudgers stood in a different situation from purchasers; that they took only *tantum et tale*, as the subject stood in the debtor, and so were subject to the personal obligation incumbent on him. *Thomson v Douglas, Heron, and Co.*, 1786, M. 10229, 10299; corrected in *Ross of Kerse*, 1792, M. 10300; and *Wylie v Duncan*, 1803, M. 10269.

⁶ See 1459, c. 27; and 1617, c. 16. *Keith v Maxwell*, 1795, Bell's Fol. Ca. 234.

gent right may be constituted in the meanwhile, which in due time may be completely available.

4. The trust-estate cannot be considered as fully created, until the right is so vested in the trustee as to denude the maker of the trust, and so prevent his creditors, or others deriving right from him, from attaching anything but the reversionary interest, after the purposes of the trust are fulfilled. This, in land estates, can be accomplished only by the same feudal act of sasine by which the trustee's right, if a real creditor or purchaser, would have been completed and rendered effectual against all deriving right from the granter.¹

5. The trust-estate may be vested, and very conveniently so, in one person, subject to the administration of several trustees. A numerous body is fitter to deliberate than to act. But the common method of creating trusts is by a deed expressly in trust, or qualified by a [35] backbond, the trust being in either case made to qualify the fee. The estate must in this case be conveyed to the whole trustees, and vested in them all by infestment, in order to enable them effectually to act. Where there is a power to assume new trustees, the conveyance may be so arranged, as either to make the original trustees hold the fee, at the disposal of the deliberative voice of the whole; or to vest it in the united body of trustees. Where on any change the old trustees are to retire from the office, they must be denuded of the trust-estate. They may either denude spontaneously; or being expressly bound in the trust-deed, or under an implied obligation, so to do, an adjudication may be led against them, or their heirs, if the trust be so destined.

6. Where, by the failure of the trustees named and vested with the estate, the trust falls, this effect takes place either absolutely, or, if there be interests beyond, the Court will interfere to preserve them. And this is done, either (1) by appointing a *curator bonis*; or (2) by a declaratory adjudication in favour of a new trustee suggested by the parties; or (3) by a decree of declarator of trust containing a warrant to the superior to enter the person having the radical or equitable right.² Those measures may be pursued by adjudication on a charge against the trustee's heir; or, where the conveyance is strictly personal, or the heir is incapable or unwilling to interfere, by declarator of trust, without any charge.

III. THE BENEFICIAL ESTATE UNDER THE TRUST.—The conveyance by which the trust estate is created in the person of the trustees, while it vests in the trustees a formal feudal estate, does so only for the purpose of enabling that estate to be more effectually held separate from the right of the original owner, for the accomplishment of the purposes of the trust, and for satisfying the interests raised in third parties. The two points essential to be considered are, the radical right still remaining in the granter, and the separate or beneficial interest raised for others.

1. The RADICAL RIGHT in the granter of the trust may be viewed in relation to his prior and to his subsequent creditors.

(1.) *Prior Creditors*.—In relation to his already existing creditors, his trust-deed will be good against them only where the granter is solvent, or the beneficial interest to be raised is onerous, and where the trust-conveyance is a fair and honest conveyance completed before those creditors have proceeded to attach the estate. The first branch of the Act of 1621, c. 18, to be afterwards commented on, affords a remedy against trust-conveyances, where the trust is gratuitous and the granter insolvent.³ The second branch of the same statute gives a remedy where the prior creditors, having already begun to attach the estate,

¹ See below, Index, *voce* Voluntary Securities.

² An example of a declaratory adjudication, calling the representatives of the trustee, and all having interest, will be found in the case of *Drummond v M'Kenzie*, 1758, M. 16206; and an example of the declarator of trust in *Dalziel v Dalziel*, 1756, M. 16204. [The object may now be accomplished by a vesting order, obtained on application by summary petition

under the Trusts Act, 30 and 31 Vict. c. 97, secs. 14, 15. Where the trust-deed contains a destination of the estate to the heir of the last survivor, the heir may make up a title by service as heir of provision, and convey to the beneficiary. In practice, a title is frequently made up in this form.]

³ See Comm. on this Act in the 6th book, below.

are barred by such a conveyance.¹ Where the granter becomes, or can be rendered, bankrupt within sixty days of the recording of the sasine, a remedy of another kind is given by a later statute;² and finally, wherever fraud can be fixed on the transaction at common law, it will be reducible, and creditors, whether prior or subsequent, will have the benefit of the estate.³

But where none of those statutes apply, and there is no fraud at common law, the trust-deed will be effectual to its peculiar purpose, wherever the beneficial interests raised to third parties are legitimate, though inconsistent with the claims of the prior creditors. Wherever the trust-right is not inconsistent with the claims of those creditors, they may insist on having admission to the benefit of the trust. So, where a trust-deed is made for the payment of certain creditors, and to return the reversion to the granter, or to hold it for [36] his heirs under such a destination as will not deprive him of the fee or disposal of the reversion, the trustees, in accounting to those having the reversionary interest, will be entitled to credit for debts paid under proper measures of diligence; or creditors doing diligence to attach the fund, will be entitled to a share.

(2.) *Posterior Creditors*.—As to creditors whose debts arise subsequently to the trust: 1. If the trust be such as to leave no fee in the truster, his subsequent creditors will have no share in the trust-estate. 2. Where a trust is created for payment of prior debts, and the conveyance of the residue to certain persons, in such shares as the truster shall appoint, it is held that subsequent creditors may be introduced by a supplementary trust-deed, or that the trustees making advances to the truster have right to withhold the estate till indemnified.⁴ And so, 3. A trust created for the purpose of paying off debts, and raising money for certain purposes, was held to leave in the truster so much of his original estate,⁵ as to authorize the trustees to take credit in accounting for having, in the course of their administration, paid a creditor holding certain bills due by the truster.⁶

2. The BENEFICIAL INTEREST raised to others, is in its nature a *jus crediti*. It is secured to them, on the one hand, by preference over the creditors of the trustee, who can take no share of the trust-estate in competition with the beneficial interest, provided the declaration of trust is properly made a real burden on the fee vested in the trustee; and on the other, it is made effectual against the creditors of the truster, by the real right vested in the trustee for their behoof, excluding the truster and his creditors.

This beneficial interest may be of liferent or of fee; and the doctrines of liferent and fee are here applicable, not changed by the intervention of the trust, but in some respects facilitated, and allowed to operate more effectually by means of it.⁷

The persons in whom this interest is vested, or for whom it is to be held, must be clearly ascertained, otherwise the heir-at-law will continue to have right. But whether it is sufficient to point out such persons by reference to the will of another, has been much doubted; and the doubt has been rested on this footing, that while no one can make a will which depends entirely on the will of another, there must in every trust be a responsibility by the trustees, at the call of some one having a distinct interest; an incontrollable power of disposition, being ownership, not trust.⁸ It has been held, however—1. That where the reference can apply only to one single person, or to one settled line of succession, it will be good;

¹ See Comm. on the 2d branch of Act 1621, book 6.

² See Comm. on the Act 1696, c. 5, below, book 6.

³ See *E. of Rosebery v M'Queen and Cowie*, 1823, 2 S. 443, N. E. 394.

⁴ *Turnbull v Turnbull's Trs.*, 1822, 2 S. 1; revd. 1825, 1 W. and S. p. 80. [See *Wright v Harley*, 1847, 9 D. 1151.]

⁵ The radical right in the truster is still held so far to subsist, where the deed is for the granter's behoof in reversion, that his creditors may adjudge validly, by directing their diligence against the truster, notwithstanding the feudal right in

the trustees. *Campbell v Crs. of Campbell of Ederline*, 1801, M. App. Adjudication, No. 11. See *Lockhart v Wingate*, 19 Feb. 1819, F. C., as to the effect of a trust-deed on the elective franchise. [*M'Millan v Campbell*, 1834, 7 W. and S. 441.]

⁶ *Pagan v Eaton*, 1823, 2 S. 125, N. E. 117.

⁷ See below, chap. i. sec. 5.

⁸ See in England the case of *Morris v The Bishop of Durham*, 9 Vesey 400.

as a reference to the Statute of Distributions in England.¹ 2. That where there is reference to an event which leads to uncertainty or inextricability, the trust no longer can subsist, but the true heir takes the right.² 3. That it is competent to leave the nomination of the person who is to take succession, to a particular person,³ or to the trustees.

[37] As to the nature of the right thus bestowed upon third parties,—

1. As a mere *jus crediti*, this beneficial (or, as it is sometimes called, equitable) interest is not a *jus in re*, or real estate in the land, entitling those interested to maintain any real action, as of maills and duties.⁴ It gives only a personal action against the trustee, to execute the trust or to denude.

2. This *jus crediti* may be effectually conveyed as a personal right, by settlement,⁵ or by an assignation which, if duly completed, will be preferable to a subsequent adjudication of the estate, as vesting in the assignee the beneficial interest.⁶

3. Where the beneficial interest affects heritable estate, which the trustees are directed to convey over to the person holding such interest, or which they have a discretionary power so to convey, the *jus crediti* is to be held heritable in succession; while it is to be regarded as moveable in succession, if the trust-estate be moveable, or if the subjects have been actually converted into money; and as it seems, the *jus crediti* is also to be held moveable, if the beneficial interest is a share of the estate after it shall be converted into money.⁷

4. Where the beneficial interest is taken in favour of creditors, and the trustee is infest for the creditors enumerated in a list, the right conferred is a real right in security, and will subsist while the debts are unextinguished.

As to the extent of the estate, where trustees are vested with lands for certain persons or purposes, or have a sum entrusted to them for realizing the intentions of the granter, the implied effect of the trust is to carry the rents or interests to the purpose of the deed. But this always must be a *questio voluntatis*, depending on the words or plain intendment of the trust-deed.⁸

¹ *Bellenden v E. of Winchelsea*, 1825, 3 S. 530, N. E. 367.

² *Dick v Ferguson*, 1758, M. 7446. See observations on this case by Lord Gifford in *Hill v Burns* in H. L., 2 W. and S. 88. [The power of disposition is also subject to important limitations in two particulars by statute: (1) By 39 and 40 Geo. III. c. 98, accumulations of income are prohibited for any longer period than the life of the granter, and twenty-one years thereafter or during the minority of persons in being (extended to heritable property by 11 and 12 Vict. c. 36, sec. 41). (2) By 31 and 32 Vict. c. 84, sec. 17, no liferent interest can be created, except in favour of persons in life at the date of the disposition.]

³ *Murray v Fleming*, 1729, M. 4075, where a husband disposed his land estate to his wife in liferent, and any of his blood relations whom she should name by a writ under her hand, in fee. She did name one after the husband's death, and the heir was unsuccessful in challenging the disposition. *Orichton v Orichton*, 1826, where also the power was given to the wife of the granter of the trust-deed, 4 S. 553, N. E. 561.

See also *Snodgrass v Buchanan*, 1806, M. App. Service of Heirs, No. 1.

Campbell v Campbell, 1738, M. 3195, 4076, 13004.

Hill v Burns, 1824, 3 S. 389, N. E. 275; aff. 14 April 1826, 2 W. and S. p. 80.

⁴ *Drummond v M'Kenzie*, 1758, M. 16206, 2 Pr. of Eq. 12. Here the trustee died, and left the beneficial interest unexecuted. It was held incompetent for the holders of that interest to bring an action of maills and duties.

⁵ *Gordon's Trs. v Harper*, 1821. In this case the beneficial interest devolved on Robert Gordon, to whom, on majority, the trustees were appointed to 'denude of the lands.' They put him in possession, but he made up no titles, and a competition arose between trustees named by him in a deed of settlement, and the heirs of the original truster, who pleaded that, Robert Gordon not having made up titles, his right to the lands fell. It was held that the beneficial interest was a *jus crediti* fully vested in Robert Gordon, and effectually conveyed by his settlement. 1 S. 185, N. E. 175.

⁶ *M'Dowal and Selkirk v Russell*, 1824. This was a competition between an assignee to the beneficial interest, and the trustee for the general creditors of the cedent, specially adjudging and making up titles to the subjects. 'It was observed from the chair that there is a material distinction between this case and that where a party having the beneficial interest in the trust was the granter and original proprietor—that the trust is in that case merely a burden on the right, but that where there is no original title, and the right arises from the trust-deed alone, there is only a *jus crediti*. In this opinion the rest of the judges concurred.' 2 S. 682.

Smith v Leitch, 1826, where one holding a conditional fee executed a trust-conveyance of it after the condition was purified. 4 S. 659, N. E. 665.

⁷ *Burrell v Burrell*, 1825, 4 S. 314, N. E. 317. [See, as to Constructive Conversion, M'Laren on Wills, chap. xi. The subject is too extensive for discussion in a note.]

⁸ See *E. of Stair v Trs.*, 1826, 4 S. 483, N. E. 488, where

IV. ADMINISTRATION OF THE TRUST.—The powers to be exercised by the trustees depend on the terms of the appointment; or are implied in the nature of the trust, and the legal capacities of the trustees.¹

1. The object of the trust must be legitimate; and all that is now allowed of those [38] MORTIFICATIONS which were once so frequent in an age of superstition and religious bigotry,² is accomplished by means of trust; as endowments for universities, hospitals, and charities of various kinds. Lands and other heritable subjects are for such purposes vested in trust, to be held by the trustees in feu or blench; and such trusts are effectual where the purpose is intelligible, and capable of being executed. Nay, a trust of this sort has been sustained where the general purpose only has been indicated, and the particular destination left to the discretion of the trustees.³

2. The trust will be effectual to sustain future or contingent interests, or those of persons not yet existing; and the fee in the trustees will be effectual to all intents, as if those persons were actually in existence, or as if their right were already purified.

It is on this account that trust-deeds are made use of so much in family settlements and in marriage contracts, where, if the simple conveyance alone were used, the purposes of the arrangement would find an obstacle almost insurmountable in the maxim, that a fee cannot be *in pendente*.

3. The trustees may be invested with power to accumulate profits for particular purposes or destinations; to sell lands and apply the price; or to realize funds and purchase estates: and their powers and duties will in general depend on the terms of their appointment. But wherever the will becomes inextricable, or where it is intended for too distant a contingency, it will be ineffectual at common law,⁴ or barred by a statute made on the view of the difficulties raised on the will of the late Mr. Thelluson.⁵

In general it may be laid down, as to the power of sale and distribution: (1) That, where trustees are instructed generally to sell property, they may use their discretion in selling by auction or private sale; (2) That, where the sale is intended for the purpose of paying off the debts of the granter insolvent, or where the estate plainly turns out insolvent, the trustees cannot legally pay at their will to the first creditor who makes a demand; (3) That, where the trust is for general management and economical arrangement, or for family distribution or settlement, the trustees are entitled, as the granter himself would have been, to pay to the creditor first demanding payment, *primo venienti*, where such payment is made in *bona fide*;⁶ (4) That, where the trustees are judicially called on by a creditor to pay his demand, they cannot in preference pay another without having ample funds for the payment of the creditor bringing his action;⁷ and (5) That, even where the call of creditors is extrajudicial, but such as plainly to indicate a shortcoming in the funds, the trustees will probably be held bound to suspend their

interests of a sum to be laid out in buying land held to go with the principal. *Templar and Lady Montgomerie v Graham's Trs.*, 1826, 4 S. 460, N. E. 466, a similar question as to the rents of estate during a contingency. [*Infra*, p. 38, note 1.]

¹ [In *Milne's Trs. v Cowie*, 1853, 15 D. 321, trustees were held to be entitled to take into consideration letters written by the truster on the subject of the trust.]

² 1587, c. 29.

³ *Hill and others v Burns*, 1824, 3 S. 389, N. E. 275; aff. 14 April 1826. This was a trust of moneys to be distributed to the charitable institutions established or to be established in Glasgow and its neighbourhood, at the discretion of the trustees. 2 W. and S. 80. See also *Crichton's case*, *supra*, p. 36, note. [*Murdoch v Mags. of Glasgow*, 1827, 6 S. 186; *Black's Trs. v Miller*, 1836, 14 S. 555, aff. 2 S. and M'L. 866; *Dundas v Dundas*, 1837, 15 S. 427; *M'Leish's Trs. v*

M'Leish, 1841, 3 D. 914; *Mags. of Dundee v Morris*, 1858, 20 D. (H. L.) 9, 3 Macq. 134.]

⁴ See *M'Nair v M'Nair*, 1791, Bell's Oct. Ca. 546.

⁵ 39 and 40 Geo. III. c. 98. It seems very doubtful, however, whether this Act applies to Scotland. [See note, *supra*, p. 36.]

⁶ *Ranken v Gairdner*, 1741, M. 16201, where the general doctrine is delivered in absolute terms.

In *Alison v E. of Dundonald's Trs.*, 1793, M. 16211, it was held that trustees in a family settlement may pay *primo venienti* till interpellated by legal diligence, and that they are not under any necessity of bringing a multiplepoinding. The chief question was, whether a private extrajudicial demand was a sufficient interpellation to impose on the trustees the duty of bringing a multiplepoinding; and it was held not to be so.

⁷ See the above note.

payments till in a multipoleinding the order and safety of the course of payment be judicially settled.

In those trusts which are intended for the investment of money in land, either to be entailed or settled on particular persons, the words and plain intendment of the deed give the law of the trust.¹

[39] In all cases of trust, the trustees must strictly maintain their neutrality, and make a complete and thorough separation between their fiduciary and their private character. So, 1. In accounting for their intromissions, they must not only keep exact accounts,² but they can take credit only for what they have actually paid.³ 2. They cannot avail themselves of rights which they have purchased, though such rights might otherwise have entered into competition with those having interest in the trust.⁴ 3. In selling the trust-estate, they cannot also be purchasers.⁵

In their administration of the trust, a demand made against a debtor to the estate cannot be met by setting off a debt due to the debtor by the trustees who make the demand. There is no *concursum debiti et crediti*. Neither is there concurrence where a trustee demands a private debt from one who is a creditor under the trust. But where a demand is made by trustees for a debt due to the trust-estate, it may be met by a debt due under the trust to the defender. Again, where the debtor of the trustee is called on to pay a private debt, and being a creditor under the trust, and the trustee the sole intromitter, there is room for doubt whether there may not be compensation.⁶

Trustees acting within the line of their trust will render the trust funds responsible; but personally they will not be liable to an action except on the ground of delict or *quasi delict*.⁷ They will not in sales be held to give their own warrandice, except from fact and

¹ [See *E. of Stair v E. of Stair's Trs.*, 1827, 2 W. and S. 414, 614; *Templar v Graham*, 3 W. and S. 47; *Campbell v Campbell*, 1838, 16 S. 1251; *Macpherson's Trs. v Macpherson*, 12 D. 486, 1 Macq. 243; *Dickson's Tutors v Scott*, 1853, 16 D. 1; *Farquharson v Farquharson's Tr.*, 1866, 4 Macph. 831.]

² *Gourlay v Dumbreck*, 1710, M. 16192.

³ *E. of Craufurd v Hepburn*, 1767, M. 16208. See also *Maxwell v Maxwell*, 1667, M. 16166; *Rae v Glass*, 1673, M. 16171; *Sinclair v Maxwell*, 1708, M. 16186.

⁴ *Wright v Wright*, 1712, M. 16193. [*Hamilton v Wright*, 1842, 1 Bell 574.]

⁵ See *M'Kenzie v York Building Co.*, 1793, as decided by reversal in House of Lords, 13 May 1793, 4 Dow 379, 3 Paton 378.

See *Smith v Robertson*, 1826, 4 S. 442, as to an accountant employed under an extrajudicial trust, and afterwards in a sequestration; *Drew v Paterson*, 1825, 4 S. 259, N. E. 264, as to a commissioner on a sequestrated estate; and *Jeffrey v Aitken*, 1826, as to creditor selling under his bond, 4 S. 722, N. E. 728. [See also *Taylor v Watson*, 1846, 8 D. 400; *Gillies v MacLachlan*, 1846, 8 D. 487; *Fraser v Hankey*, 1847, 9 D. 415; *Brown v Burt*, 1848, 11 D. 338; *Thorburn v Martin*, 1853, 15 D. 845. For the same reason, trustees are disqualified from borrowing from the trust-estate even on heritable security—*Perston v Perston's Trs.*, 1863, 1 Macph. 245; and generally from entering into any contract in which the trustee's individual interest may conflict with his duty—*Aberdeen Ry. Co. v Blaikie*, 1854, 1 Macq. 461.]

⁶ In *Hay v Brown*, 1825, 4 S. 344, N. E. 348, a difference of opinion on this point took place on the bench. A trustee died, and his representative pursuing for a debt due to him, the defender pleaded set-off on a debt owing to him from the trust, the deceased having had the sole intromission with the

funds. The Court held there was no concurrence, Lord Alloway dissenting.

⁷ [In *M'Clymont v Hughes*, 1827, 5 S. 321, and *Kennedy v Wightman*, 1827, 5 S. 792, one trustee was held liable for the intromissions of a co-trustee. And see *M'Nair v Broomfield*, 1830, 8 S. 968; *Moffat v Robertson*, 1834, 12 S. 369; *Blair v Paterson*, 1836, 14 S. 361; *Urquhart v Brown*, 1843, 5 D. 1142; *M'Millan v Armstrong*, 1848, 11 D. 191; *Ogilvy v Lady Boswell*, 1850, 12 D. 940; *Ross v Bogie*, 1850, 13 D. 44. Trustees were found liable for funds intromitted with by their factor in *Syme v Charles*, 1830, 8 S. 741; *Seton v Dawson*, 1841, 4 D. 310; and for money paid to a *curator bonis*, who had not extracted the warrant of his appointment or found caution, *Donaldson v Donaldson's Trs.*, 1833, 11 S. 740. In the following cases—*Ainslie v Henderson's Trs.*, 1835, 13 S. 417; *Home v Pringle*, 1837, 16 S. 142, 2 Rob. 384; *Cameron v Anderson*, 1844, 7 D. 92; *Home v Menzies*, 1845, 7 D. 1010—trustees were held not liable for the intromissions of a factor, under an exempting clause in the deed, nor where he was reputed solvent; nor, in *Clyne's Trs. v Clyne*, 1848, 10 D. 1325, in special circumstances.

On the other hand, in *Morrison v Miller*, 1827, 5 S. 299, under special circumstances trustees were held liable for loss, by refusing to invest in Government stock, although acting under the advice of counsel. On appeal, the case was compromised. In *Wellwood v Ross*, 1831, 9 S. 790; *Mayne v M'Keand*, 1835, 13 S. 870; and *Pollexfen v Stewart*, 1841, 3 D. 1215, trustees having power to invest the trust funds in the purchase of lands, were held personally liable for having invested them in the purchase of feu-duties, teind-duties, and other unauthorized securities. See also *Thomson v Campbell*, 1838, 16 S. 560; *Bon-Accord Marine Insurance Co. v Souter's Trs.*, 1850, 13 D. 295; *Thomson v Christie*,

deed. Nor can action be raised, or decree insisted for against them, except as trustees, and of course as under a responsibility limited to the estate in their hands.

V. EXTINCTION OF THE TRUST, AND REINVESTMENT IN THOSE HAVING RADICAL RIGHT.—When the purposes of the trust are accomplished, the trustees are bound to denude. This may be enforced by Declarator of Trust and Adjudication. It does not take place *ipso jure*, because, on the one hand, the formal right, the feudal conveyance, must be completed. The feudal casualties fall by the death of the trustee who is the vassal, and the estate must stand transferred on the record. On the other hand, something most likely is to be done; expenses paid; indemnity given against responsibility; advances reimbursed, and so forth; in security of all which the trustee may retain the estate.¹

ART. II.—OF ESTATES BY RESERVED BURDEN.

The fee may be burdened with a sum to be paid to the granter; or with an annuity to be paid to him periodically; or with a sum payable to a third party. This is called BURDEN BY RESERVATION, or REAL BURDEN.

The creditors of the burdened disponee cannot attach his right otherwise than under [40] such burden; provided the burden be definite in its amount, and either the right be still personal, and the burden clearly expressed as a condition of the grant; or the feudal right be charged with the burden, so that it may distinctly appear in the infestment on record.

The person in whose favour the burden is created, has a real right which his creditors may attach. But these rights being of the nature of securities for debt, will be discussed under that department.²

ART. III.—OF FACULTIES OR POWERS TO BURDEN LAND WITH DEBT.

There may be reserved, in a conveyance to land, a Power or Faculty, to be exercised by the granter or by another, to burden the estate with debt; and under this power a burden may effectually be created on the estate conveyed, provided it be definite in extent, and appear upon the record. Whether the fee is to be enjoyed by the disponee free from the burden, must remain in suspense until the exercise of the power on the one hand, or the death of the person who holds that power on the other; and if, in the meanwhile, the creditors of the disponee should attach the property conveyed, they must take it subject to the condition of the power to be exercised.

The reserved faculty may constitute an estate attachable either, 1st, by the creditors of the person to whom the faculty is reserved, or for whose behoof it is created; or, 2dly, by the creditors of the person in whose favour the power has been exercised. But it is requisite to this that the faculty should be properly constituted.

I. A FACULTY RESERVED TO THE GRANTEE, is an estate which, during his life, and while not yet exercised, his creditors have a right to adjudge, to the effect of attaching the fund at the disposal of their debtor; for he is bound to do justice by exercising the faculty in their favour.³ The diligence of creditors will be excluded by the legitimate exercise of the faculty

1852, 1 Macq. 236. Observe also that trustees who, acting within their powers, take up bank stock or shares in any partnership estate, become liable as partners to the creditors of the company as individuals, and not merely *qua* trustees. *Lumsden v Buchanan*, 1865, 3 Macph. H. L. 89, 4 Macq. 950; *Graham v Western Bank*, 1866, 4 Macph. 484.]

¹ *Watt v Greenfield's Trs.*, 1825, 3 S. 544, N. E. 376; see

also *Carse v Carse*, 1666, M. 16165. [*Henderson v Norrie*, 1866, 4 Macph. 691.]

² See below, Index, *voce* Burden by Reservation.

³ *Hope Pringle v Hope Pringle*, 1677, M. 4103; *Elliot v Elliot*, 1698, M. 4130. In the former case the bond was personal, and subsequent to the faculty; in the latter the debt was prior, and could not in itself be held an exercise of the faculty. *Ruscoe's Crs. v Blair*, 1723, M. 4117.

in favour of a third party ; provided the deed in exercise of the faculty is completed before the diligence, and is a due exercise of the faculty.

1. As there can be no real burden upon land which is not definite in extent, and which a creditor or purchaser cannot know how to extinguish, the reservation of a faculty can form a real burden only when it appears upon the record. During the life of the disponent the faculty itself forms a real burden on the right of the disponent ; and every creditor of his, or purchaser from him, knows that, to the extent allowed, it may be exercised hereafter. But while no exercise of the faculty appears on record, the creditors of the disponent during his life, and the creditors of the disponent after the disponent's death, are entitled to suppose the faculty unexercised.

2. But it is not sufficient that the record should give notice of the sum and of the name of the person for whom the faculty is intended. It is further requisite, that the real right remaining by reservation in the disponent or his nominee, shall be transferred by a voluntary conveyance made real by sasine, or by adjudication duly completed.¹ It was at one time [41] invariably stipulated in the reservation or creation of the faculty, that the power should be exercised by means of an infeftment of wadset or of annualrent, etc. But although for a long course of practice conveyancers have used a form of expression quite general, reserving or conferring a power to burden the estate to a certain extent, this power must be exercised by such a conveyance as shall not only give notice of the name of the person in whose favour it is exercised, but transfer to him the real right. It may appear to be anomalous, and contrary to feudal principles, that a disponent who divests himself, or a third party who never was feudally invested, should have power to grant a precept on which infeftment may proceed. But the principle is this, that the conveyance to the disponent is limited by a condition, viz. That the disponent shall still retain the power of constituting a real security

¹ Faculty reserved to burden an estate, being exercised by a mere personal deed, not made real by infeftment during the granter's life, cannot compete with an infeftment granted by the person whose right was burdened with the faculty before the personal deed was made real. *Ogilvy v Ogilvie*, 1735-7, M. 4125 ; *Elchies, Faculty*, No. 1.

On this case, Lord Elchies says in his notes : ' This reclaiming bill against the interlocutor 26 June 1735 was delayed from time to time, partly till the other question between the parties upon the relict's consent to the disposition to Gardener were likewise reported, and partly because of the importance of the point of law,—viz. the effect of a reserved faculty to burden where either the creditor or the sum was indefinite, that is, where either it was not the burden of a particular debt already existing, or then created. *Kilkeran's* difficulty was, that though the debts were not real, yet, if the faculty was real, which he thought it was, the bonds might be made real by diligence, and would be drawn back to the date of this faculty ; and he thought this was a reservation of a part of the fee to the extent of this sum. *Arniston* seemed to think this faculty real, and that this was a reserved estate, effectual against singular successors ; but then he thought that if he did not exercise it during his life by granting infeftments, the bonds granted by him could only be preferred to singular successors of the son, according to the dates of their diligence, and therefore was for adhering. I agreed that it was a reserved estate, but not a reserved fee, or part of the fee of the lands, since the whole fee was in the son, who was the only vassal ; and that reserved estate was no stronger than the like estate created (if the father was not before proprietor), as in the case of the *Sinclairs* and of the *Romes*, quoted in the papers (and in this *Arniston* agreed

with me) ; for both of them might grant infeftments, but the infeftments would be preferred only according to their dates with the creditors, or singular successors of the son, the fiar : that if this faculty was real, any exercise of it after the father's death was inhabile, at least would only be preferred according to their dates, otherwise they behoved to be preferred to all singular successors, *quandocunque* the creditors in them should adjudge. At last, without a division, the Lords adhered.'

In the subsequent case of *Scotsraig*, the Court held that a faculty to burden, conceived in the most plain and express terms, so as to make every personal deed, in exercise of that faculty, however latent, to become a real burden, is repugnant to law ; and such latent deed will be no real burden, nor the possibility of such a deed an encumbrance sufficient to entitle a purchaser to retain any part of the price. *Crs. of Douglas of Scotsraig v Stewart*, 1737 ; *Elchies, Faculty*, No. 3.

In the case of *Henderson's Children v Crs.*, 1760, the children, as creditors of the disponent, were held preferable only according to their diligence. M. 10179.

In a question with the widow of a son claiming her terce, a daughter of the disponent was held not to be a real creditor under a faculty reserved to the father, the deed being merely personal by which she was to have the benefit of the faculty. *Montier v Baillie*, 1773, M. 15859.

See also *Hill v Hill*, 1774, M. 10180.

The decision in the case of *Boquhan and Cunningham* (see p. 42, *infra*), which is opposite to these, is not approved of. See M. 4133 ; *Elchies' Notes*, 131. [See *Hyslop v Maxwell*, 1834, 12 S. 413, as to the distinction between the exercise of such a faculty to the effect of creating a real burden, and the exercise of it for the purpose of regulating succession.]

over the lands, by his own act, or by that of another appointed by him, and named in the deed.¹

Mr. Erskine says, that if the deed in which the faculty is reserved express not only the sum, but the person in whose favour it may be exercised, a personal bond in favour of that person by him who is entitled to exercise the power, is a sufficient exercise of it to create a real burden;² and his reason is, that the purchaser may thus know both the extent of the debt and how to extinguish it. This opinion, however, may be questioned. The true doctrine seems to be that which has already been laid down as applicable to the ordinary case.³

It may be doubted what should be the effect of an objection, in point of form, [42] fatal to the sasine by which the faculty is exercised. It would probably be held to cut down the right of the person in whose favour the faculty had been exercised, and to give admission to the personal creditors of the disposer doing diligence by adjudication, although the entry of the sasine on the record might be said to give full notice of the burden.

A bare adjudication, without a charge, and merely with its recorded abbreviate, does not seem to be sufficient to constitute the real right in the creditor under the faculty.

II. A FACULTY TO BE EXERCISED BY A THIRD PARTY has a very different effect from that which is reserved to the disposer himself. Before the disponee's right is completed by sasine, the disposer's creditors undoubtedly may, in this case as in the other, attach the estate disposed, and become by their diligence preferable to the disponee and all others. But after the disponee's right is completed, the creditors of the disposer can have no title to adjudge the faculty vested in a third party, unless it be a mere trust in that person for the disposer's benefit.

III. EFFECT OF FACULTY IN COMPETITION.—After the death of the granter of the faculty, or of him on whom the power is conferred, a competition may arise between the creditors of the disponee and the person (or his creditors) in whose favour the faculty has been exercised. In such a competition, the rules seem to be these:—

1. If no real right be created, and on record, at the death of the disposer, or of him who has the power, the faculty, in a question with real securities, or complete conveyances proceeding from the disponee, is to be held as still unexercised, and by the death extinguished; and so the whole estate is an unburdened fund of the disponee.⁴

¹ Ersk. ii. 3. 21.

See the case of *Anderson v Young and Trotter*, 1784, M. 4128.

The difficulty in feudal law was here disposed of in a case where the purchaser of lands took the titles to another person in trust, with power to the purchaser to burden, sell, etc., without the trustee's consent.

² Ersk. ii. 3. 50.

³ [Lord Ivory, in his note to the passage, appears to adopt the author's view.]

⁴ Lord Kilkerran, in his remarks on the case of *Boquhan and Cunningham* (see next note), says: 'In this judgment the Lords were not unanimous. It was observed that, a century ago, all such faculties were quite ineffectual unless exercised specifically by burdening the lands by infeftment, insomuch that even no personal action lay against the disponee to the personal creditor of the granter. In process of time the Lords did, it is true, *ex equitate*, so far remit this rigorous construction of such faculties as to give personal action; but to give the personal creditor of the disposer a preference appeared to be without foundation, as it was without precedent. An assignation of the faculty by a personal deed is no exercise of the faculty: it may have been intended

as such by the granter, but an intention is nothing when not habilely executed, and such assignee is still no more than a personal creditor. Now, had the Lords found that the granter's bare contracting debt was an exercise of the faculty, and thereupon found even the personal creditors of the granter preferable to infeftments from the disponee, the ground of the decision might have been understood, though not approved of; but this middle way of finding the faculty exercised to the effect of giving preference to (over) the disposer's (disponer's) personal creditors, and not also to (over) his real creditors, was what several of the Lords could not approve.

'It is an agreed point, that a faculty to burden or a faculty to alter is a real right; but it is quite a different question, What rights granted in consequence of such faculty are real? Now, as such faculty is a real right, it follows that no infeftments granted by the disponee can defeat the granter's power to burden or alter. Yet this is to be understood with a limitation; for though an infeftment at any time in the granter's life will be preferable to an infeftment by the disponee, though prior; and an infeftment from the granter, though not taken upon his precept till after his death, will be preferable to an infeftment from the disponee, if posterior thereto;

[43] 2. If the person in whose favour a faculty has been exercised has not taken sasine, or if the deed in exercise of the faculty is personal, and no steps have been taken to make the debt real, it may be questioned whether he has any preference over those who are personal creditors of the disponee at the disponent's death? It was found, in the case quoted below, that there was such a preference.¹ But the judgment is not approved of. Lord Kilkerran, in reporting the case, seems to deliver his own opinion in stating the opinion of the minority against the judgment.² The true doctrine appears to be, *1st*, That the exercise of the faculty, though by personal deed, makes him in whose favour it is exercised a personal creditor of the disponee. Thus, it has been fixed that a deed containing precept of sasine, though no sasine has been taken, is a good exercise of the faculty against the disponee;³ and this holds even although the expression of the faculty should be to burden with wadsets or annualrents.⁴ *2dly*, That the mere contraction of personal debts by the holder of the faculty is an exercise of a power to contract debt, and grant security therefor;⁵ and even where the faculty is in common form, the contracting of debt is held a presumptive exercise of it:⁶ so that diligence used upon such rights, in order to realize the burden, even after death, if first completed, will be effectual to give a preference. But, *3dly*, That where the question is between the mere personal creditors of the disponent and those of the disponee, there seems to be no good principle upon which the former can have preference.⁷

yet if, at the granter's death, there is no infetment from him on record, the creditor or singular successor of the disponee, obtaining infetment on the faith of the record, will be preferable to any infetment that may afterwards be taken upon the granter's precept, which lay latent at his death; and were it otherwise, the security by the records would be wholly frustrated.

'And upon this ground it was that, anno 1736, in the case of Ogilvie of Coul, the Lords preferred an infetment by a son, the disponee, to the creditor of the father adjudging after the father's death, though the son's disposition was with the burden of a faculty to the father to contract debt to the extent of the said creditor's debt. In like manner, anno 1737, a bill of suspension being presented by the purchaser of the estate of Scotsraig against the creditors on this ground, that he was not *in tuto* to pay the price—for that, by a reserved faculty in his author's right to burden the lands with a certain sum, he might be in hazard of eviction—the Lords, in respect his author was then dead, and no exercise of the faculty on record, “remitted to the Ordinary to refuse the bill.”

¹ A father disposed his estate to his son, reserving a faculty to burden the lands with 10,000 merks Scots; and in his second contract of marriage he exercised this faculty, by providing a sum to the children of the marriage, declaring it a burden on the lands, and assigning the faculty to the children. The son contracted many debts, some real, some personal; and after his death a competition arose between a daughter of the second marriage and the real and personal creditors of the disponee, for the price of the lands sold judicially. The Lords all agreed that the 10,000 merks was not a real burden, and that therefore the son's real creditors were all preferable; and yet they found the daughter preferable to all his personal creditors, who had done no diligence to affect the estate. *Crs. of Boquhan v Cunningham*, 1739, M. 4135; *Elch. Faculty*, No. 5.

² It resolves into these considerations, that faculties which at first were ineffectual unless exercised by infetment, came afterwards to afford a personal action, which can be no ground, however, of preference; that an assignation of the faculty is

no exercise of it, and in no shape betters the condition of him in whose favour the exercise is made, or makes him other than a personal creditor; that although a faculty is a real right during the disponent's life, the creditors of the disponee may, immediately on his death, secure the estate from any exercise of the faculty, latent, and not appearing on the record; and that, to give consistency to this decision, it should have been fixed as a general rule, that the granter's personal creditors entitled to be considered as objects of the exercise of the faculty, have a preference over even the real creditors of the disponee. See above, for these notes of Lord Kilkerran, p. 41, note 4. The remarks of Lord Elchies on the case will be found in note 7.

³ *Hamilton of Silverton*, 1624, M. 4098.

⁴ *Pringle v Pringle*, 1677, M. 4103.

⁵ *Crs. of Ruscoe*, 1723, M. 4117.

⁶ *Elliot of Sunnyside v Elliot*, 1698, M. 4131.

⁷ In his notes on the case of *Cunningham v Crs. of Boquhan*, 1739, *Elchies' notes*, Faculty No. 5 (see above, note 1), Lord Elchies says: ‘The Lords agreed that Miss Cunningham, upon the personal bond, in exercise of the faculty, had no real right upon the subject, nor was she preferable to the real creditors of the son. But they found her preferable to the personal creditors who had done no diligence (no more than she had) to affect the estates, which to me appeared a very new and odd decision; that in competition of creditors merely personal for the price of lands, none of whom had any real right in the lands, or used diligence for affecting the same, should yet be preferable one of them to the rest, since the law knows no privileged debt upon lands other than what are real. Arniston put his opinion upon this, that the reserved faculty was an implied prohibition to the son to contract debts in prejudice of the faculty; and the President seemed inclined to carry that observation further—to be a sort of inhibition to the lieges to lend to the son, in prejudice of the faculty. But Arniston would not carry it so far. But I own the whole went far beyond the reach of my poor understanding.’ 11 December, adhered, 7 to 6. *Vide Crs. of Dr. Ogilvy*, 1737. See above, note 4, p. 41, for Lord Kilkerran's remarks.

3. The right of the creditors of the person to whom the faculty is given to attach [44] that faculty after his death, can scarcely be permitted to ground a real preference, to the exclusion of the donee's creditors. To carry this right of attachment beyond the life of the person holding the power, without any diligence begun during his life for rendering the subject litigious, seems a great stretch, since the faculty appears by the death to be extinguished, and the land disburdened. And even where there has been an intention of exercising the faculty, but it has been done only by a personal deed, it does not appear that diligence is competent after death. This is still clearer where the deed (as a personal bond) is anterior to the disposition, and so exclusive of all idea of an intention to exercise the faculty.¹

SECTION IV.

LIMITED ESTATES IN LAND DEPENDING ON DEEDS OF ENTAIL.—COMMENTARY ON THE ACT 1685, C. 22.

Of all restrictions on the commerce of land, and on the rights of creditors to attach the property of their debtor, the most important, and the most inexpedient and oppressive, are those which arise from entails; and it is sincerely to be hoped that, ere long, some safe course may be devised for restraining the exorbitant effects of the entail law of Scotland, and for introducing some limitations, consistent at once with the rules of justice and with public policy.² But the present inquiry is limited to the law as it exists.

Deeds of entail are designed to preserve the descent of estates in a particular line of succession, by means of prohibitions, restraints, and conditions; while the full right of a proprietor is, in all other respects, conferred on the persons successively taking under the deed. The law judges differently of the effect of such deeds, as against the heirs who succeed under them; and against strangers who, as purchasers or creditors, acquire the property from the person in the present right of the estate. The former are held, by their acceptance, to undertake the obligations imposed;³ against the latter there are not, at common law, any unquestionable means of giving efficacy to such conditions. Neither inhibition,⁴ nor interdiction, nor even the double clause of irritancy and of resolution, were sufficient at common law to secure this object; and although in the case of Stormont, and in others,⁵ decisions were pronounced favourable to the efficacy of entails, it was found necessary to remove all doubts by a statute, which should, on the one hand, give efficacy to entails, and, on the other, make it an indispensable condition of their efficacy, that creditors and purchasers should have full notice. This is the statute 1685, c. 5; and on its provisions the effect of the limitations imposed in deeds of entail depends.⁶

By this statute it is declared,—

(1) That 'it shall be lawful to His Majesty's subjects to tailzie their lands and estates, [45]

¹ In the case of *Rome's Ors.*, in 1719, M. 4113, it was found that an adjudication led after the disponer's death, upon a personal bond, was not competent to hurt the right of an onerous purchaser from the donee; but there, indeed, the real right was established in the purchaser before the leading of the diligence, and consequently the diligence might be found insufficient upon another ground than that of incompetency.

² [This has been in part carried into effect by the statute 11 and 12 Vict. c. 36.]

³ The effect of a breach of the injunction in grounding a claim of indemnification is at present under consideration in the case of *Ascog* [4 W. and S. 196], and in the *Queensberry*

cases, as remitted by the House of Lords. [4 W. and S. 254; and see *Bruce v Bruce*, *ibid.* 240. Judgment for the defenders in all the cases.]

⁴ *Bryson v Chapman*, 1760, M. 15511, 5 Br. Sup. 940; and *L. Ankerville*, 1787, M. 4882.

⁵ *V. Stormont v Ors. of E. of Annandale*, 1662, M. 15475, 13994. See *Stair ii. 3. 237*; also *Craig v Craig*, 1712, M. 15494, Rob. App. Ca. 110.

⁶ [That is, in the case of deeds of entail executed prior to the recent conveyancing statutes. A direction to record the deed in the Register of Tailzies is now equivalent to the insertion of the statutory prohibitions, followed by clauses irritant and resolute. 31 and 32 Vict. c. 101, sec. 14.]

and to substitute heirs in their tailzies, with such provisions and conditions as they shall think fit, and to affect the said tailzies with irritant and resolute clauses, whereby it shall not be lawful to the heirs of tailzie to sell, annailzie, or dispoise the said lands, or any part thereof, or contract debt, or do any other deed whereby the same may be apprized, etc., declaring all such deeds to be in themselves null and void, etc.:' (2) That 'such tailzies only shall be allowed, in which the foresaid irritant and resolute clauses are insert in the procuratories of resignation, charters, precepts, and instruments of sasine:'¹ (3) That 'the original entail shall be once produced before the Lords of Session judicially, and their authority interposed to it:' (4) That a 'record be made in a particular register book, to be kept for that effect, wherein shall be recorded the names of the maker of the tailzie, and of the heirs of tailzie, with the general designations of the lordships and baronies, and the provisions and conditions contained in the tailzie, with the irritant and resolute clauses subjoined thereto, to remain in the said register *ad perpetuam rei memoriam*:' (5) That being so insert, the 'same shall be real and effectual, not only against the contraveners and their heirs, but also against their creditors, apprizers, adjudgers, and other singular successors whatsoever, whether by legal or conventional titles:' and (6) That the omission of the provisions and irritant clauses in the rights under which any of the heirs enjoy the estate, shall be a contravention, whereby the estate shall devolve to the next heir of tailzie; but the same shall not militate against creditors, or other singular successors, contracting *bona fide* with the person who stood infest, without having the said clauses in the body of his right.

Two main questions arise for consideration under this Act, wherever creditors are desirous of attaching an entailed estate: viz. (1) Whether the restraining words of the entail comprehend the debtor, and are such as to exclude the diligence of creditors? and (2) Whether the forms have been duly observed which the statute has required for rendering effectual the prohibitions of an entail?

I. RESTRAINING WORDS.—The general rule is, that the right of an heir of entail is that of a full proprietor, in every particular in which he is not effectually fettered and limited; and that all words of restriction are subject to strict interpretation.

1. The prohibitions and limitations (commonly called the fetters of an entail) are directed to three several objects: (1) Against selling the estate; (2) Against the contracting of debt; (3) Against any alteration of the order of succession. And in the practice of conveyancers, clauses are framed for each of these purposes. The entailer may have sufficient confidence that his heirs will not voluntarily sell the estate, or alter the line of succession, but he may think it still necessary to prevent them from contracting debt so as to endanger the entail; or he may have full reliance on the solvency of the heirs pointed out in his destination, so as to have no fear for the disappointment of his intentions, provided he can prevent them from selling the estate or altering the succession; or he may think his entail secure against sale and insolvency, and in danger only from an alteration of the line of succession. And as the prohibition of these several acts may each in its turn form the sole object of an entailer, in perfect consistency with unrestrained freedom as to the others, it has been settled that fetters cannot be extended by implication from cases expressed to cases not expressed. It may happen that, owing to the carelessness or ignorance of the conveyancer, those purposes may have been confounded in a deed of entail; and the manifest purpose of the entailer may appear fairly to include, under any of the conditions, the others,—the prohibition to alter the succession, for example, being necessarily a prohibition against selling, of which the [46] necessary effect is to alter the succession. But the rules are: 1. That from one limitation another is not to be inferred; from cases expressed, no prohibition is to be extended to acts not expressed. 2. That the restraining words shall be clear, and that, although there are no technical words, or *voces signatae*, by which alone the prohibition can effectually be

¹ See *Denham v Stewart*, H. L. 17 Feb. 1737, 1 Cr. St. and Pat. 233.

expressed, the act prohibited must at least be directly specified, either in express and intelligible words, or in words of which the fair and obvious construction shall include the particular act as by substantive prohibition.¹

The result is, that in order to make an entail effectual against creditors, it must contain an express prohibition against contracting debts so as to affect the estate, otherwise the creditors will not be excluded. It will be no bar to creditors, that their diligence will necessarily have the effect of defeating the destination of the estate which the heir is prohibited from altering; neither can they be obstructed by a prohibition to sell.

II. IRRITANT AND RESOLUTIVE CLAUSES.—It is, under the statute, necessary that the words of prohibition shall be accompanied by an irritant and a resolutive clause, clearly directed, each of them, to that particular prohibition. The CLAUSE IRRITANT declares the debts, when contracted, to be void and null.² The CLAUSE RESOLUTIVE annuls the right of the heir of entail who shall disregard the prohibition.³

III. PERSONS AGAINST WHOM THE RESTRAINTS ARE DIRECTED.—In order to have operation against any one holding the estate under the entail, it is indispensable that the limitations or fetters should be expressly and clearly pointed against such person. But this is not the sole difficulty which has attended the question as to the efficacy of prohibitions.

1. With regard to the INSTITUTE, who, as donee, takes the estate by direct conveyance, and is in no sense to be considered as an heir,⁴ the *first* difficulty is, whether, under the statute, he can be subjected to the restraints of the entail otherwise than by a personal engagement implied from his acceptance. The words of the statute, in declaring how far the restraints shall be effectual, are applied only to '*heirs*.' The power given is, to tailzie lands, and 'to affect the said tailzies with irritant and resolutive clauses, whereby it shall not be lawful to the heirs of tailzie to sell,' etc.; and in thus providing, the Legislature, it is said, did enough, since the entailer has it in his power, in making an entail, to fulfil any wish he may have to include the person whom he first calls, by making him an heir of tailzie, and himself the institute. But it is now settled, that, notwithstanding the limited expressions of the statute, the institute may, as such, be effectually placed under the restraints of the entail, provided the expressions to this effect be clear and unambiguous.

2. Holding, as the Court of Session seems pretty uniformly to have done, that the institute *may* be included, provided he is expressly and unambiguously declared so to be, [47] it has been much doubted whether any of the general expressions used in such deeds be sufficient for this purpose. The points settled are: 1. That under the term '*heirs*' the institute is not included. 2. That under the term '*member of tailzie*' he is not included. 3. That the combination of these expressions, conjunctively or disjunctively, does not include the institute. 4. That he is not, by implication from other parts of the tailzie, to be construed within the restraints; and that this rule being once settled, it is not now to be got rid of by

¹ For the doctrine of construction of entails, see Campbell's *Heirs v Wightman*, 1746, M. 15505; Elch. Tailzie, No. 29. *Sinclair v Sinclair*, 1749, M. 15382; Elch. Tailzie, No. 36; 1 Cr. St. and P. 459. *Cuming Gordon v Gordon*, 1761, M. 15513. *Scott Nisbet v Young*, 1763, M. 15516, 2 Pat. 98. *Stewart v Home*, 1789, M. 15535. *Bruce v Bruce*, 1799, M. 15589. *M'Laine v M'Laine*, 1807, M. Tailzie, No. 14. *Brown v C. of Dalhousie*, 1808, M. Tailzie, No. 19. *Henderson v Henderson*, 21 Nov. 1815, Fac. Coll. D. of Roxburgh, in H. L. 17 Dec. 1813, 2 Dow 149. *Queensberry* case in H. L., 5 Dow 297 and 1 Bligh 340. *Elliot v Potts*, H. L. 14 Mar. 1824, 1 Sh. App. Ca. pp. 16 and 89. *Barclay v Adam*, in H. L. 15 May 1821, 1 Sh. App. Ca. 24. *M'Kenzie*, 1823, 2 S. 331, N. E. 293. *Nisbet*, 1823, 2 S. 381, N. E. 339. [For a fuller exposition of the rules of construction applied to the technical clauses of entails, reference is made to Mr. Duncan's Digest of

Entail Cases, and to the 32d chapter of the editor's treatise on Wills and Succession. See *Lang v Lang* (Overton), 1 D. 98, and the cases raised under sec. 43 of 11 and 12 Vict. c. 36, particularly the Kintore and Halkerton cases, 4 Macq. 520.]

² *Baillie v Carmichael*, 1734, M. 15500; *Gardner v Heirs of Tailzie of Dunipace*, 1744, Elchies, Forfeiture, No. 18. See Rob. App. Ca. pp. 110, 117, for the case of Riccarton; and compare p. 117 with the report of Lord Kilkerran in the case of Dunipace.

³ *Hepburn's Ors. v his Children*, aff. in H. L. 7 Dec. 1758, 2 Pat. 17; *Kemp v Watt*, M. 15528; *Bruce of Tillycoultry*, 1799, aff. 4 Pat. 231. See also *Elliot of Stobs*, 19 May 1803, F. C.; and in this case observe what Lord Chancellor Eldon says, 1 Sh. App. Ca. 93.

⁴ Ersk. iii. 8. 31.

nice, thin, and shadowy distinctions.¹ But, 5. That where the prohibitions are distinctly pointed against the institute, and the resolute clauses against the *persons* and heirs, it will be sufficient to comprehend the institute.²

3. Where the prohibitions are directed only against heirs, it may, in particular circumstances, be doubted whether the first person who is to enjoy the estate under the tailzie is an heir, and so subject to the restraints, or only an institute, and thereby exempt from them. 1. Where the person first taking is a proper conditional institute, it is held that he is not comprehended under the term *heirs of tailzie*.³ But, 2. Where the destination is successively to one after another, although all that precede in such destination should predecease the entailer, the person taking by such substitution is not a conditional institute. So, where one named his eldest son as institute, whom failing his second son, whom failing his daughter, and the sons died before the entailer, and the daughter on his death came to succeed immediately in the place of the institute, she was not held to be a conditional institute, and as such exempt, but considered as a substitute and heir of entail.⁴

4. Where the maker of the entail gives the first place to himself, it has been held that words of disposition are not sufficient to give the person taking after him the character of institute.⁵

5. Till lately it was held almost uniformly, that whatever might be the effect of prohibition against institutes or heirs of entail, yet by no device or clause of prohibition could the maker of an entail withdraw his estate from the diligence of his own creditors, or prevent even his future debts from affecting the estate, while he continued to hold the fee. But in the House of Lords this doctrine has undergone a very careful revisal and investigation, and the result is very important. 1. It has been admitted as a point fixed, that the entailer cannot make a gratuitous settlement of the estate so as to bind himself and exclude his creditors. 2. On the other hand, holding it as also settled that the institute may be bound [48] although not mentioned in the statute, it has been considered that a mutual entail, or an entail for a money consideration, is equivalent to a purchase with an entail by the purchaser, and effectual against the proprietor as institute who has entered into this onerous bargain. On these principles the case of Agnew was determined.⁶

¹ In the Duntreath case, where the expression was 'heirs,' the House of Lords determined 'that the appellant being fiar or disponee, and not an heir of tailzie, ought not, by implication from other parts of the deed of entail, to be construed within the prohibitory, irritant, and resolute clauses, laid only upon the heirs of tailzie.' *Morr. Dict.* p. 4411. See notes of this case as decided in the Court of Session, *Hailes*, p. 298. Observe particularly the opinion of Lord Pitfour.

In *Steel v Steel*, 12 May 1814, aff. 27 June 1817, where the expression was 'heirs and members of tailzie,' a similar decision was given, 5 Dow 72, 6 Pat. 322.

See also *Wellwood v Wellwood*, 1791, Bell's Oct. Ca. 191; *Wellwood v Preston*, 1797; *Miller v Cathcart*, 1799. [Observe, however, that where a truster directs his trustees to make a strict entail containing prohibitions directed against the 'heirs of entail,' the Court will require the fetters to be applied to the institute, and also to conditional institutes. *Seton v Seton*, 1854, 16 D. 658; *Forbes v Forbes*, 1853, 15 D. 809.]

² *Syme v Ranaldson Dickson*, 1799, M. 15473; *Douglas & Co. v Glassford*, 1823, 2 S. 487, N. E. 431, aff. 1 W. and S. 323. [*Baugh v Murray*, 1834, 12 S. 279; *Maxwell v Logan*, 15 S. 291, aff. M'L. and Rob. 790; *Campbell v M. of Breadalbane*, 2 Rob. 109; *Brown v M'Gregor*, 3 S. and M'L. 84.]

³ *Menzies of Culdares v Menzies*, 1785 and 1803, aff. 20

July 1811, 5 Pat. 522. Here the dispositive clause was, 'I hereby, under the condition, etc., and *failing of heirs-male of my own body, sell, annailzie, and dispose* to Captain Alexander Menzies, during all the days of his lifetime, etc., and to the said James Menzies, my great-grandchild, and the heirs of his body,' etc. James Menzies was held a conditional institute, not under limitations directed against heirs of entail. [*Maxwell v Maxwell*, 1817, Hume 875.]

⁴ *M'Kenzie v M'Kenzie*, 24 Nov. 1818. See 1 Sh. App. Ca. 150. See also *Menzies of Culdares v Menzies*, above note.

⁵ *Gordon v M'Culloch*, 1791, M. 15465, Bell's Oct. Ca. 180. See also *Livingstone v L. Napier*, 1762, M. 15418.

⁶ The families of Vans and of Agnew were united by the marriage of John Vans of Barnbarroch, and Margaret Agnew, only child of Robert Agnew of Sheuchan. The marriage was at first disapproved of, but the lady's father was afterwards reconciled to it, and a postnuptial but onerous contract was made between Mr. Agnew and Mr. Vans, whereby Mr. Agnew agreed to advance £3000 to Mr. Vans for liquidation of his debts, and also to settle a large personal estate on him and his wife. Mr. Vans, in consideration thereof, executed a mutual entail along with Mr. Agnew of both their estates on the same series of heirs, Agnew giving, etc. to John Vans and Margaret Agnew, and the longest liver of them two, and the heirs of entail named, the lands and estate of Sheuchan; for

Except in the case of mutual and onerous entails, the prohibitions are ineffectual against the creditors of the entailer. If the entailer's debts exceed the value of the estate, it may be brought to a judicial sale, according to the forms hereafter to be explained. If they are such as only to encumber the estate, the only remedy is by an application made to Parliament for authority to sell as much as may be sufficient for paying off the debt. The execution of these Acts is committed to the judges; generally to the Lord President, Lord Justice-Clerk, and Lord Chief-Baron.

REQUISITES OF EFFECTUAL ENTAILS.—It is not enough to protect an estate from the diligence of creditors, that the lands should be settled by a deed of entail, of which the restraining expressions are clear, and the irritant and resolute clauses correct, and duly pointed against the person to be restrained. It is further necessary that the forms pointed out in the Act 1685 be complied with.

The following points have been settled under this statute:—

1. The original deed of entail must, in order to bind third parties, be produced judicially, and recorded in the register of entails, whether it was made prior or posterior to the statute.¹ It is not enough that charter and sasine have followed on the deed of entail, and that the prohibitions in this way appear in the record of sasines;² nor is it even enough that the charter be recorded.³

2. The entail, though recorded in the register of entails in terms of the Act, has no [49] effect against the creditors of the heir-at-law, unless it has been completed by infestment;⁴

which causes, and for the sum of £3000 paid by the said Robert Agnew to the said John Vans, etc., the said John Vans gave, etc., in favour of himself and the said Margaret Agnew his spouse, and the longest liver of them two, whom failing to the other heirs of tailzie, etc., his lands and estate of Barnbarroch, etc. The deed contained the proper irritant and resolute clauses, directed against John Vans and Margaret Agnew, as well as the heirs, etc. The entail was duly recorded 1755, but no sasine passed till 1775. The entail was drawn by Lord Braxfield; and the opinion of Lord President Campbell, while at the bar, was in favour of the efficacy of the entail. In an action of declarator to have it found and declared that the entail did not affect or exclude the debts of the entailer, John Vans, the Court of Session decided that the entail was not effectual to exclude the creditors. *Stewart v Agnew*, 1784, M. 15435.

A private Act of Parliament was then passed to authorize the sale of a part of the estate in order to pay Vans' debts, and certain lands were sold. But after thirty years, the heir of entail, who was a minor and abroad, having arrived at majority and come to Britain, took an appeal to the House of Lords, who, having remitted the case for reconsideration, the Court of Session confirmed their former judgment. *Stewart v Vans Agnew*, 2 June 1818, F. C.

It was on a new appeal taken against this judgment that the discussion alluded to in the text took place in the House of Lords, when the judgment of the Court of Session was reversed, and the entail declared effectual to protect the estate against the future debts of Mr. Vans. 14 July 1822, 1 Sh. App. Ca. 320. [See also *Sharp v Sharp*, M. 4299; *Shaw v Shaw*, 1715, M. 15572, aff. Rob. 203; *Paul v M'Leod*, 1828, 6 S. 826; *Dickson v Cunninghame*, 7 S. 503, aff. 5 W. and S. 657.]

¹ [*Broomfield v Paterson*, 1784, M. 15618, and 14 S. 1033; *Ross v Drummond*, 1844, 3 Bell 87; *E. of Eglinton v Montgomerie*, 1842, 4 D. 425, aff. 2 Bell 149.]

² *Philp v E. of Rothes*, 1758, M. 15609; *E. of Rosebery v Baird*, etc., 1765, M. 15616; *L. Kinnaird v Hunter*, 1761, M. 15611; *Irvine of Drum v E. of Aberdeen*, 1776, M. 15617, App. Tailzie, No. 1. All these judgments were affirmed in the House of Lords.

Debts were contracted by an heir of entail infest, but before the entail was recorded in the Register of Entails. The entail was then recorded; and in a question between the creditors proceeding to attach the estate, and the next substitute, the estate was held attachable. *Smollet v Smollet's Crs.*, 1807, M. App. Tailzie, No. 12. See below, p. 49.

³ *Irvine v E. of Aberdeen*, 1776, *supra*. [*Grahame v Grahame*, 8 S. 231, aff. 5 W. and S. 759; *King v E. of Stair*, 6 D. 821, aff. 5 Bell 82; *Stewart v Stewart*, 5 Bell 139. It is an obvious corollary of the rule that the whole entail must enter the Register of Tailzies, that an entail effectual against creditors cannot be constituted by reference to another deed containing the conditions and restraining clauses. *Cathcart v Gammell*, 1852, 1 Macq. 363; and see *Lord Forbes v Gammell*, 1858, 20 D. 917.]

⁴ This will be found well illustrated in two important cases reported in Bell's Ca. pp. 166, 179.

The first case is that of *Douglas of Kelhead v the Crs. of Sir John Douglas*, 1765, M. 15616. Sir William Douglas, who was absolute fiar of the estate, made an entail to himself in life-rent, and his son, afterwards Sir John Douglas, etc., in fee. This entail was recorded regularly, but no infestment was taken upon it. Sir John entered to the possession, and continued in it as apparent heir for many years. He contracted much debt, and his creditors adjudged the estate, were infest, and raised an action of judicial sale. An application was made by a substitute in the entail to have the lands struck out of the sale, but the Lord Ordinary refused to do so; and the cause having been stated in memorials to the Court, was solemnly decided in the same way.

Russell, Ross, etc., v Crs. of Ross of Kerse, 1792, M. 10300.

and even the admission by the creditors that they knew of the entail, will not defeat their diligence.¹

3. As the creditors of the heir-at-law may attach the estate, notwithstanding a recorded entail, while it continues a personal deed; so, on the other hand, if, in the sasine taken on the entail, the conditions have been left out, or even if they have been inserted only by reference to the conditions in the deed of entail, and not verbatim inserted, creditors will not be barred.²

4. How far an estate may be availably attached by the diligence of creditors, or imperfect securities completed in competition with those having a *jus quæsitum* under uncompleted entails, has given rise to several questions. And the principles have, in no small degree, been disturbed by attention to certain loose conceptions which are said to have been entertained by conveyancers and practical lawyers, and relied on by the country, favourable to creditors, and hostile to the rights of heirs of entail. This is a bias not unnaturally arising from the wish to find some practical remedy against the severe restraints by which, against reason and equity, our law of entails forbids even the most moderate family provisions. But it is perhaps one of the worst ways of working a reformation [50] in jurisprudence to give sanction to practical facilities, which are never beyond the reach of doubt, but which yet serve to hide the evils of the law. More correct views appear to have been adopted in the House of Lords in the Sheuchan case, and also to have been entertained by many eminent lawyers in the Court of Session; the substitutes under an entail being regarded as creditors entitled to particular remedies against the defeasance of their *jus quæsitum*, and as engaged on the ordinary principles of competition, in a rivalry with creditors of the ordinary description. To explain the principle of this doctrine, let it be considered that creditors of the ordinary description either trust to real security or rely on general credit. In the former case, they have such benefit as the property on which they are secured, voluntarily or by diligence, may afford them: in the latter, they take the rights of their debtor, such as they are, with all the limitations and qualifications to which they are subject; and with the benefit of the laws, which guard against fraud by gratuitous alienations, or by undue preferences granted to particular creditors.

Hugh Ross was absolute fiar of Kerse, and infekt. He made an entail to his eldest son, etc., with prohibitions to sell and contract debts, and with irritant and resolute clauses. The entail was duly recorded, but no sasine was taken upon it. The entailer died, and his son—although he made up titles by general service as heir of line, and also by special service to other subjects—possessed Kerse without making up any titles, and without taking sasine. His creditors adjudged upon charges to enter heir in special, and raised a judicial sale. The object of the question was to clear the title of the purchaser, and enable him to pay safely. The papers in Douglas's case were reprinted by order of the Court, and the case was fully argued. The Court found the tailzie no bar to the sale. In pronouncing this decision, the Court seemed to be unanimous, and the grounds upon which they proceeded are resolvable into the following propositions:—1st, That an entail, while personal, is qualified with the conditions and limitations which it contains; for every personal right must thus be subject to the conditions under which it is granted. 2d, That it follows from this proposition, that where the heir of entail has no other right, his creditors, who can reach the land only by the entail, cannot, while it continues personal, attach the lands, if the limitations strike against debts. 3d, That while the right continues personal, the creditors of the granter, or those of his apparent heir, or of the heir of entail, if *alioquin*

successurus, may attach the land, because no encumbrance can be effectual against land to burden or destroy a former sasine, unless by infektment, to which, in the case of entails, is superadded the necessity of recording the deed in a particular register. 4th, That creditors may, where there are several rights in the debtor's person, take which they please, and render it effectual by their diligence, the first infektment deciding the preference. 5th, That the old distinction stated between purchasers and adjudgers, viz. that adjudgers must take their rights *tantum et tale*, as they stand in the debtor, subject to all the burdens with which his right is attended, was pushed too far. And, 6th, That the very terms of the Act 1685, in requiring the conditions to enter the infektment, imply that no entail can be secured against creditors or purchasers, unless infektment has been taken.

See also the case of *Auchindachy*, M. 10971, Bell's Oct. Ca. 8, 199, aff. in H. L., 3 Pat. 317.

¹ *Cuthbert v Paterson*, 23 Feb. 1787, 2 Pat. 377.

² In Lord Maxwell's case, effect was given to the entail as at least forming an obligation on him who was selling, and so effectual against a buyer from him while in *nudis finibus contractus*. Kilk. 539. But private knowledge has no effect against creditors doing diligence. *Crs. of Murray Kyninmond*, 1744, M. 15380, Elch. Tailzie, No. 26.

But under those rights, a creditor, especially on general credit, is still liable to certain disappointments—by the sale of the debtor's estate; by the constituting of securities for money borrowed; by the diligence of other creditors; by diligence in implement of obligations to convey: and unless the substitutes holding a *jus quæsitum* under an entail are to be denied all remedy for implement of their right, they also by their diligence may defeat the right of ordinary creditors on general credit, and get the start of them in various ways. They may apply to have the entail recorded, if that be wanting to its efficacy: they may compel the heir in possession to complete his right by infeftment. Thus, in all cases where there is a *jus crediti*, the creditor is entitled to his legal process; and where there are opposing rights, the competitions should be determined by the priority of the completion of the real security. This brings the matter to a simple principle universally applicable to all cases of competition. But it has been urged against this conclusion: 1. That there is thus an unjust favour shown to substitutes over other creditors, since the act by which the real security is completed is instantaneous, while the process by ordinary creditors is tedious. 2. That it has long been held as settled law, that a person lending money to an heir of entail in possession, but without having completed the entail, has a right to attach the estate at any time, even after the entail is completed, insomuch that it has been held an advantage to such creditors to have the entail completed, as excluding others, but saving their right; and on the faith of this, immense sums have been lent to heirs of entail. Even were such understanding and practice uniform, it might be a subject of regret that innocent and confiding creditors should suffer. But this never can be sufficient to establish the rule, if in point of law it is groundless. The opinions of some of our greatest lawyers of the last age, in consultations which I have seen, is quite adverse to this supposed general understanding, although undoubtedly it does appear that other lawyers had held a different opinion.

On looking to the statute which has been supposed to support the alleged general understanding, two cases are distinguishable. 1. The general case of an incomplete entail, whether by want of infeftment, or by want of recording in the register of tailzies; with regard to which it is enacted, that the requisites of the statute being complied with, the entail shall be effectual not only against the contraveners and their heirs, but 'against creditors, comprisers, adjudgers, and other singular successors whatsoever,' whether by legal or conventional titles. 2. The other case is a special one, where the heir of entail is infeft, but has omitted from his infeftment the irritant and resolute clauses, in which case the entail is not 'to militate against creditors and other singular successors, who shall happen to have contracted *bona fide* with the person who stood infeft in the said estate, without the said irritant and resolute clauses in the body of his right.'

Two cases have occurred relative to this doctrine—the case of Smollet, and that of [51] Sheuchan.

In Smollet's case, titles were made up under the entail, and the heir was infeft, and contracted debt before recording the entail; and after the entail was recorded, the creditors adjudged the entailed estate, now in possession of the next heir of entail. And an action of judicial sale having been raised, one farm was sold, the price of which was sufficient to discharge the debts. The purchaser raised the question as to the validity of his title, and it was held good; in other words, the creditors of the heir in possession, although their debts stood on his general credit at the time the entail was completed by registration, were held entitled to adjudge the estate from the substitutes.¹

¹ *Smollet's Crs. v Smollet*, 1807, M. App. Tailzie, No. 12. Although here the judgment was unfavourable to the entail, the opinions of the judges who were against the decision seem to be law. They held the creditors contracting on general credit, to trust their money to the personal faith of their

debtor, exposed to all the risk of sales, securities, and other spontaneous acts on the one hand, and to adjudication and all sorts of diligence on the other; that the substitutes were proper creditors under the entail, entitled to enter into competition; and that while the personal creditors have the whole

In the case of Sheuchan the same question occurred with little variation. It was a mutual entail in 1757, proceeding on a contract, by which it was provided that the debts which Mr. Vans then owed should not be affected by the deed. The entail was immediately recorded, but there was no infeftment in the entail till the year 1775; and debts were contracted previously to the sasine, but after the recording. The Court of Session in 1784 held 'that the estate of Barnbarroch was affectable by the debts of John Vans at the time of his death.' And afterwards, on remit from the House of Lords (2 June 1818), they confirmed their former judgment. The House of Lords 'found the estate affectable only, (1) by the debts due by John Vans at the date of the deeds of tailzie, and which remained due at the time of his death,'—this was under the special stipulation of the deed; and (2) by such other debts of the said John Vans as had become real charges upon the said estate before the infeftment of 20th May 1775.¹

5. If the debtor's sole right be derived from the entail, the conditions will be effectual against him and his creditors, though not recorded, provided infeftment have not followed on the entail.²

[52] DILIGENCE COMPETENT TO CREDITORS.—It has been doubted what diligence is competent, during the heir's possession, to creditors who are affected by the restraints of the entail.

1. It seems to be quite indisputable, that the rents may be arrested as they fall due; and that the fruits may be poinded, where the land is in the heir of entail's natural possession.

2. It has been doubted whether the liferent right of the heir may be adjudged, and whether a judicial sale and sequestration of the rents be competent. It is said that this would be against all the views which commonly dictate the conditions of an entail, and inconsistent with that family dignity connected with the land which the prohibition to contract debt is intended to secure, by preventing the estate from being possessed by another than the heir of entail. It is said, besides, to be exceedingly difficult to perceive how there can be an adjudication with infeftment, much more a sale followed by infeftment, without incurring the irritancy of alienation; since it is scarcely enough to say, that there is no alienation as to the subsequent heirs, that there is alienation as to the heir in possession only, and that he is barred *personalī exceptione* from objecting to any proceedings

artillery of the law at their command, it is under this limitation, that they shall complete their security while yet the lands are not bound in the fetters of the entail. This opinion had the support of Sir Ilay Campbell, President of the Court, who particularly referred to his whole course of experience as consistent with this doctrine.

¹ *Stewart v Vans Agnew*, H. L., 1 Sh. App. Ca. 320. See the opinions of Lord Chancellor Eldon and Lord Redesdale in *Sandford on Entails*, p. 375. As to the debts incurred after the date of the entail, and to which the special stipulation did not apply, and those which were incurred afterwards, and while yet the right remained personal, the ground of the Lord Chancellor's opinion was thus expressed: 'Although the debts incurred between the date of the contract and the infeftment of the heirs of entail in 1755 were personal obligations, yet, if adjudication had been led on them before that infeftment, it appears to me they would be prior rights. But I do think that, as soon as infeftment was taken for the heirs of entail upon the onerous contract, their right became preferable to all personal debts contracted after the date of the entail, and which had not before that infeftment been rendered real charges by adjudication.'

The whole doctrine here laid down has been contested in a

pamphlet published by Mr. Swinton, entitled, 'Remarks by Archibald Swinton, Esq., Writer to the Signet, 1824.' The defect in the argument of this paper appears to be, that the analogy is attempted to be run too closely between an entail and an interdiction. If it be granted to Mr. Swinton that an entail operates merely as an interdiction, his argument is good; but Mr. Swinton forgets that the heirs of entail have also a *jus crediti* under the irritant and resolute clauses.

Mr. Sandford, in his *Treatise on Entails*, has also contested the doctrine of the decision in the House of Lords, p. 124; but his reasoning is not satisfactory.

² See the cases of Douglas, etc., in a preceding note.

In the following case the deed had not been recorded: *Denholm of Westshiells v Baillie*, 1731, as reversed in H. L., 1 Pat. 113. *Kilkerran*, 545-6, states as the principle of this reversal, that as infeftment had not followed, the creditors could not plead that they had contracted on the faith of the records, and so could not object to their being bound by the clauses in the entail as if recorded. See the case of *Crs. of Carleton v Gordon*, 1743; *Elchies, Tailzie*, No. 51. *Syme v Dewar*, 1803, M. 15619.

In the following case, sasine had not followed: *Chisholm v McDonald*, 1800, M. App. Tailzie, No. 6.

having that effect. But it is held, notwithstanding, that the right may be adjudged.¹ Nay, it is also held that the heir in possession may voluntarily grant an effectual security over his liferent right by bond of annuity and infestment, provided the conveyance contain a declaration that it is not to affect the property or injure other heirs or substitutes.²

RIGHT OF HEIR OF ENTAIL TO WOODS, ETC.—Although the right of an heir of entail seems in many respects to be similar to that of a liferenter, in others it is stronger, partaking of the nature of a fee. Thus, in the case of a common liferenter, liberty will not be given to cut even *sylvæ caducæ*, unless they have been laid out into allotments for cutting.³ But an heir of entail may cut woods, or dispose of them if ripe for cutting, under certain restrictions,—the cutting ceasing with his life; what is uncut at his death being *pars soli*, descendible, as part of the entailed estate, to the next substitute.⁴ The rents or price suffer a corresponding division: the price of what is cut before his [53] death goes to his executors; the price of what is not cut till after, goes to the next substitute, and may be attached by his creditors.⁵ Under the heir's right as fiar, it has been thought that creditors can attach the faculty of cutting the timber, or by means of diligence take the uncut timber and bring it to market: at least the woods usually allotted for cutting will in such a case be regarded as part of the liferent use and produce of the estate, and subject to diligence. If the heir of entail's right to cut wood depended, as sometimes has been said, on his power of administration, it might fairly be argued that he alone could

¹ Creditors have been found entitled to adjudge even the fee of the estate itself, *valeat quantum valere potest*. This was decided in a case peculiarly strong. The estate of Colvill was held by the bankrupt under a strict entail, which forfeited the right of the heir in possession and all his descendants, if the estate was allowed to be attached for debt. A creditor adjudged the estate, and the debtor petitioned the Court, representing the inevitable consequences of this diligence, and stating that it was in truth a device used by one of the substitutes, in collusion with the adjudger, to obtain the estate by the debtor's forfeiture. But the Court held that creditors were entitled to adjudge their debtor's estate whether it was entailed or not. *Colvill*, pet., 1779, M. 168.

Surely this decision is not to be approved of, and would not be repeated were such a question to occur again. See the case of *Niven v M'Farlane*, 20 Nov. 1799, n. r. (alluded to below, chap. 2, sec. 2, § 8), where the Court did not entirely disregard the defence of the bankrupt, who refused to assign his lease on pretence that it contained an irritancy; but an inquiry was made into that fact before proceeding. In the case of *Johnston*, 4 Feb. 1813 (same page), the Court refused to order the bankrupt to sign a conveyance of the lease.

² *Sir W. Nairn v Gray*, 15 Feb. 1810, F. C. [*Bontine v Graham*, 1837, 15 S. 712.]

³ See below, p. 61.

⁴ The following cases illustrate some points of the doctrine: *Hamilton*, 1757, where the substitute in vain offered the price, to save the trees.

Pringle v Scott of Gala. The question was argued, Whether an heir of entail had a power of selling the woods on the entailed estate, so as to entitle the purchaser to continue the cutting after the seller's death or forfeiture? The Court found, 'that the disposition to the woods did subsist for no longer than for the granter's lifetime;' but afterwards they found, that 'if the woods were ripe for cutting at the time of the seller's death, the deed is still a good and subsisting deed.' Against this judgment a petition was presented, but the cause

was amicably settled. July 1730, Session Papers, Advocates' Library.

In the subsequent case of *Lord Cathcart*, the heir of entail had sold all the growing timber on the estate, both planted and natural, with liberty to cut it at any time before the year 1767. The Court found that none of the planted trees could, in virtue of this contract of sale, be cut after the death of Sir James Shaw, the seller and heir of entail; and in respect it was alleged by the pursuer, and not denied by the defender, that the natural woods sold by Lord Cathcart were not fit for cutting at the time of Sir James Shaw's death, therefore they reduced the said contract. *L. Cathcart v Sir John Stewart Nicholson Shaw*, 1755, M. 15399.

This was not a negative determination or opinion, that the trees might have been cut before the death of the heir of entail. That question was not determined, and there was no occasion to decide it, since the contract was not acted on till after the heir of entail's death; and so what was actually decided was sufficient to preserve the planted wood.

In the later case of *Veitch of Ellilock*, it was decided that the right of the purchasers was at an end the very instant of the heir of entail's death, and that they were obliged to account for the wood cut between the moment of his death at London and the time when it was known in Dumfriesshire, where the estate lay, though it was not alleged that the woods were not ripe for cutting.

In *M'Kenzie and Shaw v M'Kenzie*, 1824, the Court seemed to hold: 1. That they have a jurisdiction to interfere, at least in extreme cases, to prevent destruction and waste. 2. That the heir of entail lies under certain restraints, as, *first*, Not to cut unripe wood; *secondly*, Not to cut ornamental and shelter wood. The Court ordered a minute to be put in by consent, stating the limits of the right claimed; and, on such minute, allowed the cutting to proceed in terms of it, under inspection of neutral persons. 2 S. 775, N. E. 643. [See these cases commented on, and the subject considered generally, in *Paul v Cuthbertson*, 1840, 2 D. 1286.]

⁵ *M'Leod v Sir John Stewart's Crs.*, 24 June 1721, n. r.

exercise the faculty of cutting the timber;¹ and that although the creditors might take the benefit of that timber when cut, or of any contract for cutting it, they could have no right to exercise this power themselves. At any rate, creditors should have no right to cut any wood except that which is designed for timber; not the ornamental trees, which are as part of the estate or mansion-house.

The heir of entail may work mines, minerals, stone-quarries, etc., and his creditors will be entitled to the benefit of them. But it does not appear to have been decided whether the creditors of an heir of entail can explore the lands, and open such mines or quarries.

It has been held, that an heir of entail cannot pull down the mansion-house for the purpose of exposing the materials to sale, nor can his creditors do so.²

There are other important questions of power under the restraints of entails, which will find a more fit place under the subjects to which they more immediately relate. Such are, questions as to powers to grant leases,³ and questions as to provisions to widows and children.⁴

SECTION V.

LIMITED ESTATES OF LIFERENT AND FEE.

[54] Fee, as a relative term contradistinguished from LIFERENT, is the estate to which a person is entitled after the death of one who has the use of the property during his life. But fee, as an absolute term, is taken to express the full right of property, without any immediate reference to a subsisting liferent.

LIFERENT is a right conferred either by the law itself, or by deed, to enjoy the use, possession, and fruits of property, during the life of the person favoured, or of another.

Liferent and fee, while subsisting together, are mutual restraints on each other, and so are necessarily both of them limited estates, conferring on each of the holders relative rights. But not only does a liferent not exclude a fee: it implies the existence of a fee independent of it.

Liferents, where properly constituted either by legal construction or special deed, are effectual burdens on the right of fee; and creditors attaching the fee can bring the estate to sale only under burden of the liferent.

Liferents are either conventional or legal. The conventional are by reservation, or by constitution; the legal are Terce and Courtesy.

I. OF CONVENTIONAL LIFERENTS.

Among conventional liferents the chief distinction is between reserved liferent, and liferent by grant to another.

I. LIFERENT BY RESERVATION is created by a conveyance, transferring the fee or property of land, but reserving to the granter the use and enjoyment of the property during his life. It does not require sasine to be taken on the conveyance in order to constitute the liferent in this case. It rests on the original sasine as still by force of the reservation subsisting. And the right depending on the original infeftment unexhausted, it is in law considered

¹ The cutting down of planted timber, for gain or for payment of debt, might be a very questionable act, if the point could be held as open. See p. 51, note 4. And so it appeared to Lord President Blair in *Gordon's case*, 1811, 14 F. C. 161.

² *Gordon v Gordon*, 24 Jan. 1811, 14 F. C. 161.

³ See afterward, vol. i. pp. 66, 70.

⁴ See afterwards, Index, *voce* Marriage Contracts.

rather as a fee limited than as a new liferent. On this principle, the liferenter by reservation can enter heirs and purchasers.¹

II. LIFERENT BY GRANT TO ANOTHER is constituted by deed of conveyance, completed by sasine duly recorded; and the title of the liferenter depends on a sasine duly registered, as in other alienations of land.² Liferent by grant depends entirely on the words of its creation. There are not, indeed, any *voces signatæ* by which alone the liferent can be created. But where land is conveyed, the meaning at least must be clear and obvious, that the right is intended to be restricted to liferent, otherwise it will be held a fee.

Where the words used are clearly descriptive of a liferent, as 'to A. B. in liferent,' or 'for liferent use allenary,' or 'liferent alimentary use only,' they are never held to convey a fee, unless in circumstances where there would otherwise be no fee existing. But such a necessity may occur in consequence of the maxim, that the fee of an estate cannot be *in pendente*. The law will not endure the absurdities which would follow such suspension of the fee. Thus, if a superiority were disposed in terms not comprehending a fee, there would be no superior, and the vassals could not be entered. If the *dominium utile* were so conveyed, the superior would have no vassal; so that, where the former owner of the estate had [55] contracted debt, his creditors could not reach it, because there would be no one from whom it could be adjudged. To avoid these absurdities, law construes a fee where the words strictly seem to imply only a liferent, though sometimes the fee, which thus *ex necessitate juris* is implied, is only fiduciary or in trust.³

When, coupled with such a liferent, the fee is so conferred that it cannot vest in the person for whom it is designed, there may *ex necessitate juris*, or by operation of the deed, be a fiduciary fee till the person having the beneficiary right can take; but the fee vests the moment that by possibility it may. So an estate to a father in liferent, for liferent allenary, and to his eldest son in fee, is held by the father in fiduciary fee till his son exist, and then the fee is with him;⁴ or an estate disposed in trust, with a strictly limited liferent, and a suspensive disposition of fee, is held in fee by the trustees till the purifying of the condition, when it instantly vests as a *jus crediti* against the trustees.⁵

¹ Ersk. ii. 9. 42. Formerly he was allowed to enter *heirs* only, though in Craig's time his power extended to all vassals. Now it seems to be settled that he may enter both *heirs* and *purchasers*, the interest of the fiar to object being taken away by 20 Geo. II. c. 50, sec. 12, which compels the superior to admit singular successors. [A liferenter by reservation appears also to be entitled to the custody of the title-deeds. *Bowes v Fergus*, 1831, 10 S. 164. See Prin. 1040, 1055.]

² Ersk. ii. 9. 41.

³ See this doctrine well explained in *M'Intosh v M'Intosh*, 28 Jan. 1812, F. C. See below, p. 55, note 6.

⁴ See below, p. 55.

⁵ *Wellwood's Trs. v Wellwood*, 1791, Bell's Ca. 191: The deed was to the granter 'during all the days of his life; and failing of him by decease, to my heirs, etc., aftermentioned.' This was considered as suspending only the *exercise*, not the *vesting*, of the right of fee. See opinion of Lord Braxfield particularly.

M'Dowal and Selkirk v Crawford's Trs., 1824, 2 S. 682, N. E. 574. Here there was a trust-deed. Certain furniture, etc., 'together with a tenement of houses, to be liferented, used, and possessed by Margaret Buchanan, my spouse, during all the days of her life, while she remains my widow only; but on her death or second marriage, if she survive me, or at my death, if I survive her, my said furniture, etc., and the said tenement of houses, to go to and be the absolute property of

the said George Crawford; whom failing, etc. Declaring that, on my death, and the death or second marriage of my wife, etc., my trustees shall be bound to denude themselves of the said tenements, etc., in favour of my said sons in their order.' In 1793 the granter died. In 1797 George assigned his share in security of a debt. He became a bankrupt, and was sequestrated in 1811; and the widow died in 1818. The chief question was, Whether George's interest was a *jus crediti* vested by the purifying of the condition, and transmissible by assignation? The Court held it to be so; and in deciding thus, they considered his right to be a fee vested and transmissible.

Smith v Leitch, 1826, 4 S. 659, N. E. 665, aff. 1829, 3 W. and S. 366. Here there was a trust-deed 'for behoof of E. Ironside, my wife, in case of her surviving me, in liferent for her liferent alimentary use allenary during the time of her life, and of her continuing my widow; and after her death, or in case of her entering into another marriage after my death, then for behoof of George Leitch, my brother, and his heirs and assignees in fee, in case he shall survive me, and shall be in life at the time of the death or second marriage of the said E. Ironside; and failing the said George Leitch by decease, etc., then I appoint the said trustees to hold, etc., in trust for behoof of James F. Leitch, etc., in fee, in case he shall be in life at the time of the death or second marriage of the said E. Ironside; and failing the said James F. Leitch, by decease before me, or prior to the death or second marriage of the said

Conventional liferent commonly forms a part of the provisions in marriage contracts and family settlements. And the following seem to be the chief points:—

1. A liferent is frequently created in marriage contracts in favour of the wife, instead of leaving her to her legal liferent of terce. This is generally called a LOCALITY; and the lands Locality lands, from the localling or apportioning of particular lands for the use of the widow. The wife, by this liferent right, is saved from the danger of the defeat of her terce by the alienation of land during the husband's life, and from the necessity of legal proceedings after her husband's death, for settling her proportion; but she takes the risk of the produce of the locality lands.

2. In marriage contracts and family settlements it is also common to create a species of right called conjunct fee and liferent—CONJUNCTIVA INVESTITURA—having in contemplation the interests of husband and wife, or of parents and children.

[56] With respect to HUSBAND and WIFE.—1. Where property is vested in conjunct fee and liferent; where it does not come from the wife or her relations; and where the destination does not peculiarly favour her or her heirs, and distinctly intimate a preference in her behalf, the husband is proprietor or fiar, and his creditors are entitled to attach the subject under the burden of the wife's liferent:¹ the creditors of the wife, after the husband's death, can affect only the liferent.² 2. If the subject come from the wife or her relations, and the expression is not such as clearly to intimate a preference in favour of the husband, the wife is fiar, the husband liferenter: the husband's creditors cannot attach the fee,³ while the wife can grant no conveyance, nor her creditors attach her right, otherwise than with a full reservation of the husband's liferent. But it is a sufficient destination to give a fee to the husband, if the subject is taken in conjunct fee and liferent, and the heirs of the marriage in fee.⁴ 3. If the wife's heirs are preferred in the destination,⁵ the fee is held to be in her. 4. The wife is fiar on her survivance, where the fee is destined to the *survivor*.⁶ 5. Where the destination is to husband and wife, and the survivor and *their* heirs, it was doubted whether *their heirs* did not mean only the heirs of the marriage. But this opinion did not prevail: the fee was held to be in the surviving wife and her heirs.⁷ It would, however,

E. Ironside, then I appoint the said trustees to hold, etc., in trust for behoof of Andrew Leitch, my nephew; whom failing, for behoof of my sisters,' etc. George and James F. Leitch survived the truster. They predeceased the widow, who never married a second time; and Andrew Leitch having, as thus succeeding to the fee, made a trust-disposition, died also before the widow. On her death, a competition arose between Andrew Leitch's trust-dispensee and the sisters of the granter of the original settlement. The Court held the fee to be in Andrew Leitch, and transmissible when he made his trust-conveyance, as vesting by the purifying of the condition.

¹ Stair ii. 3. 41. *Johnston v Cunninghame*, 1667, M. 4199, Ersk. iii. 8. 36. *Edgar v Sinclair*, 1713, M. 4201.

Even the husband's heir is held fiar on the wife's survivance. And so his creditors will be entitled to affect the fee under the burden of her liferent.

² *Rig v Rig*, 1562, M. 4197.

³ *Wordie v Sampson*, 1750, M. 4207; *Sinclair v Anderson*, 1771, M. 4241, Hailes 450; *Paterson v Balfour*, 1780; *Frazer v M'Gilvray*, 1794, M. 4212; *Robertson's Crs. v Mason*, 1795 M. 4491; *Turnbills v Turnbull*, 1822, 2 S. 1; *Muirhead v Paterson*, 1824, 2 S. 617. See *Blair's Crs. v Blair*, 1736, 1 Cr. and St. App. 251.

⁴ *Watson v Johnston*, 1766, M. 4288, Hailes 82. [See *Madden v Currie's Trs.*, 22 Feb. 1842, 4 D. 749. The case of *Watson v Johnston* seems not to support the doctrine for which the author cites it, having been decided on the ground that

the subjects belonged to the husband *nomine dotis*. See report in 5 B. S. 927, and per Lord Benholme in *Myles v Calman*, 12 Feb. 1857, 19 D. 408. See further, *Cameron v Young*, 28 June 1837, 15 S. 1205; *Fisher's Trs. v Fisher*, 19 Nov. 1844, 7 D. 129. However strong the tendency may be in dispositions to husband and wife, in conjunct fee and liferent, or in conjunct liferent (not allenary), and to the children in fee, to hold the fee to be vested in the husband as the *dignior persona*, it is now well settled that such a destination in a conveyance *by one of the spouses* leaves the fee with the granter, unless the subjects are meant to be tocher, or an intention to transfer the fee is very plainly manifested. *Myles v Calman*, *cit.*; *Mac-kellar v Marquis*, 4 Dec. 1840, 3 D. 172.]

⁵ [Or her assignees, or if she has a power of disposal. *Drover v Maxwell*, 1709, M. 4240; *E. Dunfermline v E. Callender*, 1676, M. 2941, 4244; *Porterfield v Grahame*, 1777, M. 4277.]

⁶ *Ferguson v M'George*, 1739, Elchies, Fiar, No. 5, notes, p. 136; M. 4202; 5 B. S. 664. *Riddels v Scott*, 1747, M. 4203, 14878; Elchies, *ut supra*. Both these are cases of bonds for borrowed money. *L. Boyd v King's Advocate*, 1749, relative to a lease, M. 4205.

⁷ *Ferguson v M'George*, 1739, *supra*. [*Macgregor v Forrester*, 13 April 1834, 1 S. and M'L. 441; *Burrowes v M'Farquhar's Trs.*, 6 July 1842, 4 D. 1484; *Fisher's Trs. v Fisher*, 19 Nov. 1844, 7 D. 129. But it seems to be otherwise when the destination is to the survivor and the heirs of the marriage, because they are the husband's heirs. *Neilson v Murray*,

rather appear (at least where the subject belongs to the husband, or the money by which it is purchased comes from him), that while the husband lives he may alienate, or his creditors attach.¹ And, 6. Although the wife will be held as fiar, *cæteris paribus*, where the subject flows from her, yet if it has come into the communion as tocher, it will require the strongest expressions of preference in her favour to vest her with the fee.²

In rights taken to PARENT and CHILD, the parent is in general held as proprietor or fiar; the child's right being considered only as a *spes successionis*, and so postponable to the parent's creditors.³ But this rule suffers the following exceptions: 1st, where the children are in existence, capable of taking the fee, and the right is taken to the parent in liferent, and the child or children *nominatim* in fee; ⁴ 2d, where the right bears an express limitation [57] of the parent's interest to a liferent, as by the expression 'for liferent use allenary' (only), or 'for liferent alimentary,' where these words are not coupled with words importing a fee.⁵ 3d, Even where the children are not yet born, if the right be taken to the parent 'for liferent use allenary (only), and the children in fee,' in such case, *ex necessitate juris*, the property is held to be in the parent till the existence of the children. There being no one alive capable of taking the fee, and the law requiring a fiar, a constructive fee in trust for the fiar *in spe* is held to reside in the parent; but creditors have no right to it—it is merely fiduciary. If a trust be established for the parent's liferent and children's fee, the fee is in the children.⁶ But, 4th, where the children are in existence, and the destination is to the husband and wife in liferent, and the children by name in fee, reserving to the parent in whom the original fee resided the power of burdening and disposing of the property, the fee is held to be in the parent.⁷ And, 5th, the parent may make a destination to his children

1732, 1 Cr. and St. 65; Lord Fullerton in *Mackellar v Marquis*, 4 Dec. 1840, 3 D. 172. See also *Scott v Maxwell*, 22 May 1850, 12 D. 932, aff. 1 Macq. 791.]

¹ *Kilkerran* in *Ferguson's case*, *supra*; *Reid v Forrester*, 1804, n. r.; *Pringle v Richardson*, 1806, n. r.

² *Bruce Henderson v Henderson*, 1790, M. 4215, aff. 3 Pat. 686; *Ersk. iii.* 8. 36. See Lord Pitfour's opinion in *Watson v Johnston*, *supra*.

³ *Wilson v Glen*, 14 Dec. 1819, F. C. Here the disposition was to husband and wife, and the longest liver in conjunct fee and liferent, for their liferent use allenary, and to their son *nominatim*, his heirs, etc., in fee. Sasine was taken in these terms: The son, after his parent's death, possessed the lands without completing titles otherwise than by the original sasine. A question arose between his heir and the heirs of his father, turning on the point whether the fee was in the father or the son. The Court held the fee to be in the father.

See also the following cases:—*Children v Crs. of Frog*, 1735, M. 4262; confirmed 1741, by *Lillie v Riddel*, M. 4267; *Cuming v L. Advocate*, 1756, M. 4268; *Cuthbertson v Thomson*, 1781, M. 4279; *Robertson v D. of Athole*, 1806, M. App. Fiar Absolute 1; *Pollock v Pollocks*, 1806, M. App. Provisions to Heirs 6; *Lindsay v Dott*, 1807, M. App. Fiar 1; *Shanks v Kirk-Session of Ceres*, 1797, M. 4295; *Maxwell v Grieve*, 1822, 1 S. 509; *Kennedy v Allan*, 1825, 3 S. 554. [*Gordon v Mackintosh*, 8 Dec. 1841, 4 D. 192, aff. 4 Bell 105; *Edward v Shiell*, 12 Feb. 1848, 10 D. 685; *Forrest v Forrest*, 26 May 1863, 1 Macph. 806.]

⁴ [*Mackintosh v Mackintosh*, 28 Jan. 1812, F. C.; *Macgowan v Robb*, 29 Mar. 1864, 2 Macph. 943.]

⁵ *Falconer v Wright*, 1824, 2 S. 633, N. E. 537.

⁶ See, for the doctrine of this paragraph, the case of *Newlands v Newlands' Crs.*, 1794, M. 4289, Bell's Ca. 54, 7 2; aff.

1798, 4 Pat. 43, 3 Ross, L. C. 634. See also *Thomson v Thomson*, Bell's Ca. 72; aff. 14 Dec. 1812, 1 Dow 417, 5 Pat. 654. See also the cases quoted in those reports: *Watherstone v Rentons*, 1801, M. 4297; *Gordon v Allan*, 1801, n. r. The words must be clearly taxative. *Lindsay's Children v Dott*, 1807, M. App. Fiar 1; *Robertson v D. of Athole*, 1806, *supra*. See further, *Seton v Crs. of Seton*, 6 Mar. 1793, M. 4219. And see the principle of fiduciary fees *ex necessitate juris* well explained by Lord Meadowbank, and his communication of Lord J.-C. M'Queen's opinion on the point. *M'Intosh v M'Intosh*, 1812, 16 F. C. 493. [See *Logan v Maxwell*, 20 Dec. 1836, 15 S. 291; aff. 1 Aug. 1839, M'L. and R. 790. *Barstow v Stewart*, 18 Feb. 1858, 20 D. 612. *Martin's Trs. v Milliken*, 24 Dec. 1864, 3 Macph. 326. As to the principle of this rule of construction, see *Montgomerie Bell's Lectures* 783. As to the effect of a trust, see *Mein v Taylor*, 8 June 1827, 5 S. 757, aff. 23 Feb. 1830, 4 W. and S. 22; *Ewan v Watt*, 10 July 1828, 6 S. 1125; *Ross v King*, 22 June 1847, 9 D. 1327; *Ramsay v Beveridge*, 3 March 1854, 16 D. 764. But it is only a *continuing* trust, i.e. one which provides for the retention of the subjects in the hands of the trustees till the fee emerges, which has this effect. A direction to trustees to pay or convey to a parent on liferent and children on fee gives the parent a fee. *Hutton's Trs. v Hutton*, 11 Feb. 1847, 9 D. 639; *Ferguson's Trs. v Hamilton*, 13 July 1860, 22 D. 1442, aff. 4 Macq. 397.]

⁷ *Turnbolls v Turnbull's Trs.*, 1822, 2 S. 1. See also *Cuming v King's Advocate*, 1756, M. 4268. [*Baillie v Clark*, 23 Feb. 1809, F. C.; *Dickson v Dickson*, 1780, Hailes 865. But a mere faculty to dispose of the fee conferred on a liferenter whose right is constituted by grant does not convert the liferent into a fee. *Morris v Tennant*, 3 June 1853, 15 D. 716, aff. 6 July 1855, 27 Jur. 546; *Sprot v Pennycook*, 12 June 1855, 17 D. 840; *Alves v Alves*, 8 Mar. 1861, 23 D. 712.]

by name successively in liferent allanarly, and their heirs in fee, to the effect of creating a succession of liferents with fees merely fiduciary.¹

II. OF LEGAL LIFERENTS.

The legal liferents are Terce and Courtesy.

I. **TERCE.**—The Terce is a liferent, given by law to the widow of an heritable proprietor who has been married to her for year and day, or has had a living child by her;² provided she has not accepted of a special provision. It extends to one-third of all lands; of teinds, if vested by separate infestments;³ and of heritable securities, in which, at the time of her husband's death, he stands vested as of fee by infestment.⁴ This liferent, given by the law, is grounded on the obligation incumbent on a landed proprietor to make a reasonable provision for his wife, according to that condition of life in which she has been during her marriage.⁵ And, consistently with this, the legal provision ceases where a settlement has been made and accepted of; unless the deed shall bear expressly⁶ that the wife shall have [58] right to the Terce as well as to the conventional provision. This rule holds even where the conventional provision is out of an estate in another country, and where the contract or settlement is foreign.⁷ To discharge the terce, however, the wife must accept of the conventional provision, either in the marriage contract, or by accepting or acquiescing in a provision by separate deed; and this in the full and fair knowledge of her rights.⁸

The necessity of the widow having a house in which to reside, has given rise to the question: Whether she has not right to a terce of the mansion-house; or at least, where there are two houses, to the use of one of them? In one case, the Court held the widow entitled to a terce of the mansion-house and garden.⁹ But in a subsequent case this was

¹ *Allardice v Allardice*, 1795, Bell's Fol. Ca. 156. See the doubts and scruples stated by Sir Ilay Campbell, lest this should create a dangerous innovation in the law of Scotland. [It is competent to constitute or reserve a liferent interest in moveable estate in favour only of a party in life at the date of the deed constituting or reserving such liferent; and where any person of full age, and born after the date of the deed, is in right of moveable estate in liferent in virtue of a deed dated after 31 July 1868, such moveable estate belongs to him absolutely; and if it is in the hands of trustees, they are bound to make it over to him. The date of testamentary deeds for this purpose is taken to be that of the granter's death, and the date of a contract of marriage is held to be the date of the dissolution of the marriage. 31 and 32 Vict. c. 84, sec. 17. The author treats more fully of fee and liferent in the Prin. secs. 1707 sqq., 1951 sqq.]

² [The rights of surviving spouses are now the same whether the marriage has lasted a year and a day or not. 18 Vict. c. 23, sec. 7.]

³ *C. of Dunfermline v E. of Dunfermline*, 20 July 1627, 1628, M. 14707, 15840; *Moncrieff v Tenants of Newton*, 1667, M. 15844, 15733; *Belschier v Moffat*, 1779, M. 15863. [*Arbuthnott v Arbuthnott's Trs.*, 1805, Hume 294.]

⁴ *Carruthers and Maxwell v Johnston*, 1706, M. 15846. A real lien, as in a burden reserved, depending on the sasine of the disponee, seems, however, to afford a terce to the widow of the creditor. See below, p. 57.

⁵ This obligation is not held as discharged by the terce, for it may be entirely inadequate. See *Thomson v*

McCulloch, 1778, M. 434, Hailes 797. See also below, p. 58, note.

⁶ This might seem to be a natural consequence at common law of the principle on which the terce is grounded. But a statute was required to settle the point.

The question arose in the case of *Lady Craigleith v Lady Prestongrange*, 1681, M. 15845, and this case was referred to Parliament by the Court; but Parliament did not think themselves authorized to pass a *declaratory* law. Therefore they sent the case back to the Court, and passed the Act of 1681, by which it was enacted, that 'where there shall be a particular provision granted by a husband in favour of his wife, either in a contract of marriage or some other writ, before or after the marriage, the wife shall be thereby secluded from a terce out of any lands or annualrents belonging to her husband, unless it be expressly provided in the contract of marriage or other writ containing the said provision, that the wife shall have right to a terce by and attour the said provision conceived in her favour.' 1681, c. 10. See Sir G. M'Kenzie's Obs. 460.

⁷ *Lothian v Ross (Ross v Aglionby)*, 1797, M. 4631, App. Foreign 5, as revd. 1797, 3 Pat. 621; *Jankouska v Anderson*, 1791, M. 6457; *C. of Findlater v E. of Seafield*, 1814, F. C. [Nisbett v Nisbet, 24 Feb. 1835, 13 S. 517; *Keith's Trs. v Keith*, 17 July 1857, 19 D. 1040.]

⁸ [*Cowan v Kerr*, 15 Dec. 1830, 9 S. 188; *Douglas, Heron, & Co. v Cant*, 1783, M. 11461; *Belschier v Moffat*, *supra*; *Hope v Dickson*, 17 Dec. 1833, 12 S. 222.]

⁹ *Montier v Baillie*, 1773, M. 15859.

much and justly doubted.¹ In that case it was even doubted whether, where there were two mansion-houses, the widow could claim terce on either.²

The EXCEPTIONS from the terce are not reducible to any uniform principle. The following, however, seem to include all the cases in which the estate of an heritable proprietor is not liable for terce:—1. Superiorities in relation to feu-duties as well as casualties.³ But it might admit of question whether this would hold in the cases of whole cities feued out, as Greenock or Paisley.⁴ 2. Rights of reversion, as unfit subjects of aliment to a wife, since they produce no annual profit.⁵ 3. Patronage, for a similar reason.⁶ 4. Coal, as being the consumption of the principal subject itself.⁷ 5. Leases, as not feudal subjects. 6. Burgage subjects afford no terce,⁸ for which no very satisfactory principle has been assigned. Subjects, although situate *beyond the burgh*, provided they hold burgage, are exempt from terce; which was found with regard even to a land estate.⁹ On the other [59] hand, subjects *within burgh*, not holding burgage, are liable to terce.¹⁰ Terce is given of tenements in burghs of barony.¹¹

The husband's infetment as of fee, as it subsists at the time of his death, is both the measure and the security of the wife's terce.¹² But, 1. It must be a real and substantial fee, not nominal or in trust.¹³ 2. The wife comes not in as a purchaser, but her right is a part of the husband's original sasine. 3. Although, in strict terms, the husband has no infetment in a burden reserved in his favour, but the sasine of the disponent is his security, yet, according to the spirit of the rule, a terce seems to be due from such an heritable debt, as well as from an heritable bond: the disponent's sasine is the sasine of the creditor.¹⁴ 4. It is of no consequence whether the lands have descended from an ancestor, or have been acquired by the husband himself. The rule in courtesy is different. 5. The terce is not excluded by any right merely personal: and so, while the husband has full power to alienate or burden his land during his life, infetment must have followed, before the right of either purchaser or creditor can exclude the terce.¹⁵ And the purchaser may retain the price of

¹ Mead v Swinton, 1796, M. 15873.

² There was no occasion to decide the point, for the one house had been built with the design of pulling down the other. [Mr. Shaw's edition (p. 608) says that the rule in Logan v Galbraith, 1665, M. 15842, 'seems better, that no *pro indiviso* right can be insisted on.' See Prin. 1598, 1603.]

³ Stair ii. 6. 16; Ersk. ii. 9. 49. Lady Dunfermline v E. of Dunfermline, 1628, M. 15840.

⁴ In Lady Dunfermline's case, the Court proceeded chiefly on the practice, and were unwilling to introduce a new usage, where the lady was, besides, sufficiently provided. [In Nisbett v Nisbett's Trs., 24 Feb. 1835, 13 S. 517, the Court refused to disturb the general rule, that no terce is due from feu-duties even where the husband had by a single transaction feued out the greater part of his estate shortly before his death.]

⁵ Stair ii. 6. 16; Ersk. ii. 9. 49. M'Dougal v M'Dougal's Crs., 1801, M. App. Terce 2.

⁶ But patronages have been held as legitimate subjects of conventional provisions to widows by way of locality. Lady Forbes, 1758, as revd. 18 Feb. 1760, 2 Pat. 36; D. of Roxburgh v Duchess, 25 June 1818, F. C.

⁷ Bank. ii. 6. 11. Lady Lamington v Lamington, 1628, M. 8240; Belschier v Moffat, 1779, where the coals were let on lease, M. 15863, and Hailes 838. But have not widows from a going coal sufficient for their own consumption? [See below, p. 61, note 7.]

⁸ Craig ii. 22. 34; Stair ii. 6. 16; also Stair i. 4. 23; Bank. ii. 6. 11; Ersk. ii. 9. 49. But observe the ambiguous terms

which these lawyers make use of. [This exception from terce no longer exists. 24 and 25 Vict. c. 86, sec. 11.]

⁹ Lowthian v Aglianby, 1801, M. App. Annualrent 2, aff. 4 Pat. 464, where terce was found not to extend to a land estate held burgage.

¹⁰ Rose v Fraser, 1790, M. 15867.

¹¹ Park v Gibb, 1769, M. 15855, Hailes 306.

¹² So the terce is a preferable burden on the estate in the hands of a purchaser, where it has been sold by the heir, and the title completed before the widow's service to her terce. Boyd v Hamilton, 1805, M. 15874. See p. 58, note 1. [Nor is it barred by reduction of the husband's infetments on the ground of informality, not affecting his radical right to the subjects. Rose v Fraser, 1790, M. App. Terce 1.]

¹³ And so, where an infetment was to a father in liferent, and his son in fee, *with power to the father to sell, and contract debt*, this being held radically a fee in the father, the son's widow, on his death, during his father's life, was refused a terce. The question arose with the Crown, as in right of the father, by forfeiture for his rebellion in 1745. Cuming v King's Advocate, 1756, M. 15874, 5 B. S. 843.

¹⁴ [The author, in the Prin. 1598, expresses a different opinion in regard to burdens by reservation, which appears, from a note in Mr. Shaw's edition, p. 807, to proceed on the words of the brieve, '*vestitus et sasitus ut de feodo*;' the right being also transmissible by assignation and general service.]

¹⁵ Campbell v Campbell, 1776, 5 B. S. 627; M'Culloch v Maitland, 1788, M. 15866. This was established so early as 1532, Crichton v Hamilton, M. 15835.

lands till the terce be satisfied.¹ So it is not sufficient to defeat the terce, that resignation *in favorem* has been made and accepted by the superior;² though an instrument of resignation *ad remanentiam* would exclude the terce, as completing the feudal conveyance to the superior. So the exercise of a faculty to burden will not exclude the terce, if infeftment have not followed.³ And finally, the terce is not excluded by a creditor adjudger, who has given a charge on his adjudication to the superior. This question our lawyers of the seventeenth century seem to have held extremely doubtful.⁴ But at last it was determined in the widow's favour on a hearing in presence, and this has been since held for law.⁵ 6. The terce is excluded or diminished by heritable securities on which infeftment has followed. If the security has been granted by way of absolute disposition, the terce is not totally excluded, but the disposition is taken only as a burden to the extent of the debt really meant to be secured.⁶ The debt is, however, enlarged, and the terce diminished, by new bonds extending the security as eiks to the reversion.⁷

[60] The widow will have redress against any fraudulent contrivance or neglect by which the infeftment of the husband has been lessened. Thus, the husband cannot divest himself in favour of the heir, reserving only his own liferent.⁸ So a fraudulent delay to take infeftment will not avail the husband's heir; although doubtful cases of mere delay will not entitle the wife to relief.⁹ Mr. Erskine is of opinion that the redress in these cases is only by a personal action, and that onerous creditors will be preferred:¹⁰ and this seems to be law.

Although the terce is provided by law for the widow, it does not necessarily follow that her claims shall in all cases be restricted to a third of her husband's estate. Against his creditors, indeed, she will have no available claim beyond the third; but against his heir she will be entitled to claim an additional aliment.¹¹

SERVICE AND KENNING TO THE TERCE.—The widow's right to her terce is vested by her service as tencer; a decree of the sheriff, proceeding on the verdict of a jury impanelled in virtue of a brief from Chancery.¹² The effect of this is to give the widow a *pro indiviso* right of possession, and to vest in her a third of the rents from the term after her husband's death. It is not necessary in order to confer on her a preference; the preference of the terce depending not on this proceeding, but on the husband's sasine.¹³ But without the service her right does not transmit to her heir on her death.¹⁴

¹ In *Boyd v Hamilton* (p. 57, note 12), the Court held 'a purchaser entitled to retain a part of the price during the subsistence of the right of terce, which is a preferable claim.'

² Dirleton, indeed, seems to hold a contrary doctrine; but he is well refuted by Stewart. Dirleton and Stewart, *voce* Terce, p. 309; De Resignationibus, pp. 250-262.

³ *Montier v Baillie*, 1773, M. 15859.

⁴ Dirleton states it as a doubt, and Stewart resolves it in favour of the compriser, p. 309. And it was accordingly so decided, *Hunter v Douglas*, 28 Jan. 1715, M. 15850.

⁵ *Carlyle v Crs. of Easter Ogle*, 1725, M. 15851; Ersk. ii. 9. 46.

⁶ Thus, terce found due from lands absolutely disposed, but qualified by a backbond, deducting only the debt in the backbond. *Bartlet v Buchanan*, 21 Feb. 1811, 16 F. C. 200.

⁷ *Bartlet v Buchanan*, 27 Nov. 1812, 17 F. C. 14.

⁸ Balfour, xcv. § 13; Craig ii. 22. 27; Dirleton, *voce* Terce; Stair ii. 6. 16. *M. of Annandale v Scott*, 1711, M. 15848, determined on a hearing in presence.

⁹ *Carruthers v Johnson*, 1705, 1706, M. 15848. [*Bell v Halliday*, 8 Dec. 1825, 4 S. 289, where the widow was held entitled to compensation from the heir for lands sold by him before her terce lands were fixed.]

¹⁰ Ersk. ii. 9. 46.

¹¹ *Thomson v M'Culloch*, 1778, M. 434, Hailes 797. Here the estate yielded £240 of rent, but the husband had been infeft in no more than gave a terce of £40. The eldest son and heir, in an action for aliment, was held to plead no good defence in saying that, 'having a legal provision of terce, the widow was entitled to nothing more.' [*Blake v Bates*, 19 Dec. 1840, 3 D. 317; *Ferguson v Logan*, 1809, Hume 5; *Macgregor v Ballantine*, 1818, Hume 8.]

¹² This brief is directed to the sheriff to inquire and assign to the widow her reasonable third of the lands, etc., in which her husband died last vest and seised as of fee. The jury is thereupon impanelled to try, (1) whether the claimant was the lawful wife of the deceased, and (2) in what lands the husband died infeft as of fee. To these two questions an answer is given by the verdict, which specifies also the first term after the husband's death as that from which the widow's right is to commence. The sheriff subjoins a decree conformably to that verdict, and ordains extracts.

¹³ See *Boyd v Hamilton*, *supra*.

¹⁴ *M'Leish v Rennie*, 1826, 4 S. 485, N. E. 491. [See Stair ii. 6, 15; Ersk. ii. 9, 55. 'It has been well observed, that this decision would require to be reconsidered.' Prin. 1602. More's notes on Stair, p. 218. The case cited will now probably be followed.]

The appropriation of a particular portion of the estate to her is accomplished by the process of KENNING to the terce, which proceeds before the sheriff, and the widow's right is completed by delivery of earth and stone, and an instrument of possession.¹

The widow's claim, as against creditors selling the estate, may either be, 1. For a third share of the price of the lands, or of the sum if the subject be an heritable bond, to be secured to her in liferent; or, 2. For the actual possession, as a burden on the purchaser; or a third of the rents, or of the interests. In the former case, her service is a sufficient title to enable her to join in the conveyance to the purchaser. When she claims possession, she must be kenne'd to a particular portion of the estate, or at least that portion must be set aside for her by agreement or arbitration.

II. COURTESY, or CURIALITY.—The husband, as administrator of the goods in communion, has, JURE MARITI, a right during the marriage to draw the rents of his wife's heritable property of all descriptions. After her death, where there has been a living child, the husband's right is converted into a liferent, by the COURTESY of SCOTLAND, in all her heritage, as contradistinguished from conquest. These two rights may be considered separately.

1. The JUS MARITI is not a liferent in the husband, but the power of administering [61] the wife's estate, reaping the fruits, and taking the rents during the subsistence of the marriage. The husband's creditors have the power of attaching the rents of the wife's estate for his debts; but the principle on which this attachment proceeds seems very questionable. The husband's right is not, strictly speaking, prospective, but attaches in the moment of the existence of the rents, fruits, etc., as moveables falling under his *jus mariti*, which carries all moveables. On this ground, the proper diligence by creditors seems to be arrestment for affecting the particular rents. If the creditors, desirous of a more comprehensive diligence, should proceed to adjudge the *jus mariti*, they may find their diligence come into competition with arresting creditors, such adjudication being competent only as the diligence applicable to a right having *tractum futuri temporis*. On the validity of such an adjudication, however, our lawyers differ. Erskine seems to regard the adjudication as ineffectual.² Sir James Stewart thinks it will be good.³ Bankton also lays it down expressly, that the *jus mariti* may be adjudged;⁴ and in an argument by Lord Kaimes, after his method, in a question respecting the adjudication of an office, he seems to favour the same opinion.⁵ In one case, the Court held an adjudication of the husband's interest in the wife's lands to be good.⁶ And in a later case, where the question occurred in the shape of competition with arresting creditors, such adjudication was held an effectual form of attaching the rents, though, in the peculiar way in which the adjudication had in that case been led, it was bad.⁷

Where the *jus mariti* is excluded, the husband's creditors have no right to the accruing rents; nor will they be allowed to profit by an evasion of this exclusion, contrary to the nature of the settlement which confers the right.⁸

¹ [This does not enter the Register of Sasines. Jur. Styles i. 327 (4th ed.); Shaw's Bell's Com. 808, note.]

² See Ersk. i. 6. 12; Ersk. ii. 2. 6; Ersk. ii. 12. 6.

³ Ans. to Dirleton, *voce Jus Mariti*, p. 174.

⁴ Bankt. iii. 2. 38, vol. ii. p. 219.

⁵ Select Dec. p. 220.

⁶ *Menzies v Crs. of Gillespie*, 1761, M. 5974. There, an adjudication on a bond by husband and wife was found null, in so far as it proceeded on the wife's bond as being void; but was sustained on the husband's bond, in so far as it adjudged his interest in the rents during the marriage.

⁷ *Calder v Steel*, 19 Nov. 1818, F. C. Certain creditors of John Sommervill had adjudged his wife's estates as if they had belonged to the husband, with all right, title, etc. Subsequently to this, other creditors arrested the rents as they

fell due; and on a competition, the Court held, that although it was competent to adjudge the husband's interest in his wife's estate, the adjudication led in that case could not so affect the future rents of the wife's estate as to stand against the arrestments, and therefore preferred the arresting creditors.

⁸ *Palmer v M'Conochie*, 11 Dec. 1816, F. C. Lands were settled on a daughter in liferent for her liferent use alienarily, and her children in fee, excluding the *jus mariti*. The daughter and her husband made up titles, not in terms of the destination, but in simple and absolute terms, by precept of *clare constat*, and sold the lands for a perpetual heritable annuity, taken payable to her and her husband for his interest, and her heirs. The husband became insolvent, and his creditors claimed his life interest in the heritable annuity. The

2. The COURTESY or CURIALITY seems to be of the nature of a proper liferent in the husband. He takes the rents not merely by force of the *jus mariti*, which absorbs each accruing moveable as it vests in the wife, but he enjoys the estate and rents as a liferenter. This is, in truth, the counterpart of the Terce, though it differs from it in many essential points. It is indispensable to this right, 1. That there shall have been a living child born of the marriage, who is heir of the wife, or who, if surviving, would have been entitled to succeed:¹ 2. That the wife shall have succeeded to the subjects in question as heir either of line, or of tailzie, or of provision; in contradistinction to conquest, or property acquired [62] by purchase, donation, or other singular title.² It is not easy to see a good principle for this distinction; and some of our best lawyers (as Lord Pitfour and Lord Braxfield) have declared that they can discover no good reason for the distinction.³ But they all agree that it is a fixed point not to be touched. '*Servate terminos quos patres vestri posuere*,' is Lord Pitfour's answer to doubts suggested on the point. It is sufficient if the wife be *alioquin successura*, although she has her direct title as disponee: she is held as taking in such case *præceptione hæreditatis*.⁴ 3. It is requisite that the wife shall, at her death, have been infeft.⁵

As the courtesy comprehends only heritable subjects vested by infeftment in the wife, at her death it is, of course, liable to diminution by every burden vested by infeftment; and so far it resembles terce. The difference between the rights is, that while terce suffers diminution only by debts and burdens completed by infeftment, courtesy is accompanied by a general responsibility for all the wife's debts. But the husband has relief against the wife's executors for such of her debts as are personal.⁶

Courtesy vests *ipso jure*; the husband, without any form of law, merely continuing his possession. The criterion of preference is his wife's infeftment.

III. EXTENT AND EXERCISE OF THE LIFERENTER'S RIGHT.

In concluding this subject of liferent and fee, it may be observed, that in all cases, whether the liferent be reserved by one who was formerly full proprietor (which is the most favoured species of liferent); or be constituted by grant; or flow from the legal effect of marriage, as the courtesy or terce; the right of the liferenter is merely that of possession and ordinary administration during his own life.⁷ The only way in which creditors can avail themselves of it, is either, by the diligence proper to moveables, to attach the rents or fruits as they arise; or by adjudication, to get into possession; or at least to put themselves in a condition to apply for a sequestration under the common law during the liferenter's survivance; or, by judicial sale, to bring the liferent to market and convert it into money.

The general rule respecting the use and possession to which a liferenter is entitled, and of the benefit of which his creditors may by diligence avail themselves, is, that he may take every use which is possible, and requisite to the full enjoyment of the subject, without consuming the substance.⁸ He may, for example, reap the fruits, natural and industrial, but

Court held the husband's creditors not entitled to the annuity during his life.

¹ See Ersk. ii. 9. 53. [The test of viability is, that the child has been heard to cry. *Robertson v Robertson*, 22 Jan. 1833, 11 S. 297.]

² *Hodge v Frazer*, 1740, M. 3119, Elch. Husb. and Wife 13; *Paterson v Ord*, 1781, M. 3121, Hailes 879.

³ See 1 Hailes 458; 2 Hailes 879.

⁴ *Primrose v Crawford*, 1771, M. App. Courtesy 1, Hailes 458. [*Knight v Robertson*, 1798, M. 8815.]

⁵ [But it has been held sufficient, even if the infeftment be irregular, provided the defects in her title were such as might have been remedied in her lifetime. *Hamilton v Boswell*, 1716, M. 3117; *Fraser, P. and D. Rel. i. 639*; *Bell's Prin. 1606*.]

⁶ *Monteith v Monteith*, 1717, M. 3117. [The husband is liable for the interest only of his wife's personal debts to the extent of the rents accruing to him by his courtesy. See *Fraser, P. and D. Rel. i. 643*.]

⁷ Leases fall on death even of liferenter by reservation. *Frazer v Middleton*, 1794, M. 8256, 7849. [So also *feus. Redfearn v Maxwell*, 7 March 1816, F. C.]

The fiar and liferenter generally concur in granting a lease for an absolute term, which is useful to both, and beneficial for the country.

In England, where an estate for life is constituted, it is generally accompanied by a power to grant leases, in order to prevent the determination of the tenant's right on the death of the lessor.

⁸ [Thus, in a liferent of a mixed subject, such as a stocked

not destroy or alienate any part of the subject itself; and so, as minerals and coal are properly a part of the subject, not regenerating like fruits, a liferenter has no right to them without a special grant, even where they are opened and in a course of being worked.¹ But though this be the general rule, yet, wherever the minerals are let on lease, and it is [63] plainly the intention of the granter of a liferent that it should include the rents, this intention will be effectual.²

As to Woods, the liferenter has no right to cut those which do not spontaneously grow again, as Firs. The liferenter (unless a liferenter by reservation³) has no right to cut even *silvæ cæduæ*, when not laid out in annual cuttings or hagg, though in use to be cut and sold once in twenty-five or thirty years. And although the wood should become ripe for cutting during the liferent, he has right to cut only what may be necessary for the use of the estate,⁴ after making due communication to the fiar, and with the privilege to him of designating the trees fit to be cut.⁵ But copse-wood laid out in annual allotments for cutting is like a part of the regular profits of the land,⁶ and the liferenter may continue the cutting.

Liferenters may take coal, or stone, or timber, from going mines, quarries, and *silvæ cæduæ*, for the use of the estate under liferent.⁷

The liferenter may in competitions claim the value of his liferent, but he cannot be compelled to take the value instead of the actual enjoyment of the right.

IV.—EXTENT AND EXERCISE OF THE FIAR'S RIGHT.

The estate of the fiar can be available to creditors only under burden of the liferent. And the fiar and his creditors can demand no use which may disturb even the amenity of the liferenter's possession. They are not entitled to cut growing timber, even under that limitation.⁸

SECTION VI.

LIMITED ESTATES BY MEANS OF CONJUNCT RIGHTS.

CONJUNCT RIGHT, or common property among strangers, is established sometimes by accident, sometimes by design. Thus heirs-portioners succeed to land in equal shares *pro*

farm, the liferenter is bound to keep up the stock substantially of the same kind, value, and extent as when she got it; and her representatives are only liable for material differences. *Rogers v Scott*, 19 July 1867, 5 Macph. 1078.]

¹ Stair ii. 3. 74; Ersk. ii. 9. 57. A liferenter by marriage contract was held not entitled to let a lease of limestone rock, or to work it for sale. *Swinton v Duchess of Roxburgh*, 1 Feb. 1814, F. C. If the minerals be let on lease for a rent, it seems doubtful whether the yearly accruing rent is not the liferenter's. But the better opinion seems to be that it is not, such rent being in truth the conversion of the fiar's right. Yet see the question as to woods, above.

² So a general liferent of all heritable and moveable subjects held to include rents of a lease of minerals. *Waddel v Waddel*, 21 Jan. 1812, F. C. In a question of *bona fides* as to the rents or price of what had been worked, the Court sustained the *bona fides* of the liferenter as entitling her to keep those rents; but this was admitted with some difficulty. *D. of Roxburgh v Duchess*, 17 Feb. 1815, F. C.

³ See *Ferguson v Ferguson*, 1737, M. 8235; *Elchies, Liferenter*, No. 1.

⁴ Stair ii. 3. 74. *Lang v D. of Douglas*, 1752, M. 8256; *Elchies, Liferenter*, No. 6. And see the case of the Kinneil woods there referred to. [*Hamilton v Hamilton*, 21 May 1723, Rob. App. 43.]

⁵ *Dickson v Dickson*, 1823, 2 S. 152. [*Dingwall v Duff*, 4 Dec. 1833, 8 Mar. 1834, 12 S. 216, 541.]

⁶ Ersk. ii. 9. 58. See also *Ferguson v Ferguson*, *supra*.

The question solemnly tried in the case of *Seton of Touch*, where the Court had at first, without opposition, allowed the creditors of the liferenter to sell coppice-wood, which had not been cut for thirty years. But, on the fiar appearing, this decree was recalled, and the Court held the liferenter entitled only to cut wood so as to yield a constant yearly income. *Gray v Seton*, 1789, M. 8250, Hailes 1067. See *Dickson's* case, *supra*, note 5. [*Eiston v Eiston*, 10 June 1831, 9 S. 716; *M'Alister's Trs. v M'Alister*, 27 June 1851, 13 D. 1239.]

⁷ In the *Duchess of Roxburgh* case, 7 Jan. 1816, F. C., she was held entitled to work the lime for the use of the locality lands, and this although first opened by herself. This was acquiesced in.

⁸ See Ersk. ii. 9. 56. *Tait v Maitland*, 1825, 4 S. 247.

indiviso, and while the subjects continue undivided, are common proprietors. So, when persons engaged in a scheme of merchandise, or manufacture, purchase jointly the houses, lands, mines, ships, etc., which are necessary for carrying on their adventure, they are common proprietors of them.

[64] Property naturally divisible may, by succession or by purchase, become common, and by convention may be made indivisible; while that which is by nature indivisible may, in point of right, become separate instead of common property. For any of the joint proprietors may insist for the separation of his share, and dissolution of the community, unless the condition of his right, or his own agreement, or the occasion which led to the community, bar the proceeding. The right, in such cases, extends only to a share, after the debts to which the property is liable are discharged.

In order to bring common property to a division, application may be made to a court to distinguish the shares, if the subject be naturally capable of division.¹ If the subject be not naturally divisible, the object of the application is, to enforce one or other of the following alternatives:—Either that the defenders should dispose of their shares at a certain price, or take the pursuer's share at the same rate; or that the whole should be exposed to sale, and converted into the divisible form of a price or sum of money.²

The creditors of a joint proprietor, after using the proper diligence for acquiring to themselves the rights of their debtor, may take proceedings, as he himself might have done, for having the property divided or sold.

Sometimes an estate in land, or a bond for money, or even moveable property, is taken with a destination, out of which disputes arise relative to the interests of the parties as common or separate.

1. Where the conveyance is made simply 'to two or more persons and their heirs,' or to them 'in conjunct fee,' this forms a case of community or common property.

2. When an infeftment is granted (or a bond taken, or a lease made) to two or more, 'in conjunct fee and liferent, and to their heirs,' the right of each is not only a right *pro indiviso*, but is burdened with the eventual liferent of the other, and can be sold, burdened, or adjudged, only under that qualification.³

3. Where it is to two 'jointly, and the survivor and their heirs,' each has a fee which his debts will affect: the survivor becomes sole fiar;⁴ but the right thus bestowed seems to be of the nature of a mere destination. Either of the parties may onerously dispose of, or grant securities over, the subject, which will be effectual notwithstanding the destination to the other; or his creditors may adjudge it, and so defeat the right of the associate.

4. Where it is 'to two jointly, and the heirs of one of them,' the one less favoured is a bare liferenter: the other is fiar, and not only cannot be gratuitously disappointed, but cannot even by onerous conveyance be deprived of his right. Ersk. iii. 8. 35.

¹ For the case of heirs-portioners, the very old form of a Brieve of Division still subsists. It is directed to the sheriff: a jury is named under his authority to measure and lay off the shares, and by lot they are appropriated to those interested. The matter is commonly arranged extrajudicially by referees.

² Stair i. 7. 15, and 16. 4; Bankt. i. 8. 40; Ersk. iii. 3. 56. *Milligan v Barnhill*, 1782, M. 2486, Hailes 897. This was the case of a brewhouse, of which the original proprietor had sold one-half *pro indiviso*. The action was to enforce the alternative. *Defence*.—No man is to be compelled to part with his property except for the public benefit. The defence was repelled. [*Stewart v Simpson*, 26 Nov. 1835, 14 S. 72;

Bryden v Craig, 4 Feb. 1837, 15 S. 486; *Brock v Hamilton*, 27 Jan. 1852, 19 D. 701, note.]

A proceeding of this kind, for dividing the property of ships, is well known in Admiralty. The judge either orders a sale, or, on a judicial minute by the parties, adjudges the share of the party willing to sell to belong forthwith to the other.

³ *Brown*, 18 Nov. 1789, n. r. The rule here was applied to a lease, where the landlord's right, as assignee of one of the tenants, was restricted on the cedent's death; the other, as liferenter, acquiring right to the whole.

⁴ *Bisset v Walker*, 1799, M. App. Deathbed 2, where rights to land so taken were held to vest a fee in the survivor not requiring service to complete it.

CHAPTER II.

OF LEASEHOLD PROPERTY AS RESPONSIBLE FOR DEBT.

LEASEHOLD property is of great and growing importance. The farmer of modern times [65] is a person possessed of skill, industry, and capital, which he is willing to apply in the cultivation of land belonging to another, provided he have full assurance of the stability of his right during a period sufficient for bringing back the proper returns; and of indemnification for his improvements, if it should happen that the lease should be prematurely brought to a close.

In the contract of lease, on which this sort of property depends, as regulating the respective estates of the landlord and of the tenant, the landlord furnishes land, and all the necessary accompaniments of houses, offices, fences, and drains, to adapt it for residence and cultivation; while the tenant, on his part, furnishes the capital, industry, and skill which are necessary to make the land produce its increase. And this mutual contribution is made for the raising of a gross produce to be divided between the parties (after defraying necessary charges), in the largest proportions to each, which their respective means and situations afford—the highest rent to the landlord, the largest profit to the farmer; with security to each in the undisturbed enjoyment of his peculiar estate.

In contemplation of the events which are chiefly in view in the present inquiry, two questions suggest themselves as important to be settled: 1. What assurance does the law give to a tenant against the insolvency and creditors of his landlord; or against purchasers of the estate; or substitutes in a deed of entail? And, 2. What are the rights of which the creditors of the tenant may on his insolvency avail themselves?

SECTION I.

EFFECT OF LEASE AGAINST PURCHASERS OF THE LAND—AGAINST CREDITORS—AND AGAINST HEIRS OF ENTAIL.

The security of a tenant depends on a statute passed in the fifteenth century, whereby 'it is ordanit for the sauftie and favour of the puir pepil that labour the grunde, that they and all uthers that hes takyn or sal tak landis in tyme to cum fra lordis, and has termes and zieres thereof, that suppose the lord sel or analy their landes, that the takers sal remayn with thare tackis on to the ische of their termes, quhais hand at ever thai cum to, for sic lik male as thai tuk them of befor.'¹ It is settled in the construction of this statute: 1. That it applies to all leases, both agricultural and urban.² 2. That the lease must be in writing.³ 3. That there must be a rent stipulated,—this being both requisite in the nature of a lease, and taken for granted in the statute; but it is not necessary that the rent be an adequate consideration for the right to possess.⁴ 4. That the tenant must be in posses- [66] sion; this being the sasine of a lease, and the sole indication by which purchasers or creditors may with certainty know of the existence of the tenant's right.⁵ 5. That the lease must have a termination, or ish, as it is called in the books; and so, indeed, the Act itself declares, in describing the tenants to be protected as those 'who have terms and years,' and in declaring the protection to continue 'on to the ische of their terms.' The construction of law is, that a lease which does not express the term of endurance is, in so far as purchasers

¹ 1449, c. 17; 2 Act Parl. p. 35, c. 6.

⁴ Ersk ii. 6. 24.

² Ersk. ii. 6. 27. *Waddel v Brown*, 1794, M. 10309.

⁵ Stair iii. 2. 16. *Wallace v Campbell*, 1750, M. 2805, 2809;

³ *Skene*, 1637, M. 8401; *Kiell v Johnston's Tenants*, 16 July 1636, Durie 817; *Lieth v Stewart*, 1776, Hailes 174. Ersk. ii. 6. 25.

or creditors are concerned, granted only for a year; or, at furthest, for such time as is necessarily implied from the words of the lease.¹

SUBSECTION I.—COMPLETION OF THE TENANT'S RIGHT.

In competition with a singular successor in the lands, the contract gives no real right, but only action on the warrandice against the landlord.

1. A lease becomes a real right in the land, operating like an alienation, to the exclusion of singular successors, from the moment of the tenant attaining possession. By the Roman law, the rule was: '*Emptorem fundi necesse non est stare colono cui prior dominus locavit*.'² In Scotland, of old, it was common, in order to make the right of the tenant real upon the land, to insert a precept of sasine in the lease, so that the tenant might be infeft; and if the question had occurred at that time, whether a tenant, without having completed his real right by sasine, could have opposed an onerous purchaser, there could have been no doubt that his right would have been held merely personal, and consequently ineffectual. The statute has substituted possession for sasine, conferring on tenants in possession a real right; and under it, a tenant, not having attained and continued in possession, is, in competition with singular successors, purchasers, or creditors adjudgers of the landlord's estate, merely a personal creditor under the contract of location; just as, in a contract of sale of land, the vendee is a personal creditor prior to his sasine.³ Many cases are to be found in the books settling this question beyond all controversy.⁴ If, therefore, the creditors of the landlord adjudging, or a purchaser from the landlord, should find it for their benefit to refuse implement of the lease, the tenant, not being in possession, is entitled to no preference.⁵

2. One acquiring right, not from the landlord, but as assignee or as subtenant from the original tenant, completes his real right by possession, as the original tenant did; and thus having obtained his right, is secure against the landlord and his singular successors on the one hand, and against the cedent's creditors on the other hand, provided that assignees and subtenants are admitted by the original lease, or that, where they are excluded, the landlord makes no exception to the transference in question.

[67] 3. Where the original tenant has granted a sublease, and afterwards assigns his right as principal tenant, the assignment is truly of the surplus rent only; and uplifting the rents, or intimation to the subtenant, completes the real right.⁶

¹ *Redpath v White*, 1737, M. 15196; *Scott v Straitons*, 1771, M. 15200, Hailes 404. Held, indefinite ish good against heirs, ineffectual against purchasers.

² Cod. lib. iv. tit. 65, l. 9.

³ The analogy generally referred to in illustration of the effect of possession in completing the tenant's right is sasine. But there is this difference, that sasine once taken, continues to operate; possession taken and lost, is ineffectual.

⁴ So early as Lord Durie's time, we find a decision in which a competition had arisen between a tenant and an appriser. 1st, The Court was of opinion that the tenant, having obtained possession before the appriser had made his right real by infeftment, was clearly preferable, and the lease effectual. 2d, But it having turned out that the sasine of the appriser was taken before the tenant had entered to the possession, the Court preferred the appriser. *Wallace v Harvey*, 1627, M. 67.

In this and the subsequent cases, it is proper to observe that a question of considerable importance in competitions is included, viz. whether creditors holding heritable securities by infeftment on heritable bonds, or by adjudications, are to be considered as having a right exclusive of a tenant; or whether

this right is not rather of the nature of a burden, leaving the proprietor's right and administration, to the effect of giving possession to the tenant, unimpaired. But this is a question to be treated afterwards.

⁵ [See *M'Lean v Cameron*, 1796, 3 Pat. 474.]

⁶ This doctrine is first laid down by Lord Kilkerran, in reporting the case of *Wallace v Campbell*, M. 2809 (above, p. 63, note 5). He says, 'that in a case where the assignee cannot attain the actual possession, the civil possession, by uplifting the rents, comes in its place; or if such assignee should be considered only as an assignee to the maills and duties during the currency of the tack, it must, as other assignments, be completed by intimation to the tenant.'

This principle ruled the case of *Sime's Tr. v Fidler*, 1806, 13 F. C. 554. Sime borrowed from Fidler £1000, and gave bond for it with a subset of a farm which he held from Lord Arbuthnot (under burden of a previous subset to Davidson), and an assignment to the surplus rent payable by Davidson. Fidler uplifted the surplus rents for several years; afterwards Sime became bankrupt, and the trustee on his sequestrated estate sold the lease. Fidler then claimed the balance of his

4. Where a tenant not prohibited has assigned, the assignation is not effectually completed by intimation to the landlord without possession.¹ But the possession of the assignee may be civil as well as natural; and therefore, if *his* subtenant hold the lands under a written lease, it will be enough.² The only difficulty is the ostensible ownership from continued possession where the cedent is subtenant. This would be fatal in Moveables; but the tenant's right in Land has two points—written title and possession—without the union of which there is no legal ground of credit or of reputed ownership.

5. In assigning a sublease, intimation to the principal tenant is not sufficient.³

6. It has been questioned whether a tenant already in possession, receiving a pro- [68] rogation of his lease beyond the term originally stipulated, is to be held, while the original term is unexpired, as in possession of a real right, or only as a personal creditor, with respect to the prorogated term. This question has been decided in two cases against the tenant, and on just principles.⁴

debt unextinguished, and the trustee resisted this, and maintained that no preference was constituted. The question was, whether payment of the rents by the subtenant to the creditor holding this right completed the assignation to the surplus rent, so as to raise a preference. Lord Glenlee found Fidler 'had a preferable right to the tack in question, and the proceeds thereof, to the extent of the balance of debt due to him.' Lord President Campbell said: There have been sundry questions as to completing assignations of tacks, and it was settled in Hardie Douglas's case that possession is the proper course. Now here is all the possession which the case admits of, viz. possession of the subrents. Lord Hermand, same view. Lord Newton had always a difficulty about completing real lien on a lease, without putting creditor into possession.—Doubt whether there be possession here. Lord Armadale agreed with the President. Petition refused.

¹ The case of *Yeoman v Elliot and Foster*, 2 Feb. 1813, 17 F. C. 149, is reported so as to give an impression that the Court held mere intimation to the landlord, and entry in his rental book of the assignee's name, to be sufficient to complete the transference. The following observations on that case in the former edition of this work, drew the attention of the Court to the subject:—

'It deserves to be reconsidered whether intimation ever is a completion of an assignation, except when it is made to a custodier of moveables, converting him thenceforward into a custodier for the assignee, or to a debtor discharging the claim of the former creditor, and substituting the assignee in his place. So the assignation of a lease, where there is a sublease, is well completed by intimation to the subtenant, because it is truly only an assignation of rents, and the subtenant is the debtor. But there seem to be no *termini habiles* for intimation to the landlord, to the effect of transferring a lease. And the argument that otherwise there are no means of borrowing money on the security of a lease, is fit only for the Legislature.'

In the subsequent case of *Brock v Cabell* (see next note), the judges of the Second Division denied Yeoman's case as an authority for the above doctrine, and referred to the words of the Lord Ordinary's interlocutor to show that the decision went on the sublease and possession, as the only possession which circumstances admitted, having been held as good civil possession by the assignee.

² *Brock v Cabell*, 1822, 2 S. 52, N. E. 46. Tenants of a bleachfield borrowed money from the Glasgow Bank, on an

assignment to their lease *ex facie* absolute. The Bank intimated their assignation to the landlord, and were to give a sublease to the debtors, on which they might continue their possession; but the sublease was not authenticated, nor did it specify any rent. The Court held the assignation incomplete to bar the general creditors of Newbigging and Company, and this chiefly on the invalidity of the sublease to sustain the possession as for the assignees, and under their authority.

See *Russell v L. Breadalbane*, 1822, 2 S. 62, N. E. 54, under appeal.

³ Such an assignation was loosely supposed to have been held as completed by intimation to the principal tenant in *Hardie Douglas v Hay's Crs.*, 1794, M. 2802. But no such judgment was pronounced; and in *Yeoman v Elliot and Foster*, 2 Feb. 1813, F. C., that case was said by Lord Balgray to be incorrectly reported.

⁴ 1st, In the case of *L. Cranstoun's Crs. v Scott*, where the new lease was granted three years before the expiration of the possession under the old lease, the Court found 'that the tack was not good against creditors, in respect the tacksman did not attain possession of the lands set, by virtue of the tack quarrelled, prior to the dates of the infestments in favour of the real creditors, etc.; and therefore sustained the reasons of reduction in so far as concerned the interest of the said creditors, reserving action to the said Thomas Scott against the Lord Cranstoun upon the personal obligation.' 1757, M. 15218.

2d, In the case of the *Crs. of Douglas of Dornock v Carlyles*, 1757, M. 15219, where the tenant, holding a lease for twenty-one years, obtained a prorogation of it from year to year till certain sums were paid to the tenant, the original term expired; and during one of the years of the prorogation, the question arose, whether the tenant's possession was effectual to make the prorogation for the subsequent years good against the creditors. The Court found that it was not.

There is one case apparently establishing an opposite doctrine from that of the above cases, but the decision proceeded not upon the simple question. The competition was between a tacksman and a purchaser; but, 1st, The purchaser had been informed of the existence of the lease by the seller; and 2d, The sale was made on deathbed, without consent of the heir, who, being liable in the obligation of warrandice in the lease, was by such a sale, if held good against the tenant, materially injured; and upon this ground the Court proceeded. *Richard v Lindsay*, 1725, M. 15217.

In concluding on this point, it may be observed, that the difficulty in completing the rights of assignees of leasehold property is chiefly felt in those cases where it is desirable to give a power of borrowing money on the security of the tenant's right. The improvement of the country, and the safety of manufacturers, frequently come to depend on this resource; and although Courts have, in the above cases, gone as far as the principles of law will allow, in order to support the credit and resources of the tenantry, this is not without considerable danger of another kind, since it is not possible, under such ambiguous and secret transactions, for general creditors to know how far their debtor's leasehold property is unburdened. It has been proposed to facilitate these operations, with due attention to the general credit of tenantry, by introducing a record for exhibiting, as in feudal property, the state of leasehold rights. Whether this proposal shall be entertained by the Legislature, and with what precautions, I may be able perhaps to state in the Appendix to this work.¹

SUBSECTION II.—DURATION OF THE LEASE.

A lease must have a definite term of duration to be effectual against purchasers of the land, or the creditors of the landlord adjudging. But it is a question of no easy solution, to what length of time such term may be prolonged. In many parts of the country, landholders have no better right than a lease for a great number of years; and villas and pleasure-grounds are frequently laid out in reliance on leases of such endurance as may seem to give to the possessor at least the full enjoyment during his life. Such leases are effectual against the granters and their heirs; but their efficacy against singular successors has been doubted where the granter holds his land under prohibitions against alienation.

1. When no prohibition exists against alienation, or the granting of long leases, it does not appear on what ground of law a stranger purchaser or creditor can object to the efficacy of a lease, however long, provided, in terms of the statute, the lease be certain. It is a sort of [69] land right, different from that which is enjoyed under a feudal grant, but still a right of a legitimate kind, clearly effectual against the heirs of the granter; and of which, by possession and the written lease, third parties may be as well aware as if it were recorded in the Register of Sasines. Whether, in policy, there may be any reason to discountenance the creation of a sort of middle right, which may lead in the end to a new constitution of land rights in Scotland, is a question which, in the present inquiry, it would be out of place to consider. It has also been questioned, whether an unlimited proprietor can, by leases, affect the future and contingent right of subsequent purchasers or creditors? But there is no case in which any such limitation has been established, as to deny efficacy to a long lease. Doubts have been thrown out occasionally, and an opinion in one case given, unfavourable to the effect of a long lease against a purchaser; but nothing amounting to a decision has ever been pronounced on the point.²

2. Where there is a prohibition, however, in a deed of entail properly constituted, it will be effectual to hinder a lease of long endurance.

First, Even where the prohibition is general against ALIENATION, it has been held that this extends to long leases,³ as being a species of alienation; and this in questions with inhibitors, in cases of forfeiture, and under the law of deathbed. In the discussions on this subject as applicable to leases, the only reconciling principle which, in the House of Lords,

¹ See 20 and 21 Vict. c. 26; *infra*, p. 78.

² *Houston's* case in ranking of *Jordanhill*, 1752, *Kilk.* 395. The case of *Fraser of Belladrum*, 1758, *M.* 15196, was not such a decision. If the Court of Session proceeded on such ground, it certainly was not so held in the House of Lords. In the case of *L. Hopetoun*, 17 Nov. 1763, there was no lease

for more than nineteen years, but merely an obligation to renew every nineteen years.

³ See *Leslie v Orme*, 1779, *M.* 15530, but especially the statement of the case after a careful investigation into Lord Thurlow's papers, by Lord Redesdale, 2 *Dow* 112, and again 1 *Bligh* 510.

appeared amidst the difficulties fit to be adopted, was to hold all leases as alienations, unless in so far as may be necessary for reaping the full profits of the estate; and to inquire, with a view to the application of the prohibition, what is fairly to be deemed within the necessary or useful power of administration, and so in legal construction to be conceded to heirs in possession, for the enlargement of their powers against the strict words of such prohibitions, as if a clause of power was introduced, giving authority to grant leases necessary for good cultivation.¹ This general principle still leaves the question, What shall be taken as the proper criterion by which to determine what is within the implied power?

On this subject it may be observed: 1. That a lease for a very long term of endurance, though at an adequate rent, has been held an alienation.² 2. That in the case where a lease of a thousand years was questioned, there was no occasion to determine the point, as the lease was objectionable on another ground.³ A lease for a hundred years has been considered as an alienation: a lease of ninety-seven years was held to be so in the Queensberry cases under the Neidpath entail:⁴ afterwards, a lease for ninety-nine years in the Bal- [70] bedie case;⁵ and one for fifty-seven years in the case of the March leases. Perhaps, according to the principle finally assumed, a lease of nineteen years is alone to be relied on under a general clause prohibiting alienation; although a lease for twenty-one years seemed on one occasion incidentally to be supposed effectual. Leases for thirty-one years seem to be effectual only as improving leases under the 10 Geo. III. c. 51.⁶

Secondly, But it has been much questioned, whether, under a prohibition to DISPONE, the same sort of exception can be taken as under a prohibition to alienate. Here the great ruling principle has, in all the cases decided by the Court of Session, prevailed with our judges, that no prohibition which is to limit the powers of the heir of entail as a fiar can be admitted by inference or implication;⁷ but a distinction has been taken in the House of Lords, holding the general doctrine established by the uniform course of entail law in Scotland, only to bar an inference from one prohibition to another, but not to exclude a rational construction of the prohibitory clause; which must be held effectual, if clear and intelligible. Both in this way, and also on the force of the authorities respecting the use of the word Dispone, that word has received a construction equivalent to alienation.⁸

3. Where a lease has been granted for a term of years beyond that which is permitted by the entail, it would rather seem that, on this sole objection, the lease would be reducible only in so far as the power had been exceeded;⁹ and, at all events, where a lease is granted *nominally* for a longer term, but of which no more is to run *after* the date of the lease than the permitted term, it is good.¹⁰

¹ This principle, after many varying determinations in simple cases, and much uncertainty, was finally adopted in the Queensberry cases. And the principles of the doctrine will be found largely explained and illustrated by Lord Chancellor Eldon, in the reports of those cases. See *D. of Queensberry's Executors v D. of Buccleuch*, 7 March 1816, F. C.; as in H. L. 10 July 1817, 5 Dow 293. Again, same case, 5 Feb. 1818, F. C.; in H. L. 2 July 1819, 1 Bligh 339; and see 6 Pat. 466, 819.

² *D. of Queensberry's Trs. v L. Wemyss* (Neidpath entail), decided in H. L. 10 Dec. 1813, 2 Dow 90, 5 Pat. 758; as explained in deciding the Roxburgh feus, *ib.* 206.

³ *Turner v Turner*, in H. L. 1 July 1812, 1 Dow 423. See *L. Elgin v Wellwood*, on a special permissive clause. 1 Sh. App. Ca. 44.

⁴ See above, note 1.

⁵ *Henderson and Brown v Sir John Malcolm*, in H. L. 18 May 1814, 2 Dow 285. See also *Sir W. Elliot v Potts*, 14 March 1821, 1 Sh. App. Ca. 16 and 89.

⁶ *Stirling v Walker*, 20 Feb. 1821, F. C.; *Sir M. Malcolm v Bardner*, 1823, 2 S. 410.

⁷ *Sir W. Elliot of Stobbs v Potts*, 1814, 17 F. C. 588; *Hamilton v M'Dowal*, 1815, 18 F. C. 302; *D. of Queensberry's Executors v D. of Buccleuch*, 1818, 19 F. C. 466.

⁸ In the case of *Elliot v Potts*, 14 March 1821, 1 Sh. App. Ca. 16 and 89; and of the *Buccleuch Leases*, July 1819, 1 Bligh 339, 6 Pat. 466; *Colquhoun Stirling v Walker*, 20 Feb. 1821, F. C.

⁹ The only case in which the question has been discussed, was one in which the lease was greatly objectionable on many grounds, and especially as being a lease of the whole entailed estate. The lease was reduced entirely, both in *Mordaunt v Innes*, 9 March 1819, affirmed; and in the *D. of Gordon v Innes*, 1822, 2 S. 32, N. E. 28. But the opinions of the Court seem at least to leave the question open, in a case where the sole objection was length of endurance.

See *Sir M. Malcolm v Bardner*, 1823, 2 S. 410.

¹⁰ *Agnew v M'Niven*, 23 June 1813, F. C.

Where the entail contains a general prohibition against alienation, or a restraint on the power of leasing, there is commonly added, as a regulator of that prohibition, a clause of power to let leases beyond the ordinary duration on particular conditions. But there is also a statute conferring powers; and to a certain extent it controls all such prohibitions, originating frequently in the shortsightedness of individuals, and imposing restraints hostile to the improvement of the country. About half a century ago, the restraints of deeds of entail pressed so heavily on agricultural improvement, that a statute was passed,¹ conferring certain powers on heirs of entail in possession, however strictly fettered by the deed, enabling them to grant leases for improvement under certain limitations. The leasing powers conferred by this Act are: 1. Power to grant leases for thirty-one years; or for fourteen years [71] and a life; or for two existing lives, provided the tenant shall be taken bound to enclose certain proportions of the farm, within certain terms, and the whole within the period of the lease. And, 2. Power to grant, for the purpose of building, leases for any number of years, not exceeding ninety-nine, provided no more be leased to one person than five acres; and that the lease shall be voidable, if not built on to a certain extent. Two restraints, however, are imposed: one, that the statute shall not authorize a lease of the manor-place, offices, garden, etc.; another, that the rent shall not be under those of former leases, and without grassum, foregift, or benefit direct or indirect.

SUBSECTION III.—OF RENT.

The rent payable to the landlord forms an important object of inquiry, both when considered as a part of the estate of the landlord attachable by his creditors, and when considered as a burden on the right of the tenant. Rent is that portion of the produce of lands, or its value, which remains for the landlord, after all the outgoings of cultivation are defrayed, including the profits of the capital employed, according to the ordinary rate of profit of agricultural stock. Loosely speaking, but not correctly, rent also is held to include the remuneration for capital expended on houses, drains, etc. Rent ought to alter with the value of the produce of which it is a part; and this is sometimes thought to be sufficiently studied in stipulating a corn rent. But it is so only when a rateable proportion is taken. While the rent is fixed, though payable in corn, the produce of the farm, it bears hardest on the tenant when he is least able for it. In bad years his produce may be below the average, and he must buy corn with which to pay his rent. The landlord, on the other hand, suffers in cheap years, when the rent falls below his necessities. To do justice to both,—to give to the tenant, on the one hand, that confidence and independence which are necessary in order to encourage improvement, steady industry, and enterprise; and on the other, to guard the landlord from the sudden changes in the value of farm produce, and thus to banish uncertainty and the necessity for arbitrary and humiliating interferences in the way of occasional abatements,—the matter should be so regulated, that the yearly rent, or a considerable part of it, should be ruled by the fiars of such grain or other produce as the farm is likely to yield, and in the proportions likely to be raised; and a maximum and minimum should be fixed, above or below which the augmentation of the money conversion, or its diminution, should not go.²

In contemplation of insolvency, it is a material question whether it be competent, as against purchasers or creditors, or heirs of entail, to stipulate that the rent shall be absorbed

¹ 10 Geo. III. c. 51: An Act 'to encourage the Improvement of Lands in Scotland, under Settlements of strict Entail.' [Amended by 11 and 12 Vict. c. 36, and 31 and 32 Vict. c. 84.]

² These principles have guided many of the judicious arrangements framed for extensive estates by Dr. Coventry,

professor of agriculture, and in the appendix to Mr. Robert Bell's Treatise on Leases. In the last edition, his son has collected some very valuable practical information and precedents of subleases. See vol. ii. p. 187. [A grain rent may be converted into a money rent by the actings of the parties. *Baillie v Fraser*, 1853, 15 D. 747.]

in the payment of debt; or to reduce it to an inconsiderable sum, and take a grassum at the beginning of the lease?

I. STIPULATED RETENTION OF RENT.—At one time leases seemed to have been much used as securities for loans of money; and many decisions relative to their effect are to be found in the books between the end of the sixteenth and the beginning of the eighteenth centuries: after which time the use of this sort of security probably yielded to the prevailing form of securities by heritable bond. It would appear,—

First, That a lease to subsist till a debt shall be paid, is not effectual against singular successors, as all leases must have a certain termination.¹ An exception was at one time admitted to this rule, where there was a surplus rent over the interest, by the applica- [72] tion of which the debt would some time or other be extinguished, so as to bring the lease to an end.² But this was altered, and the lease held to be ineffectual, the termination of the lease being uncertain.³

Second, That although it is competent to a tenant to retain the rents, in order to enforce performance of the landlord's counter-obligations contained in the lease,⁴ a tenant cannot acquire, either by separate bond or contract, or even by a stipulation in the lease itself, a right to retain the rents against singular successors, in extinction of debt or payment of interest.⁵

Third, That a lease may indirectly be so arranged as to afford a good security to the tenant for the interest of a loan, or even for the principal. The rent may be fixed arbitrarily at any sum which the parties choose to appoint; nor have purchasers or creditors any ground in law for insisting that the tenant shall pay a fair and adequate rent. Coming in the place of the landlord, they can take only such right as he has by his contract reserved; unless they can object to that contract on the bankrupt laws, or as against a prohibition to alienate. The parties may, on calculation, settle a rent, and fix a period, which will afford to the lender full security for his interest, and a gradual extinction of his principal.

Fourth, That as the tenant must be in possession upon the lease, in order to make his right real, he can claim no preference on a prorogation of which the term has not commenced.⁶

II. OF GRASSUMS.—The power of a proprietor to let leases at low annual rents, taking grassums, does not appear to be under any restraint, either in relation to the right of a subsequent purchaser; nor even in relation to substitutes in an entail, unless the entail contain special limitations of the power, or prohibitions against alienation.

1. As to PURCHASERS, the Act 1449, c. 17, not only contains no limitation on the power to fix the rent, but seems to sanction the lease as effectual against third parties, whatever may have been the rent stipulated, 'for sik like male as thai tuk them of befoir.' The only limitation is, that it shall not be a rent entirely elusory; which seems to be a fair construction of the statute, as applying expressly and giving efficacy only to leases having an *ish* and a *male*.⁷

2. As to LANDS UNDER ENTAIL. It is in this situation that the practice of taking

¹ Thomson v Reed, 1664, M. 15239; Peacock v Lauder, 1674, M. 15244; Douglas of Dornock's Crs., 1757, M. 15219.

² Oliphant v Currie, 1677, M. 15245; Cockburn, etc. v Sampson, 1698, M. 15247.

³ Factor on Auchinbreck v M'Lauchlan, 1748, Kilk. 534; Elchies, Tack, No. 14. Robertson v Spalding, 1754; Elchies, Removing, No. 8, notes, p. 405.

⁴ Walpole and Alison v M. Beaumont, 1780, M. 15249; Morrison v Pattullo, 1787, M. 10425; Bell v Lamont, 14 June 1814, F. C. [But the tenant's claims must not be illiquid, and more favour is shown to the plea at the end than during the currency of the lease. See Hill v Gordon, 1834, 13 S. 88; M'Rae v M'Pherson, 1843, 6 D. 302; Dickson v Porteous, 1852, 15 D. 1; Sprott v Morrison, 1853, 15 D. 376; Dods v Fortune, 1854, 16 D. 478; Loundes v Buchanan, 1854, 17 D. 63.]

⁵ Stair ii. 9. 29. Ross, 1626, Durie 266, where an *opinion* given by the Court, that a discharge of the rent to the tenant, in extinction of debt, would not avail against singular successors. Ersk. ii. 6. 29. M'Tavish v M'Lachlan, 1748, M. 1736; L. Cranstoun's Crs. v Scott, 1757, M. 15218. Here there were two questions: 1. Whether a power given by a separate deed to retain rents for relief of obligations, undertaken for the landlord, was effectual against creditors? and, 2. Whether a lease prorogating a former, and containing a similar power, was effectual, no possession having as yet followed? The power to retain was held not effectual after sequestration; as to the others, see above, p. 65, note 4.

⁶ L. Cranstoun's Crs. v Scott, 1757, M. 15218; Douglas of Dornock's Crs. v Carlyles, 1757, M. 15219.

⁷ Ersk. Prin. ii. 6. 10; Ersk. ii. 6. 27; Bankt. ii. 9. 1.

grassums has most prevailed. Under strict entails in Scotland, the proprietor had in [73] general such slender means of providing for his family, his widow and children, that it became a very common practice to raise a fund by means of grassums taken from the tenants with great diminution of the periodical rent. This, especially when combined with a power of granting leases of long duration, threatened the utter impoverishment of heirs of entail; but it has now been placed, by the determinations of the House of Lords, on the true footing, and a great ruling principle applied to guide the determination of the several cases. Three cases may occur:—

1. If there be no prohibition to diminish the rental, or to alienate, the same rule must apply as to the case of purchasers: there can be no objection under the entail taken against a lease, whatever rent, not elusory, may be stipulated.

2. If there be a prohibition to alienate, although there may not seem to be much danger of evil arising from the diminution of the rents in a lease of moderate duration, yet it is an important question, and of some difficulty in construction, whether it be *lawful* to cast the transaction in a form which will deprive the succeeding heir of any part of the proper rent, which is the fair produce of the estate; so as to bring, by anticipation, into the pocket of the granter of the lease what ought to have been spread over all the years of it as a rent? Something of this has been mingled in the argument in most of the cases of leases of long duration, as tending to make up the character of alienation. But applied strictly to the question of grassums, the principle adopted is, that the heir of entail in possession has no right to take to himself a greater benefit from the estate than he leaves to be reaped by his successors, whether that benefit be derived from an anticipation of rent in the shape of grassum; or from varying rents, excessive at first and inconsiderable afterwards; or in whatever shape of bonus, or otherwise, it may be taken.¹

3. In order to counteract the general prohibition against alienation, an express power is frequently granted to give leases, under condition of not diminishing the rental. If the prohibition be against diminution of the rental *generally*, it seems to be considered as having reference to the state of the rental under the last lease; so that any augmentation which circumstances may admit of, may be taken as grassum. But a prohibition to let leases below the *just rent or avail for the time*, is a bar to the taking of grassums, as forming in all cases truly deductions from the proper rent. This, after a series of the most learned and ingenious arguments which perhaps ever distinguished the discussion of any legal difficulty, the House of Lords have finally settled.²

Wherever the prohibition against diminution is fixed expressly to certain limits, it is sufficient if those limits be adhered to. The power of the heir in possession is unrestricted beyond that point; and he may take grassums, and dispose of them at his will, in so far as there is any augmentation beyond the limits assigned.³

SUBSECTION IV.—OF MELIORATIONS AND IMPROVEMENTS.

The improvements and operations by which the productive powers of the soil are aided, or the necessary facilities to cultivation afforded, properly are incumbent on the [74] landlord, to be replaced by an annual payment on the part of the tenant. The yearly return made by the tenant for such improvements, whether of drains, fences, farm offices,

¹ See this question of grassums, in all its relations, largely discussed in the House of Lords, and the above stated principles settled in the Queensberry leases, 1 Bligh 339–534, 5 Dow 297. See also *D. of Hamilton v Scott Waring*, 21 May 1816, as decided in H. L., 2 Bligh 196.

² See the Queensberry cases, *ut supra*, note 1.

³ *Wellwood v Wellwood*, 1823, 2 S. 475, N. E. 423. Here the restraint was against letting tacks 'at a smaller yearly rent than

3 bolls of oatmeal, at 8 stone weight per boll, for each acre so to be set.' But this allowed the heir in possession to take a grassum of £12,000 on a lease for 999 years. This was held good against the heirs of entail. An heir of entail claiming the bond for £12,000, as truly rent, which ought to be reconverted into rent for the benefit of the substitutes, it was held a bond good to the heir of entail to whom it was granted, and his heirs.

See *E. of Elgin v Wellwood*, 1821, 1 Sh. App. Ca. 44.

etc., is not, strictly speaking, rent, as already observed. But it may appear that, as such return is paid to the landlord along with the rent, a part at least of the capital expended on improvements ought to form a burden on those who successively derive the benefit.

1. It has been fixed, however, that an heir of entail, under restraints against alienation and the contraction of debt, is not at common law entitled to burden the estate, or succeeding heirs, with the expense of improvements.¹ But the same statute which authorized the granting of improving leases, gave also power to heirs of entail to burden the succeeding heirs of entail to a certain extent with this expense. This was the statute 10 Geo. III. c. 51. By sec. 9 et seq. of this Act, on observing certain precautions, giving certain notices, and lodging with the sheriff-clerk the vouchers of payment, the sums expended on improvements are allowed to form a burden on the succeeding heirs, to the extent of certain proportions of the rents of the estate. But, 1. The precautions enjoined must be observed with the most scrupulous accuracy, else the benefit of the Act is forfeited, and the rule of the common law will guide the decision. 2. The sum expended will not ground any adjudication against the entailed estate. And, 3. While it forms a debt personal against the heir, it is declared by sec. 15 that this claim shall be preferable over every other creditor of the heir in possession, in competition for the rents.

2. Where there is no entail, expense laid out by the proprietor can ground no claim against singular successors; but where the tenant is to make the improvements, and the lease bears that he shall receive a consideration at the close of the lease, this will be effectual against singular successors.²

SUBSECTION V.—EFFECT OF LOCAL CUSTOM.

But although a lease in writing, containing such terms clearly expressed, will be deemed effectual against purchasers and creditors, how shall particular claims and rights of the tenant, arising not under the written lease, nor from the general law, but from local custom, be disposed of? If, for example, it should be the custom of a particular district that the tenant may remove the houses on the farm, or all that can be removed, and claim the value of what he leaves, will that affect a singular successor? In a case of this sort, the Court, distinguishing between a local usage and a verbal bargain or understanding as to a particular farm, held the stranger bound by the former.³ But serious doubts have been raised to what extent conditions implied from usage can be sanctioned? In the House of Lords, after very ample discussion, on two occasions, relative to the disposal⁴ of the straw [75] of the way-going crop, the lease was held as the rule of the contract; not to be extended by any *implied* assent to local usages.

SECTION II.

OF THE TENANT'S ESTATE, AS AVAILABL TO CREDITORS OR ASSIGNEES.

The permanency of the tenant's estate is of great consequence to the agricultural interests of Scotland; and absolute security on this point is the only certain encourager of

¹ *Dillon v Campbell* of Blitheswood, 1780, M. 15432; *Farquhar v Webster*, 1792, Bell's Oct. Ca. 207; *Taylor v Bethune*, 1792, Bell's Oct. Ca. 214; *Todd and Moncrieff v Skene*, 1823, 2 S. 113, N. E. 104, aff. 26 June 1825, 1 W. and S. 217. [*Ross v Hawkins*, 1848, 10 D. 1288; *Mackenzie v Mackenzie*, 1849, 11 D. 596.]

² *Arbuthnot v Colquhoun*, 1772, M. 10424; *Maxwell Morri-*

son v Patullo, 1787, M. 10425. [Such obligations also transmit against the landlord's general representatives. *M'Gillivray's Exrs. v Masson*, 1857, 19 D. 1099.]

³ *Bell v Lamont*, 14 June 1814, F. C.

⁴ *D. of Roxburgh v Robertson*, 28 June 1816, F. C., revd. in H. L. 2 Bligh 156; *Gordon v Robertson*, 1825, 3 S. 656, N. E. 458, revd. in H. L. 19 May 1826, 1 W. and S. p. 115;

honest industry, spirited exertion, and the fearless application of capital in the cultivation of the land. While yet tenants were entirely dependent on the will of their landlords for the continuance of their possession, no system of cultivation could be followed. The rotation of crops, of which the average produce is necessary to indemnify the original outlay, could not be depended on, and was not studied or understood. The science and art of agriculture may almost be said to commence with the permanence given to the right of the tenant; and although this department of the law of Scotland has not yet arrived at perfection—the *delectus personæ* implied in leases being still a cause of great uncertainty—perhaps, on the whole, considering the intimate relation of landlord and tenant, as much relaxation has been given to the landlord's privilege as well can be expected in a matter so nearly connected with the comfort of his own possession of his lands.

LIMITATION OF TENANT'S ESTATE BY DELECTUS PERSONÆ.—By the law of Scotland, the landlord is held to select his tenant with an especial view to personal qualifications. In this *delectus personæ* he is considered as having two objects in view: 1. To procure good security for his rent; and, 2. To be assured of the skill and fidelity of his tenant as an agriculturist, and of his peaceable disposition as a neighbour and a tenant.

In Scotland as well as in England, a lease is regarded as an absolute estate for years. But in England this has more effect in colouring the whole doctrine of the law relative to the assignable nature of a lease than in Scotland. In England, so absolute is the tenant's right, that his creditors may take the lease under a commission of bankruptcy, although it should bear an express provision against the tenant's assigning without the landlord's consent.¹ The landlord's remedy is, by stipulating for re-entry on the tenant committing an act of bankruptcy; or that the farm shall be actually occupied by the tenant, and that he shall actually hold the lease, and 'depart with no part of it.'²

By the law of Scotland, the bias inclines the other way. Instead of the lease being held in the general case to be assignable, it is considered as naturally exclusive of assignees, in being granted with a particular respect to the personal qualities of the tenant; insomuch that it is necessary to have a declared, or at least an implied consent, that the creditors [76] shall have right to enter upon the lease, or to sell it, in order to entitle them to do so.

1. **HEIRS.**—Originally, in Scotland, the *delectus personæ* implied in leases was so strong, and the leases so strictly personal, that the right was not held descendible even to HEIRS, unless they were expressly mentioned in the lease. But the whole spirit of the law, and the nature of the connection between proprietors and their vassals and tenants, is now changed, and a freer interpretation of the contract of lease has been introduced. Heirs now succeed in leases without any special mention of them.³

2. **ASSIGNEES.**—In agricultural leases of ordinary duration, the connection which subsists between landlord and tenant, and the annoyance which a landlord may suffer from a disagreeable neighbour, still continue the *delectus personæ* so strongly as to require an express destination to ASSIGNEES, in order to make effectual a voluntary transference without consent of the landlord.⁴ The more slender connection which subsists between the landlord and the

Ogilvy v Gruar, 1770, Hailes 364. Bell on Leases i. 331, note. [See Hunter v Miller, 1863, 1 Macph. H. L. 49, 4 Macq. 560.]

¹ This settled in Doe v Carter, 8 Term. Rep. 57, where the whole question is amply discussed. This determination was approved of by the Master of the Rolls in Weatherall v Gearing, 12 Vesey 513; and very recently the same doctrine delivered in King's Bench, Doe v Bevan, 1815, 3 Maule and Selwyn 358. The principle of these cases is so narrow as this, that the statute execution of a commission of bankruptcy is no breach of covenant by deed of the tenant, to which alone the stipulation applies, or that the exclusion of assignees is not the exclusion of assignees by law.

² See cases in preceding note, and Doe v Clark, 8 East. 185.

³ Ersk. ii. 6. 31.

⁴ Erskine has said that marriage is a virtual or legal assignation of a lease, and that as the marriage is indissoluble, the lease falls: Ersk. ii. 6. 31. But this is not law. The marriage is not an assignation of a lease. As heritable property, it does not fall under the *jus mariti*, although the accruing fruits do.

In Hume v Taylor, 1734, Elchies, Tack, No. 2, the Court held a lease to be void on the woman who held it being married. But that decision has not since been approved of. See Elliot v D. of Buccleuch, 1747, M. 10329; and accord-

tenant of a house or urban tenement, with the many accidents that in a lease for years may render it necessary for the tenant to leave the house, and desirable for both parties that he should have a power of assigning, have been held to justify an opposite inference in such leases, and to give an implied power to the tenant to assign;¹ which yields, however, to the implied prohibition against assigning for a different purpose or sort of habitation.² The cases stand thus opposed: In agricultural leases of ordinary duration there is an *exclusion* of assignees, unless the contrary be stipulated; in urban, there is an *admission* of assignees, unless excluded.

Assignment differs from sublease mainly in this, that the landlord who accepts of an assignee passes from all claim against the cedent, and takes the assignee as sole party in the lease; while a sublease has no effect to discharge the principal tenant.³

3. SUBTENANTS.—The above doctrine holds relatively to SUBTENANTS. They, as well as assignees, are excluded in agricultural leases, unless an express stipulation to sublet,⁴ or a destination to heirs and subtenants, be in the lease; and they are admitted in the [77] case of urban tenements, unless expressly excluded.⁵

4. LONG LEASES.—The rule is reversed in leases of long duration. Such leases are generally improving leases, and the tenant is supposed to be induced to risk somewhat on the faith of the possession being assured to him during the whole term. On this ground the right both of assigning and of subletting is implied, unless expressly excluded.⁶ And the express exclusion of the one will not exclude the other.⁷ The ordinary duration of agricultural leases is nineteen or twenty-one years; and although there has not been laid down any precise rule by which to determine what in this class of questions is to be deemed a long lease, the term of thirty-eight years has been held sufficient to confer the implied power. It has also been implied in liferent leases.⁸

5. EXCLUSION OF ADJUDGERS.—But although there is an implied exclusion of voluntary assignees in agricultural leases, an express exclusion of assignees is requisite to prevent creditors from attaching the lease by legal diligence.⁹ Such express exclusion of assignees will in all cases, whether the lease be of short or of long endurance, prove fatal to the dili-

ingly, in *Gillon v Muirhead*, 1775, M. 15286, the Court sustained a lease granted to a man and his wife, and the longest livér, as not made void by the surviving wife's subsequent marriage. Affirmed 3 Pat. 681. [It would seem that, where recognition by the landlord is relied on, such recognition must be express. *Gray v Low*, 1859, 21 D. 293.]

¹ In a lease of urban tenements, the Court found the rule of exclusion not applicable. 'Several of the Lords, however, were of opinion, that there is often no less an *electio personæ* in the tack of a house than of land.' *Aitchison v Binnie*, 1748, M. 10405. Those judges appear from Elchies to have been Arniston, Drummore, Murkle, Shewalton, and Elchies himself. Elchies, Tack, No. 13, notes, p. 444.

This determination was confirmed, *Anderson v Alexander and Mather*, 10 July 1811, 16 F. C. 327.

² In certain cases of urban tenements, a *delectus personæ* seems as natural or necessary as in an agricultural lease—as in the case of a shop, tavern, etc., having a particular character; and although perhaps it was better to bring the whole to a general rule, leaving the parties to regulate the matter by special agreement, there is one case in which an alteration in the nature of the possession, coupled with a personal objection to the assignee known to the tenant, were sufficient to exclude the assignee. *Gordon v Crawford*, 1825, 4 S. 95, N. E. 97.

³ *Skene v Greenhill*, 1825, 4 S. 25, N. E. 27. See also

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Low v Knowles, 1796, M. 13873. [*Ramsay v Commercial Bank*, 1842, 4 D. 405; *Laing v Duff*, 1845, 7 D. 556.]

⁴ *Alison v Proudfoot*, 1788, M. 15290. In that case, the general question was decided on a hearing in presence; and although some lawyers of high authority were dissatisfied with the determination, and doubtful of the soundness of the principles on which it rested, the decision has since been confirmed in a lease of nineteen years. *E. of Peterborough v Milne*, 1791, M. 15293; *L. Cassilis v Dunlop*, in a lease of twenty-one years, 5 Dec. 1806, F. C.

⁵ See above, note 1. In Anderson's case, the lessee of a house was allowed to sublet, the nature of the possession not being changed.

⁶ *Simpson v Gray and Webster*, 1794, M. 15294; *Pringle v M'Laggan*, 10 June 1802. [*Leechman v Sievright*, 1826, 4 S. 690. See also *Leck v Fulton*, 1855, 17 D. 408; *Hood v Miller*, 1855, 17 D. 411.]

⁷ *Trotter v Dennis*, 1770, M. 15282; *Crawford v Maxwell*, 1758, M. 15307; *Ogilvie v Crs. of Fullarton*, 1791, M. 15309.

⁸ See cases in the two preceding notes.

⁹ *Stair ii. 9. 26*; *Ersk. ii. 6. 32*. *Elliot v D. of Buccleuch*, 1747, M. 10329; *Kinloch v Crs. of Fullarton*, and *Ogilvie v Crs. of Fullarton*, 1791, M. 15309.

This proceeds on a principle somewhat analogous to that of the English law, as already stated, note 1, p. 72. [See *Borrows & Co. v Colquhoun*, 1 Macq. 691.]

gence of creditors.¹ Leases are sometimes made to the tenant, and his heirs and subtenants, excluding assignees. Where the tenant in such a case becomes a bankrupt, and at the desire of his creditors gives a sublease of the whole farm, it is almost the same with assigning the lease; but no objection can be taken to this on the part of the landlord.²

Leases which exclude assignees, commonly exclude subtenants also; and this exclusion is effectual to prevent a sublease to creditors without the consent, express or implied, of the landlord.

7. EXCLUSION PERSONAL TO LANDLORD.—Where an agricultural lease is taken 'to heirs,' or an urban lease is made to exclude assignees and subtenants, the exclusion is in law held to be absolute. It may be questioned, however, whether an assignment is in such a case null, or whether it is only subject to an objection on the part of the landlord. Erskine seems to consider such assignation as absolutely null, and incapable of transmitting any right to the assignee.³ If this doctrine be correct, the heir entitled under the destination to take the lease after the tenant's death, should have a right to challenge the conveyance to the assignee; and the lease should (with consent of the landlord) afford a fund of payment to the creditors of the heir. But the Court have decided on a different principle, and held the landlord alone entitled to challenge.⁴

[78] 8. CLAUSE OF EXCLUSION, UNLESS WITH LANDLORD'S CONSENT.—Where the lease contains a clause admitting assignees or subtenants, 'if approved of by the landlord,' or excluding them 'unless approved of,' an opinion formerly prevailed, that the landlord was under judicial control in the exercise of his discretion; that he was bound to assign his reasons for rejecting the tenant; and that he might be compelled, if his objections were frivolous, to admit him. In short, this was considered as a case in which both parties, contemplating the many justifiable causes that may arise on the part of the tenant for abandoning the possession, without renouncing the benefit of the contract, agree that, in accomplishing his purpose, the tenant is to meet with obstruction only if he should propose as tenant one whom, in equity and fair dealing, the landlord can hold exceptionable and unfit. Accordingly, it was at one time laid down, that in such a case the landlord 'was not entitled arbitrarily, or out of mere caprice, to withhold his consent.'⁵ And this doctrine, delivered in a book of authority, was long in practice held as the settled construction of this contract. But the doctrine, though confirmed by subsequent cases,⁶ is now entirely abandoned on

¹ See the above case of Elliot, Elchies' Notes 444. A lease for fifty-seven years, with an express exclusion, found not adjudicable. *Cunningham v Hamilton*, 1770, M. 10410.

See also below for the possibility of evading such exclusion by means of a manager, etc.

² *Crawford v Maxwell and Crs.*, 1758, M. 15307; *Trotter v Dennis*, 1770, M. 15282; and *Ogilvie v Crs. of Fullarton*, 1791, M. 15309.

³ Ersk. ii. 6. 31.

⁴ *Hay and Wood*, 1801, M. 15297. Here, a lease to David Hay and his heirs, excluding assignees, was by David's son, after his father's death, assigned to his natural son. The son having died, Hay and Wood, as heirs-at-law, challenged the assignee's right. The Lord Ordinary and the Court held the clause of exclusion entirely in favour of the landlord; and as he did not concur with the tenant's heirs, the action was dismissed.

In the case of *Deuchar v L. Minto and others*, 1798, M. 15295, a similar judgment was pronounced by Lord Meadowbank, and confirmed by the Court; and it was only after the landlord appeared and concurred with the heir in the challenge, that the assignation was held bad. [*Dobie v M. of Lothian*, 1864, 2 Macph. 788; and see *Murdoch v Murdoch's Trs.*, 1863, 1 Macph. 330.]

⁵ In the Dictionary of Decisions, vol. iv. p. 75, this report stands: 'The Lords found, that where the heritor's consent was made necessary to the assignation, he was not entitled arbitrarily, or out of mere caprice, to withhold his consent where the proposed assignee was in good circumstances, and otherwise unexceptionable.' *D. of Roxburgh v Archibalds*, 1785, M. 10412, note.

⁶ *Sir Alex. Ramsay Irvine v Valentine*, 1791. There a lease was granted by Sir Alexander to 'Valentine, his heirs and assignees, such assignees being always agreeable to and approved of by the said Sir A. R. Irvine, his heirs and successors, by a writing under his or their hands to that effect.' The endurance is 'for the space of nineteen years from and after his entry thereto; and which tack is to endure and continue after the expiration of the said nineteen years, for all the years and crops of the lifetime of the person in the actual possession of the said lands at the expiration of the said nineteen years.' Valentine possessed for some years under this lease, and becoming at last insolvent, a sequestration was applied for under the Act of the 12th of the King; and under this statute a trust-deed was afterwards executed, by which the trustees were empowered to dispose of the leases. At a meeting of his creditors the landlord attended and presided,

full consideration ; and the landlord's power of exclusion under such a clause is held to [79] be absolute.¹

The creditors may insist on the tenant granting an assignation or sublease, with the chance of its being objected to ; for the old doctrine, which inferred forfeiture from the mere attempt to assign, is now exploded. If the lease, however, should contain not only an exclusion of assignees, but also a consequent irritancy of the tenant's right, it seems doubtful whether the creditors could insist on a thing so useless to themselves as an assignation, and so destructive of the right of the bankrupt.² The adjudication, and also the deed of conveyance to be granted by a bankrupt under the Sequestration Act (54 Geo. III. c. 137, sec. 29), is not hurtful to the tenant, being only effectual 'so far as he can safely convey.' Under the subsisting Act, then, there is no occasion for the precaution taken in a case under the former statute.³

when a resolution was taken to sell the lease. Previous to the sale, the landlord, in a letter to the trustees, said : 'I consent to an assignation of the lease, etc., on the following conditions : 1. That the tenant shall reside on the farm, and have no other residence and no other farm ; 2. That the tenant shall find security for five years' rent, and for the stocking of the farm ; and, 3. That certain regulations in cropping shall be observed.' When the lease was exposed to sale with these conditions annexed, nobody appeared to offer but the landlord himself, and evidence was brought to show that the competition was in this way prevented. The landlord bought the lease ; and after keeping it for some time in his own hands, let it to another tenant for nearly double the rent. Valentine having been absent during those proceedings, brought an action on his return against his landlord and the new tenant. Lord Gardenstone pronounced a judgment, finding 'that the conditions and restrictions proposed by the defender Sir Alexander Ramsay, and adopted by the trustees as articles of the public roup, were competent, fair, and rational ; and that the purchase made by the defender at the public roup was unexceptionable.' The Court, on reviewing this judgment, reversed it ; and this appears to have been upon the ground that the landlord, by the proposal of absurd and unauthorized conditions, had contrived to secure to himself an augmented rent at the tenant's expense. Lord President Campbell held incidentally, that the clause relative to assignees gave a discretionary, but by no means an arbitrary, power of refusal to the landlord, and that the conditions insisted on by the landlord were not justified by the discretion he had reserved to himself. Lord Eskgrove held that, by his presence at the meeting, the landlord had assented to the sale upon the original conditions of the lease. The judgment was, to 'sustain the reasons of reduction in so far as regards the landlord, and reduce, decern, and declare accordingly : find him accountable for the profits of the farm, etc., and find him and his tenant bound to remove at the next term.' The House of Lords affirmed the judgment. The only difference was in these two respects :—1. A reservation was inserted of all claims competent between the creditors and Sir A. R. Irvine against each other ; and, 2. 'As it appears that the said Robert Kinnear (the tenant) has not been heard for his interest, it is therefore ordered that the cause be remitted back to the Court of Session to hear parties upon the said interest of Robert Kinnear ; and in respect that, in case of judgment passing in favour of Robert Kinnear, the privity and relation which may thereupon be found to subsist between Sir Alexander Irvine and Robert Kinnear may appear to make

some difference as to the mode and form of redress which may be competent to the pursuer Alexander Valentine, it is further ordered and adjudged, that the consideration be in like manner remitted back, and that in the meantime the said interlocutor be reversed in so far as it finds Sir A. R. Irvine, and Robert Kinnear his tenant, must remove from the farm at Martinmas next, without prejudice, however, to any point which may arise thereupon ; and that with these variations the said interlocutor be affirmed.' H. L. 4 March 1793, Mr. Baron Hume's Sess. Papers, 3 Pat. 287.

¹ *Muir v Wilson*, 20 Jan. 1820, F. C. I was counsel in this case, and gave an opinion extrajudicially on it, conformably to the authorities in the books. When the question came to be discussed, Lord Alloway ordered it to be reported for the opinion of the Court, 'in respect that an opinion has prevailed for some time in this country, founded upon the authority of the cases *D. of Roxburgh v Archibald*, 5 March 1785 (Morr. p. 10412), and *Sir Alexander Ramsay v Valentine*, 29 July 1791, that when a lease excludes assignees and subtenants without consent of the landlord, this contemplation of consent so far alters the rights of parties, that the landlord must assign some reasonable cause for refusing his consent ; and a great deal has now been stated to shake the authority of these decisions as establishing that point ; and the Second Division of the Court, in the case of *M'Kenzie v Learmont and Munro*, not reported, has pronounced a decision directly contrary thereto. In order that this matter, of such importance to the landlords and tenants of this country, may be put to rest, makes avizandum with the case to the First Division of the Court,' etc. A good report of the case will be found in a note to the fourth edition of Mr. Robert Bell's *Treatise on Leases*, published by Mr. William Bell, p. 181. [See *Ramsay v Commercial Bank*, 1842, 4 D. 405 ; *Wight v E. of Hopetoun*, 1855, 17 D. 364 ; *Stewart v Rutherford*, 1863, 35 Jur. 307. Rule applied to a mineral lease for thirty years in *D. of Portland v Baird*, 1865, 4 Macph. 10.]

² The creditors of a bankrupt tenant, whose lease excluded assignees and subtenants, insisted for a conveyance to it. The bankrupt refused, on the ground that his lease would be forfeited. The Court was clear that he was bound to grant the conveyance, but that, if his lease contained a clause of irritancy, it would both be invidious in the creditors, and hurtful to their interests, to insist for it, and that it ought not to be allowed. An inquiry into the conditions of the lease was ordered. I believe the case was afterwards compromised. *Niven v Macfarlanes*, 20 Nov. 1799, n. r.

³ The judgment, after confirming the nomination of the

9. Where the creditors adjudge a lease that is open to diligence, or where in a bankruptcy such a lease is adjudged or assigned to the trustee, it may be doubted whether the creditors or the trustee are to be held as proper tenants, independently of any new contract of lease. 1. The landlord is entitled to insist for a tenant, who shall be liable for arrears and rent.¹ 2. When the creditors, by themselves or by the trustee, take up the lease and cultivate the farm, they are liable as tenants not only for the rent of the year which they possess, but also for arrears and all the obligations under the lease.² 3. Where they abandon [80] the possession, selling off the stocking, and leaving the farm uncultivated, the landlord may let to another tenant,³ and also at the same time claim on the estate for damage, if the new lease be at a lower rent; holding the bankrupt as his tenant, and proceeding on the maxim, '*In loco facti imprestabilis subsit damnum et interesse.*'

10. POWER TO POSSESS FOR BENEFIT OF CREDITORS.—Although the creditors cannot directly acquire, either by assignation, or by sublease, or by legal process, where there is an express exclusion in the lease, it is important to inquire, whether they may not indirectly attain the same object?

1. Bankruptcy does not of itself annul a lease. The tenant, though bankrupt, may still continue in the possession, provided he pay the rent regularly, and perform the other stipulations of the contract.⁴ All that the landlord is entitled to do in case of his tenant's failure to pay the rent, is to have recourse to the hypothec, and the proceedings prescribed in the Act of Sederunt 1756.⁵ And as the tenant's capacity of acting still remains to him after bankruptcy, his creditors seem to be entitled, by agreement with him, to supersede their diligence, and allow him the use of the stocking, so as to enable him to possess the farm upon accounting to them for the profits,—a certain allowance being made to him for his subsistence.⁶

[81] 2. But where the tenant does not himself possess the farm, he will not be allowed

trustee, and ordaining the bankrupt to dispoise, bears this exception: 'With the exception of the last alternative prayer for special powers over the lease for the benefit of the creditors, as to which, refuse the prayer of the petition, and under the said exception adjudge, etc., in terms of the statute.' Sequestration of *Thomas Johnston*, 4 Feb. 1813, F. C. [See 19 and 20 Vict. c. 79, sec. 102.]

¹ *Nisbet's Tr.*, 10 Dec. 1802, M. 15268. Landlord found entitled to remove the trustee, unless he would pay not only present and future rent, but also arrears.

² *Outhil v Jeffrey*, 21 Nov. 1818, F. C.; *Sir W. Fairly v Nielson and Fulton*, 1821, 1 S. 242. [*Harvey v Haldane*, 1833, 11 S. 872; and see *Ferrier v Hector*, 1822, 1 Sh. App. Ca. 159; *L. Strathmore's Trs. v Kirkcaldy's Trs.*, 1853, 15 D. 752.]

³ See Lord Kilkerran's notes subjoined to *Elliot v D. of Buccleuch*, p. 397, M. 10333.

⁴ *Crawford v Maxwell*, 1758, M. 15307.

⁵ 'Where a tenant,' says that Act, 'shall run in arrear of one full year's rent, or shall desert his possession, and leave it uncultivated at the usual time of labouring, in these, or either of these cases, it shall be lawful to the heritor, or other setter of the lands, to bring his action against the tenant before the judge ordinary, who is hereby empowered and required to decern and ordain the tenant to find caution for the arrears, and for payment of the rent of the five crops following, or during the currency of the tack, if the tack be of shorter duration than five years, within a certain time to be limited by the judge; and, failing thereof, to decern the tenant summarily to remove, and eject him in the same manner as if the tack were determined, and the tenant had been legally warned in terms of the Act of Parliament 1555.' Act of

Sederunt, 14 Dec. 1756, sec. 5. [See 16 Vict. c. 80, sec. 29.]

⁶ When this question first occurred, the creditors of a bankrupt tenant consulted Mr. Lockhart (afterwards Lord Covington) upon the proper method to be followed for rendering the lease serviceable to them. The opinion delivered was, 'That as the lease excluded assignees, an assignation should not be granted, but that a person ought to be appointed manager or factor for managing the farm.' The creditors did not follow these directions exactly. They took an anomalous sort of half assignation in favour of a person who engaged to advance a sum of money; and the bankrupt himself, who had at one time been a baker in Canongate, resumed his trade there. The Court found that the letter conveying the lease to Henderson, the manager, was equivalent to an assignation, and therefore decerned in the removing. *Jamieson Durham v Henderson and Livingston*, 1773, M. 15283.

The tenant then came to reside on the farm, and got together, with the aid of his creditors, a sort of stock. He then presented a bill of suspension of the decree of removing, and a proof was allowed whether this was not collusive. The Court, on advising informations, suspended the decree of removing, upon the ground that, although by the lease assignees and subtenants were excluded, yet it was material justice to allow the tenant to possess, when assisted by his creditors. *Jamieson Durham v Livingston*, 27 July 1774. This was stated by one of the judges in the case of *Laird*, and who was one of the counsel in *Jamieson Durham's* case, to be the ground of the reversal.

In *Laird v Grindlay*, it was held, that when a tenant dies his heir may enter into the management for the benefit of the creditors; and that there is no necessity for the profits going

to appoint a manager accountable to the creditors. This device was at one time thought to be sanctioned by the case of Jamieson Durham,¹ and it accordingly was held to be legitimate.² But it is now settled that a mandate of this sort, intended to give the creditors the entire benefit of a lease, under the administration of a manager, is to be regarded as a covered assignation;³ and, above all, it is held that the lease is forfeited by the tenant's absence from Scotland.⁴

3. Although creditors may, with the consent of the bankrupt or of his heir, elude the force of a common clause of exclusion, it would seem that there is no direct way in which they can force the tenant so to concur. They may do execution against his person, take his stocking and his crops, and oppose, on the ground of his dishonest retention of the lease, any application he may make for protection, liberation, or discharge; but there is no form of diligence by which the lease can in such a case be taken into their hands, or placed under a manager.

IRRITANCY ON BANKRUPTCY.—A declaration that the bankruptcy of the tenant shall infer a forfeiture of the lease, will in all cases deprive the creditors of the benefit of the lease, where they have not taken the precaution to avoid rendering the tenant bankrupt.⁵

to the tenant, since the heir may enter *cum beneficio inventarii*, and pay every farthing to the creditors. 1791, Bell's Oct. Ca. p. 296.

This doctrine was approved of in the case of the **E. of Galloway v M'Hutcheon**, 1803, though the case was finally decided upon peculiar grounds. See 5 Pat. 169. M'Hutcheon of Chang held leases from Lord Galloway, which had several years to run; and having planned great improvements, he applied for and obtained a renewal for twenty-one years. The tack excluded assignees and subtenants. M'Hutcheon died after two years' possession of the new lease, very greatly in advance for improvements, and with his affairs in disorder. His brother entered *cum beneficio inventarii*, to give the creditors, without risk to him, the whole advantage of the funds, and he named trustees for the benefit of the creditors. He possessed the farm by managers, giving up the whole profits to his brother's creditors. An action of removing was first brought by the landlord, and afterwards an action of declarator. A condescendence by the landlord was ordered, and upon the relevancy of the proof some difference of opinion took place upon the bench. The majority of the Court was earnest in having the former decisions followed out, and a point so solemnly fixed not again set afloat; but it was thought proper to let in all the light possible relative to the circumstances, and the proof was allowed. At advising the proof, it was held that the tenant, in entering *cum beneficio inventarii*, and giving over the profits to the creditors, used his own right not only legally, but laudably; that he was entitled to possess by a manager, since his own residence was not required; and that Laird's case was a solemn decision on the general principle, and ought not to be overturned, nor even lightly questioned. But afterwards M'Hutcheon came to an agreement with the creditors, who, in consequence of a sum of money, discharged his brother's debts, and then he entered into possession by his own servants. The case was finally decided, on the effect of this transaction, against Lord Galloway.

And in the case of **Monro v Miller**, 11 Dec. 1811, 14 F. C. 384, where the Court held the appointment of a manager to be ineffectual, the tenant having left the country, the opinion of the Court pointed towards a decision in favour of the

creditors, if the tenant had really and *bona fide* returned to reside upon the farm and cultivate it.

The same determination, **Watson v Douglas**, 13 Dec. 1811, *ib.* 412. *N.B.*—This case decided on consulting with the First Division of the Court. **Buchan Sydserf v Todd**, 8 March 1814, F. C.

¹ This case was quite misapprehended. The true circumstances are stated above, p. 76, note 6.

² In **Laird v Grindlay**, see Bell's Ca. 296; and in **L. Galloway v M'Hutcheon**, see above, p. 76, note 6.

³ **Monro v Miller's Crs.**, 11 Dec. 1811, 14 F. C. 384. Here the tack excluded assignees and subtenants, legal as well as voluntary. The tenant went to England, and before he went granted a mandate to the trustee for his creditors, a skilful farmer, 'empowering him, as manager for me, to enter to and possess the lands, etc., you, in the first place, paying regularly the rent, etc., and fulfilling the other obligations incumbent on me as tenant; and any overplus or profits arising from the said land, you are to apply in extinguishing the debts due by me; and for any balance that may be over, you are to be accountable to me.' The Court, in respect of the desertion of the farm, and that the factory in question seems to be of the nature of a covered assignation, decerned in the removing.

⁴ See the above case of **Monro**, note 3; also **E. of Dalhousie v Wilson**, 1802, M. 15311; **Watson v Douglas**, 13 Dec. 1811, 14 F. C. 412.

⁵ **Copland v Gordon**, 7 Dec. 1805. Here there was an exclusion of assignees, subtenants, and the diligence of creditors, with a covenant 'that this tack shall at once be irritated and made void by the statutory or actual bankruptcy of the tenant.' The irritancy was found to be incurred by sequestration, and decree of removing was pronounced.

In **Forbes v Duncan**, the clause was in these words: 'It is further agreed, that the notour bankruptcy of the tenant shall be an *ipso facto* voidance of the tack.' A sequestration was awarded of the tenant's estate, and the Court held that decisive on the precedent of **Gordon's** case; and the sheriff having decerned in the removing, the Court refused to advocate. 2 June 1812, 14 F. C. 662.

It was in England held doubtful whether a stipulation

[82] But where the irritancy is stipulated on mere insolvency, the effect of it is rendered doubtful by the ambiguity of the condition. Nothing less than a proof of clear and undoubted insolvency in a declaratory action would suffice.¹

RETENTION FOR MELIORATIONS.—Where, in consequence of the tenant's bankruptcy, and a clause of exclusion or of forfeiture, the lease is forfeited, the creditors seem to be entitled to claim from the landlord the value of meliorations which may have been made in contemplation of possessing during the whole term, but which the tenant's misfortunes have now thrown into the landlord's hands.²

Where a lease is granted to a company, with an exclusion of subtenants and assignees, the bankruptcy of the company puts an end to the lease.³

POWER TO NAME AN HEIR.—Similar to the effect of an entail, is that prohibition which the clause excluding assignees and subtenants in a lease produces in the event of the tenant's death. It has been found that the effect of this clause is to prevent the tenant from naming an heir to himself without the consent of the landlord.⁴ It may be questioned whether the heir, who succeeds to the lease under such a clause, does not take it without incurring any passive title further than as he can be shown to have taken up a subject, which, as properly belonging to the predecessor, his creditors could attach. The stocking of the farm is, indeed, the fund of the creditors; so are all arrears due by subtenants; but with regard to future and accruing profits, have the creditors right to them—their debtor's right having expired with his life, like that of an heir of entail?⁵

[By the statute 20 and 21 Vict. c. 26, provision is made for recording in the Register

could be effectual for the landlord's re-entry on the tenant's committing an act of bankruptcy on which a commission should issue. *Philpot v Hoare*, Ambler 480. But it seems now to be settled that such condition is available, as consistent both with law and with sound policy. *Roe v Galliers*, 2 Term. Rep. 133. It does not seem effectual, however, to stipulate in a lease for a term of years absolute that it shall not be seized under a commission. See d. p. Buller, J., *loc. cit.*

¹ *Hog v Morton*, 1825, 3 S. 617. [See *Moncreiff v Hay*, 1842, 5 D. 249; *Young v Gerrard*, 1846, 6 D. 347. See *Stewart v Rutherford*, 1863, 35 Jur. 307, where effect was given to a stipulation in a lease, that in case of personal misconduct by the tenant, of which the landlord should be the sole judge, he should be entitled to cancel the lease.]

² *Morton v Lady Montgomery*, 1822, 1 S. 383.

³ *Campbell of Shawfield v The Calder Iron Co.*, 11 Dec. 1805. Campbell of Shawfield and 'David Muschet of the Calder Ironwork, for himself and partners,' entered into a lease, by which Shawfield 'let to David Muschet and his heirs, *secluding assignees, legal or voluntary, and all subtenants, except with the proprietor's consent*,' certain veins of iron-ore, etc. The Calder Iron Company, for whose behoof this lease was professedly granted, became bankrupt; and a new company having bought their works, Muschet became bound to supply them with ironstone from the veins contained in the lease. Security was offered for the rent. But Shawfield brought an action for declaring that Muschet, and the said Calder Iron Company, 'of which he was a partner, and for whom he took the lease,' had failed 'to implement the conditions;' and that therefore 'he, for himself and his said partners,' had forfeited the lease, and that the tack was extinct. The Court held the lease to be at an end by the bankruptcy of the company, and the necessity of their assigning to another, in order to take further benefit from it, which the lease expressly prohibits. Lord Armadale delivered a very clear opinion, that this was

a lease to the Calder Iron Company, existing and carrying on business: that this company being now dissolved, by bankruptcy and the sale of the works, there was no longer a tenant; the lease was assigned: that this would have held in an agricultural farm, but that in a mining concern it was of still more importance who should manage the mines. Lord Meadowbank had some difficulty, as Shawfield could have held Muschet bound to the end of the lease; and it is not easy to find one bound and the other free. But he thought the opinion delivered extremely strong, and felt relieved from further anxiety by Muschet having gone to England and abandoned the lease. Lord President Campbell said the lease was inaccurate: in the preamble, an agreement with Muschet, *for the use of the company*, though in the dispositive clause, *to him and his heirs*. But the whole object of the lease made it a company concern, and the company possessed, and were really the tenants. The company, however, was now gone by bankruptcy and sequestration, and by the benefit being made over to another company. A general question has been raised as to the effect of a tenant's bankruptcy; but, without entering into that in the case of an individual, here the company, the tenant, is gone.

⁴ *L. Minto v Dewar*, 20 Nov. 1798; *Col. Cunningham v Grieve*, 1803, 1805, and 1806, M. 15298. See also *Loudon v Adam*, 1805, M. App. Tack, No. 10. [And it would seem that the landlord's interest is sufficient to protect the right of an heir-substitute in a lease against defeasance by act of the institute. *Macalister v Macalister*, 1859, 21 D. 560.]

⁵ It was contended in a case, *Campbell of Melford v Gallanach*, 11 July 1806, that the heir of a tenant under such a clause, *being a substitute*, was not liable as representing his ancestor. Lord Newton, in the Bill Chamber, refused his sanction to this plea. A petition was presented to the Court, but refused on a point of form, the Court regretting that the merits of the question could not be tried.

of Sasines leases granted for a period of thirty-one years and upwards, and not exceeding fifty acres (except mines and minerals), for the transmission thereof by succession, and for transference either by simple assignation, or by assignation in security or adjudication, or to a trustee under the Bankruptcy Act.

Probative leases, whether executed before or after the passing of the Act, of thirty-one or more years' duration, of heritable subjects, may be recorded in the Register of Sasines (sec. 1); and assignations either simple or in security, writs of acknowledgment as heir or general disponee, notarial instruments, discharges and renunciations, may also be recorded in the proper registers in which the leases themselves are recorded. Leases containing an obligation upon the granter to renew the same from time to time at fixed periods, or upon the termination of a life or lives, or otherwise, are to be registrable, provided they are to be renewable, so as to endure for thirty-one years or upwards (sec. 17). No lease executed after the passing of the Act, unless where the same shall have been executed in terms of an obligation to renew as above mentioned, and of date prior to the Act, shall be registrable where the name of the lands whereof the ground thereby let consists or forms a part, and the extent thereof, shall not be set forth, or where the ground let shall not be described by boundaries in the lease, and whereof the extent shall exceed fifty acres (sec. 18).

On being presented for registration, the writs are to be forthwith shortly entered in the Minute Book, and fully copied into the register, and redelivered to the parties with certificates, as in the case of recorded sasines. Leases under the Act, and binding as in a question with the granters, which shall have been recorded at or subsequent to the date of entry under them, are by virtue of such registration to be effectual against any singular successor whose infestment is posterior in date to the date of such registration (sec. 15). And the registration of all such leases and other writs is to complete the right under the same respectively, to the effect of establishing a preference as effectually as if the grantee or party in his right had entered into the actual possession of the subjects leased under such writs respectively at the date of the registration (sec. 16). And the same are in competition to be preferable according to their dates of recording (sec. 12). Reference is made to the statute in relation to the provisions respecting the transmission of registered leases by assignation and succession.]

CHAPTER III.

OF SUCCESSION IN HERITAGE AS AFFECTING THE INTERESTS OF CREDITORS.

By the law of Scotland, the right of creditors is not limited to the estate in possession [83] of their debtor. The creditors of an heir are entitled to adopt and prosecute their debtor's right of succession to the estate of his deceased ancestor; while the creditors of a deceased proprietor of land are entitled, after the death of their debtor, not only to follow his estate and attach it for their payment, but to hold the heir who takes the benefit of it as personally undertaking his ancestor's debts.

The former of these rights is accompanied with the adoption of all the privileges which the heir himself is entitled to exercise. The latter, in so far as it infers personal liability, suffers, in certain circumstances, a limitation to the precise amount of the ancestor's estate.

The discussion of these important rights will form the subject of this and of the next chapter. In this chapter will be considered: 1. The right of the heir's creditors, generally,

to adopt and enforce his claim of succession ; 2. Their right to exercise the heir's privilege of challenging the ancestor's deeds made on deathbed to the heir's prejudice ; 3. Their right to exercise their debtor's other privileges as heir.

SECTION I.

OF THE RIGHT TO ADJUDGE THE ANCESTOR'S ESTATE FOR DEBTS OF THE HEIR.

The title of the heir to the feudal property of his ancestor is completed by sasine. But the heir must make his way to this final completion of his title, and establish his right to demand sasine, either by the verdict of a jury in a service, or by persuading the superior to recognise his right voluntarily in a precept of *clare constat*.

The title to heritable property not requiring infeftment is completed by service alone.

The estate thus vested in the heir, comprehending all the heritable property which can descend by the law of succession, is equally liable to the debts of the heir as if it were his own original estate ; with this difference, that during a certain time there is a preference given to the creditors of the ancestor over those of the heir.¹

But it is not entirely in the discretion of the heir to take up the succession, or to abstain from it, to the effect of disappointing his creditors. They have a right of themselves to adopt and enforce his claim of succession, even against his will ; to adjudge the estates as his, and to bring them to a sale for the payment of his debts. This right is established by a statute passed in the seventeenth century, on which, in considering the law of adjudication, a full commentary shall afterwards be given. In the meanwhile, it may be sufficient here to state the general policy of this Act, that is to complete the system of remedies in relation to succession ; introduced first with regard to the ancestor's creditors ; then extended to those of the heir ; and opening to creditors in both those situations access to the estate of the deceased. By 1540, c. 106, the creditors of the ancestor had access to his estate in the person of the heir ; by 1621, c. 27, the heir's creditors are declared to have [84] a similar right to attach the succession which falls to him : and the form of proceeding introduced by the former statute, for the benefit of the ancestor's creditors, is new-modelled, so as to suit this new occasion.

SECTION II.

OF THE RIGHT OF CREDITORS TO ADOPT THE HEIR'S CHALLENGE OF DEEDS ON DEATHBED. COMMENTARY ON THE LAW OF DEATHBED.

The right of creditors is not limited to the attachment of estates to which the heir's title is open. They have also a right to avail themselves of estates which have been alienated to his prejudice while his ancestor was on deathbed. And on this subject it may be proper to explain, first, the general doctrine of the law of deathbed ; and afterwards, the exercise of the right of challenge by creditors.

By the law of Scotland, the imbecility of a mortal disease is held so far to incapacitate a person from conveying, burdening, or disposing of his land-estate, and generally his property descendible to his heir, as to entitle the heir to challenge, and have such deeds declared null, if prejudicial to his interests. This is called the Law of Deathbed. The rule is well laid down in *Regiam Majestatem*, which, although not a genuine record of the law of

¹ This is established by statute 1661, c. 24, on which see a full commentary in Book IV.

Scotland, does contain some of the old rules of our jurisprudence, mingled with those of England; and among others, this has every appearance of being a text of Scottish law: 'Where a man in deadly sickness maketh an alienation, which in health he did not think of, the same is presumed to be done through trouble of mind, and not deliberately nor by good advice.'¹

This law has a double object: First, to protect the interests of the heir-at-law from the devices to which they may be exposed in the imbecility of the last illness of his dying ancestor; and secondly, to guard, by the operation of a general rule, the last stages of mortal suffering and weakness from the importunity of self-interested attendants. This last fear was chiefly excited, perhaps, by the prevailing arts of the clergy of the Romish Church, who, with all the opportunities of auricular confession and all the influence of superstition in their hands, held constantly in view the advancement of their order, and especially the aggrandizement of the Church, by the possession of territorial property. But this law also contemplated the dangers to which the heir and the ancestor were exposed from other sources more domestic, and which in our days are chiefly to be dreaded.²

It is a fault, not unfrequent among theoretical lawyers, to reduce every doctrine to a [85] single principle, as more simple, and more according to the law of nature; and in this spirit a contest has been maintained, in respect to the policy of the law of deathbed, whether it is referable to the interests of the heir or to the tranquillity of the dying ancestor. Lord Kaimes, on several occasions,³ has laboured to establish the interest of the heir as the sole object of the law; while our old lawyers seem rather to look to the tranquillity of the dying man as the purpose chiefly contemplated. But in practical jurisprudence, which has to deal with the mingled business of human life, any attempt to restrain the rules of law to the operation of too simple and uniform a principle is dangerous. In the present matter, both the principles which have been mentioned combine; and whatever may be thought of the expediency of the law,—whether, for the purpose of protecting against a possible danger, an unbending presumption ought to be established of evil design and importunity; or whether it were not better to leave every man to encounter the risks which nature has planted around him, trusting to the vigilance of the heir to detect and expose frauds,—it is impossible to deny that this provision of our jurisprudence, though lauded by our own lawyers and by others, is far from being perfect as a protection to the heir, but, on the contrary, is exposed to palpable evasions; while as a safeguard to the dying man it is perhaps still less effectual,

¹ *Licet autem generaliter cuilibet liceat de terra sua rationabilem partem pro voluntate sua cuicunque voluerit in vita sua donare, in extremis tamen agenti hoc nulli hactenus est permissum. Unde præsumitur quod si quis in infirmitate positur quasi admortem terram suam distribuere cæperit quod in sanitate facere noluit hoc potius ex fervore animi quam ex mentis deliberatione eveniret.* 2 Reg. Maj. c. 18, secs. 7 and 9.

² Lord Stair says: 'The main reason of this law hath been for the quiet and security of dying persons, against the importunity of husbands, wives, children, or other relations; and especially against the importunity of the Romish priests, who pretended a far greater interest and duty of mortification to pious uses than of leaving to heirs, not only as meritorious to expiate the sins of the donors' lives, especially of the more vicious persons, but also for obtaining constant prayers and supplications for delivering their souls out of purgatory. And therefore this is a most convenient and just law, when men, through any indisposition, continue in or about their houses, and are not seen to indifferent and unsuspect witnesses, that thereby they may be free from all importunity, seeing they can do no more but dispose of their share of their moveables,

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which is rarely of considerable value, moveable debts being deduced.' Stair iv. 20. 38.

Dirleton, after likening a dying person to the carcase about which the eagles hover, says: 'Ex eo tempore igitur, quo æger sese domi abdidit, nec amplius in propatulo, foro, aut ecclesia sui copiam facit; licet ex morbo non decumbat, lento fortasse, eoque magis periculoso, dicitur, esse *lecto ægritudinis* et in extremis agere; et alienatione terrarum, aut rei alicujus hæreditariæ ei prorsus interdicatur.' Dirleton, *voce* Legitima Liberorum.

Of this consuetudinary law Lord Chancellor Eldon, in the House of Lords, said: 'It was held out that this was a personal privilege in favour of the heir-at-law—a regulation for his benefit alone. But in my opinion, this comes far short of the excellence of the regulation: it is also highly favourable to the dying man, that his last moments shall not be disquieted. It was perhaps at first intended to put a stop to the granting of legacies to the Church and to charities, which prevailed so much in those days. It now prevents the mischiefs that might arise from deeds obtained by besieging a person when near his death.'

³ *L. Forbes' Daughters v L. Forbes*, 1755, M. 3277.

more particularly in our days, when the whole power over the moveable succession, generally much more valuable, is open to such importunity.

In commenting on this law, it is fit to consider,—

1. The state or condition which the law holds to be Deathbed ;
2. The deeds which are challengeable ;
3. The various attempts to evade the law of deathbed ; and,
4. The exercise of the right of challenge on the part of creditors.

SUBSECTION I.—LEGAL CHARACTER OF DEATHBED.

While a person is in his ordinary state of health and capacity, and not a minor, nor cognosed as an idiot or madman, nor under interdiction, he is said to be in '*legitima potestate*,' or in 'liege poustie,' and has the full and uncontrolled power of disposal of his property. The restraint on this power begins with the commencement of his mortal disease. From that moment law presumes him to be unable to resist importunity ; and on that account imposes restraints on the exercise of his disposing power,—raising a presumption that anything which he then does to the prejudice of his heir is the result of importunity alone. But this presumption is not absolute. There are two several counter-proofs, or indications of the existence of a strength sufficient for resistance, to which the rule yields. 1. By a statute of 1696, c. 4, the survivance of the granter during the space of sixty days 'is a sufficient exception to exclude the reason of deathbed ;' and, 2. At common law, if the granter [86] have, after the date of the deed, been at kirk or market unsupported, he is deemed vigorous enough to dispense with the protection of the law—he is held as still in liege poustie.

In establishing the challenge, the first point of inquiry relates to the nature and power of the disease. And although it is a question fit for the decision of a jury, whether the granter was, at the date of the deed, ill of the disease of which he died, yet there are some points of law here for the Court.

I.—NATURE OF THE DISEASE.

1. It is not enough to support the challenge, that the granter of the deed has not survived for sixty days ; he must have been actually sick of his last illness at the date of the deed.¹

2. Although labouring under sickness at the time of making the deed, this will not be held his mortal disease, if the granter should perish by an accident ; as a fall from his horse, shipwreck, apoplexy, etc.

3. Analogous to this is the case of death occasioned by a distinctly different disease from that with which the granter was afflicted at the date of the deed. Wherever the new disease is so clearly unconnected with the original complaint, that it can be regarded in the light of a supervening accident, it will not be sufficient to make out deathbed.² So a person ill of a disease of the prostate gland at the date of the deed challenged, having afterwards died in consequence of a severe bilious attack from irregularity, was held not to have been on deathbed when he made that deed.³

4. It may happen, however, that death was occasioned by a disease different from the original ailment, and yet there may be such a connection that it shall be held a continuance of the same illness from first to last. There are known to physicians many translatable or convertible diseases, which are apt to induce each other, or which may almost be considered as different stages of the same disease, though distinguished in Nosology by different characters

¹ [Cogan v Lyon, 1834, 12 S. 569.]

² [Thomson v Thomson, 1801, Hume 142. Spiers v Mackie, 1802, Hume 144. Lillie v Lillie, 1812, Hume 153. Gray v

Gray's Trs., 1813, Hume 144. Mackay v Davidson, 1828, 6 S. 367 ; 25 March 1831, 5 W. and S. 210.]

³ Paterson's Trs. v Johnston, in Jury Court, 1816, 1 Murray 71.

and symptoms. But without entering into any inquiry of this sort (which is fit matter of evidence by physicians), it is sufficient to say, that where the diseases are convertible, or found in close connection and relation with each other, or where the last disease is an ordinary consequence of the first, it will be sufficient to make out a case of deathbed.¹

5. It is not necessary that the disease of which the granter is ill shall be of a kind which physicians call mortal; nor is it even essential (notwithstanding the name of deathbed)² that it should be so severe an illness as to confine the patient to his bed, or to his chamber,³ or to interrupt business, sometimes called *morbus santicus*.⁴ It is sufficient that the person is in a state of manifestly disordered health, sickness, or decay; which, although not marked perhaps by any nosological character, is still distinguishable as an indisposition or illness continuing till death.⁵ Nor is it indispensable that the disease shall be of a medical [87] character: a surgical disease or accident will be sufficient, if death follow.⁶

6. Although it be not essential that the disease should occasion confinement, yet confinement, contrary to the granter's usual habit, is a strong circumstance in proof of the existence of illness; and the policy of the law confirms this, in so far as the state of a person who is withdrawn from observation cannot be discovered or easily proved.⁷

7. Sickness proved at the date of the deed, followed by death within sixty days, gives the presumption of continued illness.⁸ This question was formerly decided by the Court, and will be found stated either in the older decisions, in judgments on the relevancy, or in later reports in decisions on the proof. The question is now for a jury, under such directions in point of law as the Court may give.

II.—COUNTER PRESUMPTIONS, AND EVIDENCE OF LIEGE POUSTIE.

But supposing the disease to be established, and that the granter was under its influence at the date of the deed, and that it proved in the end mortal, what is evidence to remove the presumption?

There are, as already stated, certain counter indications of firmness and strength of mind admitted by law as counteracting the presumption that the granter yielded to importunity: 1. Survivance during sixty days; and, 2. Going to kirk or market unsupported.

I. COMMENTARY ON THE STATUTE 1696, c. 4.—The presumption established by statute as a counterbalance to that of deathbed, arises on the granter of the deed surviving the execution of the deed for the space of sixty days. This was introduced for the purpose of correcting the evil of the old law, by which, if the granter was ill of his mortal disease at granting the deed, and had not afterwards been at kirk or market, he was held to be on deathbed whatever might be the distance of time, unless it could be proved that he had recovered. The difficulty of such proof, and the inconclusiveness of the presumption of imbecility during so long a time, led the Legislature to give their sanction to the opposite presumption of strength and vigour sufficient, if the granter of a deed should outlive the space of sixty days subsequent to the execution of the deed.⁹ On a preamble that 'many

¹ See *Hiddleston v Goldie*, in Jury Court, 1819, 2 Murray 115, 120. [*Weir v Knox*, 1791, Hume 135; *Brock*, 1813, Hume 137; *Black v Brown*, 1816, Hume 154.]

² *Shaw v Gray*, 1624, M. 3208. See Stair iii. 4. 28.

³ *Robertson v Fleming*, 1622, M. 3290; *Shaw v Gray*, 1624, M. 3208; *Black v Black*, 1787, M. 3202.

⁴ *Morbus santicus*, properly speaking, is an illness so severe as to furnish a just excuse from the performance of duty or transacting of business; more strictly it is applied to incapacitating diseases. See Kaimes' conclusion in *Laird v Kirkwood*, 1763, M. 3315.

⁵ *Primrose v Primrose*, 1756, M. 3300. Old age, decay of

constitution, gouty indisposition, held deathbed. *Robertson v M'Caig*, 1823, 2 S. 544, N. E. 474. Old age, no other complaint but a stuffing and cough, held not to be deathbed. [*Tomison v Tomison*, 1839, 2 D. 239.]

⁶ *Dun v Duns*, 1668, M. 3291; a case of a broken leg, afterwards amputated. *Scotston v Drummond*, 1694, M. 3297; a case of running sore in the leg, occasioned by accident.

⁷ Stair iii. 4. 28. See Dirleton, as quoted above, p. 81, note 2.

⁸ Stair iii. 4. 28; Ersk. iii. 8. 96.

⁹ The case which immediately preceded the Act, and out of which it seems to have arisen, was *Gordon v Gordon*, 1696, M.

questions had arisen concerning deeds done upon deathbed,' it was, by statute 1696, c. 4, enacted for clearing thereof: 'That it shall be a sufficient exception to exclude the reason of deathbed as to all bonds, etc., made and granted by any person after the contracting of sickness, that the person live for the space of threescore days after the making and granting of the deed; albeit during that time they did not go to kirk and market. But prejudice always; as of before, to quarrel and reduce the said rights and deeds, if it shall be alleged and proven that the person was so affected by the sickness the time of the doing the said [88] deeds, that he was not of sound judgment and understanding.'

The presumption of convalescence, or at least strength sufficient to resist importunity, is established by the mere elapse of time. The rule of computation of the term is of the greatest importance under this Act; and after full consideration it was finally settled, in a case where the deed was made at eight o'clock on 22d February, and the granter died on 22d April between ten and eleven in the evening, that the deed was ineffectual, as having been executed on deathbed. The ground of decision was thus expressed in the House of Lords: 'That the *terminus a quo* mentioned in the Act respecting deathbed is descriptive of a point of time (viz. the day or date of the deed) which is indivisible; and sixty days after is descriptive of another and subsequent period, which begins when the first is completed. The day of making the deed must therefore be excluded; and so the maker lived only fifty-nine days of the period required. Had he seen the morning of the subsequent day, the rule of law would have applied, *Dies inceptus pro completo habetur*, which makes it necessary ['unnecessary,' 3 Pat. 442] to reckon by hours.'

¹

The date of the deed must be legitimately proved; and, 1. Holograph deeds do not, unless subscribed before witnesses, with a testing clause bearing the date, prove their own date. 2. If a false date be given to the deed to defeat the law of deathbed, it cannot competently be rectified by parole evidence.²

II. KIRK OR MARKET; COMMENTARY ON ACT OF SEDERUNT 29TH FEBRUARY 1652.—Although the granter of a deed should be sick at its date, and should die within sixty days, yet he is held to have been in vigour of mind sufficient to entitle him to make an unchallengeable settlement, if at the time of making it he was able to go about his ordinary duties at kirk or market. There are other proofs of capacity and strength of mind as good perhaps in many respects; but this has been adopted by the law as best answering its purpose, as a protection to a man after he has retired to his own house out of the observation of the world. And so appointed, it is required with absolute strictness; not left to discretionary decision on equivalents.

The law, then, holds the presumption of inability and importunity sufficiently refuted, if after the date of the deed the granter have made his appearance at kirk or market unsupported.

1. It is not necessary that he be seen both at kirk and at market: one is sufficient.³

2. The purpose of requiring the granter's presence on occasions so public, is, that his true condition may be open to the observation of impartial witnesses, instead of being confined to a few persons selected to favour the deceit. The rule on this matter has been declared in an Act of Sederunt of 29th February 1692, which has ever since been recognised as law.⁴

3299, where the Lords 'thought it hard to fix a deathbed so far back (as three years), and that it ought not to exceed a year.' 1 Fount. 720. In the hands of the Legislature this was reduced to the better term of two months.

¹ Contrast these cases: *Sir John Ogilvie v Mercer*, 1793, M. 3336, H. L. 1 Dec. 1796, 3 Pat. 434, where the death was on the 59th day; and *Mitchel v Watson*, 1801, M. App. Deathbed, No. 4, where the deed was dated 23d May at two o'clock: the granter died at one o'clock of the 22d July, the 60th day.

² *Merry v Howie*, 1801, M. App. Writ, No. 3; aff. in H. L. 5 Pat. 101. [See *Gibson v Kennedy*, 1813, Hume 150.]

³ *Crs. of Balmerino v Lady Couper*, 1671, M. 3305, 3292; *Ragg v Forbes*, 1725, M. 3314.

⁴ The Lords of Council and Session, taking to their serious consideration that the excellent law of deathbed, securing men's inheritances from being alienate at that time, may happen to 'be frustrate and evacuate, if their coming to church or mercate be not done in such a solemn manner as may give some evidence of their convalescence without sup-

In commenting on the declaration of the law as contained in this Act of Sederunt, [89] the preamble first deserves attention. It is there taken for granted that the object of requiring appearance at kirk or in market is to show 'convalescence.' The whole preamble is loosely and vaguely expressed; and this word in particular is too indiscriminately used, seeming to require in all cases that the person shall have recovered from his illness. The true principle of the presumption of deathbed is, that the disease is attended with such a degree of weakness as to expose the granter to importunity. It is against this that the law is intended to be a shield, both to the ancestor and to the heir. In refuting the presumption, there is room for a distinction of cases. If the disease be strictly *morbus santicus*, such a disease as is accompanied with incapacity (as acute fevers, phrenitis, etc.), there must be convalescence proved publicly; but if the illness be not of that description, then strength and vigour sufficient to carry the party to kirk or market unsupported form the only necessary points of evidence.¹

It is required that the granter shall appear 'without supportation or straining of nature.' The degree of support is a question for a jury, not of law for the Court; and little can be laid down in point of law to regulate such decisions.² It may, however, be observed, that there is a distinction to be kept in view, in all such questions, between the case of a man who is found freely and frequently going about his ordinary duties at kirk and market, and one who makes his appearance there on one particular occasion for the mere purpose of supporting his deed. It cannot be said that this last exhibition is necessarily a fraud, or that it is to be rejected as incompetent evidence of liege poustie. But at least the party will be required to exhibit himself in circumstances much less questionable than where his appearance at market is in the natural course of his occupations, or at church in his regular and accustomed way. In the latter case it will not invalidate the evidence that he receives occasional aid, while in the other case the same assistance may be sufficient to overturn the presumption intended to be raised of liege poustie. The rule is, that the granter shall be seen in the same condition, in so far as regards aid from others, as while in good health: and the rule in this respect is tightened or relaxed, as the act of going to kirk or market [90] is done in the ordinary course of business, or for the mere purpose of giving effect to the deed.³

portation or straining of nature: And seeing some may think it sufficient if parties, after subscribing such dispositions, come to the church at any time and make a turn or two therein, though there were no congregation at the time: And likewise, if they make any merchandise privily in a shop or crame, or come to the mercate-place when there is no publick mercate; and all this performed before their own pickt out witnesses, brought along by the party in whose favour the disposition is made, that the state and condition of his health or sickness may be as little under the view and consideration of other indifferent persons as can be: the occasion of which mistake might have been, that formerly there were public prayers, morning and evening, in the church in many places, to which those who apprehended any controversie might arise upon the validity of their dispositions were accustomed to come at the time of prayer; and some thought they might come to the church though there were no publick meeting thereat, since these publick prayers were not accustomed, and to take instruments of their appearing there: For remede whereof the Lords declare, they will not sustain any such parties going to church and mercate, where it is proven that he was sick before his subscribing of the disposition quarrelled as done *in lecto*, unless it be performed in the day-time, and when people are gathered together in the church

or church-yard for any publick meeting, civill or ecclesiastick; or when people are gathered together in the mercate-place for publick mercate: And further declare, whensoever instruments are taken for the end foresaid, that the said instrument do expressly bear, that it was taken in the audience and view of the people gathered together as aforesaid, otherways the Lords will have no regard to the said instrument.'

See Lord Fountainhall's commentary on this Act in his note to the case of *Crawford v Brichen*, 1711.

¹ *Crawford v Brichen*, 1711, M. 3312; *Laird v Kirkwood*, 1763, M. 3315. *Faichney v Faichney*, 1776, M. 3316, has been reported as finding presence at kirk or market to be proof of convalescence. The true point of the case I take to have been, the want of that fair and unaided presence at kirk and market which gives proof of vigour to resist importunity. And accordingly this is the view of it given by Mr. Tait, 5 Br. Sup. 422.

² In illustration of such cases, a series of decisions from 1629 to 1787, collected in Morrison's Dictionary, pp. 3303 to 3318, will be found useful. See also *Young v Scotts*, 1777, 5 Br. Sup. 423. [*Angus v Angus*, 1793, Hume 137; *Harvie v Reston*, 1799, Hume 139; *Smyth*, 1812, Hume 148; *Cowan v Cowan*, 1817, Hume 142; *Ormiston v Greig*, 1821, 1 S. 14, note.]

³ See Stair iii. 4. 28. See *Balmerino's case*, *supra*, p. 84, note 3. Ersk. iii. 8. 96.

The Act of Sederunt requires that the appearance shall be public—in church or at market, while the people are assembled; and any instrument taken on the occasion (and so any proof offered) must show the act to have been done, and the appearance made, in ‘the audience and view of the people gathered together.’ Under this head, 1. *It is requisite that the granter shall not only make his appearance, but in such a way as not to betray symptoms of weakness and support.* So, if he appear in church for the purpose of attending worship, he must not enter when the service is half over, and leave the church before the end of it;¹ or if he go to market, he must not, in attempting to prove his independence, betray his weakness in being compelled to take the aid of those who attend him, in making any ordinary bargain. But, 2. *He is not required either to attend during the service of the church, or to make bargains in the market.* It is sufficient if he show himself at either place while there is a public resort of indifferent persons. So, a person walking through the market-place while market was held, to the house of one with whom he was to dine, was sufficient.² 3. *What shall be held a market is matter of law for the Court, not otherwise for the jury than on the direction of the judge, and so subject to review on bill of exception or new trial.* The Cross of Edinburgh was held to be a market-place;³ and appearance in the market-place of Dumfries was held sufficient, though not on the market-days appointed by statute.⁴ So, transacting business in the Commercial Bank of Aberdeen in Castle Street, where the regular market is held, and where there are daily stalls of vegetables, fruits, etc., for sale, and buying in two shops in the view and vicinity of the market-place, and walking through the market-place, were held sufficient, though not on the regular market-days.⁵ But whether other places of public assembly and resort are to be regarded as market, within the construction of the rule, does not seem to be conclusively settled. In an early case it seems to have been held that the going to an election meeting at Inverkeithing was equivalent to market.⁶ In another, a horse-race, where there was a conflux of people, but no regular market, was sustained.⁷ But in a recent case, a general county meeting, and a meeting of trustees of the roads of the county, were not held equivalent to market.⁸

III.—WHETHER EQUIVALENTS ARE ADMISSIBLE TO PROVE LIEGE POUSTIE.

It is an important question whether, although a person has not been at kirk or market, and has died within the sixty days, it is nevertheless sufficient to overturn the presumption of deathbed, that he has with vigour and ability gone about his ordinary business, in other resorts of public affairs. It will here be recollected, that while presence at kirk or market is not required by legislative enactment, but by a rule only of common law, in which a Court is to look rather to the principle and policy of the rule than to limit themselves to the strict [91] and literal construction of the words of it, as delivered in the books, or declared in the Act of Sederunt; yet it is also to be considered, that when a certain criterion has been sanctioned (though only by usage), and firmly fixed in the practice and understanding of the country, and where it is one with which it is easy to comply if the party be within the reach of the rule, it may be dangerous to relax it, so as to leave the matter on the uncertain footing of an arbitrary judgment to be formed concerning a man’s state of health and mental vigour. The inclination of the law has been to give effect to these latter considerations, and adhere to the rule as rigidly as if it were a legislative enactment. Although, therefore, where a man is found going about his ordinary business, wrangling, and making

¹ See *Faichney v Faichney*, 1776, above, p. 85, note 1.

² *Tailzeour v Tailzeour*, 1787, M. 3317.

³ *E. of Rosebery v Primrose*, 1736, Elchies, Deathbed, No. 8, and notes, p. 115; M. 3322.

⁴ *M’Cracken v Pearson*, in *Jury Court*, 2 Murray 551.

⁵ *Rait v Rait*, 27 Nov. 1818, F. C.

⁶ *Lady Scotston v Drummond*, 1694, M. 3322.

⁷ *Laird v Kirkwood*, 1763, M. 3315.

⁸ *Maitland v Maitland*, 16 May 1815, 18 F. C. 253.

bargains in his own house or in shops, settling accounts, or writing out his settlement, sitting at table with strangers, doing the honours of his house, and accompanying his guests to their horses, going about freely, riding, walking, dancing, and whistling, walking on the streets of a town amid promiscuous population, or going to public meetings of a county, or of road trustees,¹ these may well be regarded as more clearly indicative of vigour of body and strength of mind, than the mere appearance in a market or at church; yet, in various cases, such indications have been rejected, the Court refusing to sustain equivalents instead of the settled criterion of kirk and market.² Unless, therefore, the defender can make out the place in which the granter exhibited himself, or did the act relied on, to be a church or a public market, in the construction already put on it in the cases above cited, he will not succeed in establishing his exception.

IV.—REFUTATION OF THE PRESUMPTION ARISING FROM PRESENCE AT KIRK OR MARKET.

The proof arising from presence at kirk or market unsupported, and without betraying the weakness and prevalence of his disease, is held decisive of the strength by law required for resisting importunity. It will overturn this conclusion, however, if it should be proved that the granter of the deed was, at the very moment, under the influence of his disease to such a degree, as to evince rather a design *fraudem facere legi* in his attempt to appear publicly, than the vigour of a man in sufficient health to be the protector of himself and of the just rights of his heir. Although, therefore, it will not be sufficient to prove that the disease was on him, or never abated, if it be not *morbis santicus*;³ yet if plain symptoms of a disease of this description should appear (as in Stair and Fountainhall's example of a man in the paroxysm of a fever running to market⁴), or if the weakness and depression of an ordinary illness should appear to exhaust the patient in this attempt, the deed will be reduced.⁵

SUBSECTION II.—DEEDS LIABLE TO CHALLENGE ON DEATHBED.

The general rule is, that no deed granted or act done spontaneously on deathbed, to the prejudice of the heir, directly or indirectly, will be sustained as effectual, if challenged by the heir, or by those in his right.

I.—DEEDS DIRECTLY PREJUDICIAL TO THE HEIR.

Deeds spontaneous, which directly alienate, or invade, or diminish, or burden the [92] estate descendible to the heir, whether affecting lands and houses, debt heritably secured, bonds excluding executors, heirship moveables, conquest provided to the heir, or any other inheritance descendible to him as heir, are reducible on deathbed.

Those deeds may be classed as deeds of Alienation, of Settlement, or of Discharge.

I. DEEDS OF ALIENATION INTER VIVOS are reducible by the heir, if made on deathbed in the following circumstances:—

Where the alienation is gratuitous, that is to say, without full consideration or value given for the conveyance, it is challengeable on deathbed.⁶

The converse does not hold, that where the deed is for an onerous consideration it is safe from challenge. The distinction ought carefully to be marked between gratuitous and spontaneous. Although the deed be not gratuitous, yet, if spontaneous, the heir is entitled

¹ All these circumstances occur in the cases referred to.

² *Lowrie v Drummond*, 1671, M. 3319; *Crs. of Balmerino v Couper*, 1671, M. 3295; *Mountainhall's Daughters*, 1683, M. 5320; *Maitland v Maitland*, 16 May 1815, F. C.; *supra*, p. 86, note 8.

³ *Ormiston v Greig*, 17 May 1821, F. C.

⁴ *Stair* iii. 4. 28; 2 *Fount.* 683.

⁵ See 1 *Fount.* 356; *Stair* ii. 4. 28; *Ersk.* iii. 8. 96. [*Kyle v Kyle*, 1825, 3 S. 641, N. E. 449.]

⁶ *Ersk.* iii. 8. 97.

to be relieved from it, however full a consideration may have been given for it. But this is a doctrine which involves some very nice and difficult questions. And,

1. A SALE of land is not safe from challenge on deathbed.¹ But it may be observed, 1. That if the price be inadequate, redress will be given to the heir as in a transaction prejudicial to him, in which *bona fides* cannot be pleaded. The heir will be entitled to have his land again on repayment of the inadequate price. 2. That although the price be adequate, the heir may be prejudiced by the sale, in consequence of the dismembering of his estate, etc.; and he will have redress on restitution of the price.² 3. That considerable difficulties arise in respect to the terms on which the heir is entitled to his challenge. If he be required to make restitution of the price before he can be allowed to reduce, this must frequently operate as a bar in his way to relief; and Mr. Erskine lays down the rule so broadly as to imply that the heir would not be required to pay the price where it had been dissipated gratuitously to strangers.³ But there must be a distinction of cases here; and, *first*, if the ancestor has died with the price unpaid, a bond granted for it, or bills in his repositories, the heir will have his challenge on discharging the price, or cancelling the bond or bills; and he will be entitled to have them for this purpose. *Secondly*, if the purchaser himself be the person favoured to the heir's prejudice, the reduction will be competent to the full extent.⁴ *Thirdly*, if the purchaser have granted bond or bill to younger children, etc., to the heir's prejudice, he should be held as in *mala fide* in the transaction; but although a sale in such a case was held reducible, the reducer was ordained to pay to the defender the just sums for which the alienation was made and truly disbursed.⁵ *Fourthly*, in all cases where money has been actually paid to the deceased, a debt is created for which his heir is by representation liable, and therefore the heir cannot be heard to reduce (unless in a case of collusion and fraud), without, as the condition of his success, indemnifying the purchaser. He will have his remedy on deathbed against the executors who may have been favoured,⁶ or any one to whom the price has been paid on deathbed to his prejudice; but his first step to redress is indemnification to the third party.

2. The creation of BURDENS and SECURITIES are truly alienations, and are reducible if to the heir's prejudice; as for raising a fund to benefit the younger children or others. The following cases may be distinguished:—1. If the security be granted for a debt already subsisting, and for which the heir is liable, it cannot be challenged on deathbed; although the debt secured was at the date of the deathbed deed a proper debt of the executry, and although the debtor was not bound to grant any deed of security.⁷ The heir's remedy here must be directed against the executors for relief. 2. If a debt arising by legitimate and necessary furnishings to the ancestor be so secured, the security will be unchallengeable; the heir's relief being reserved against the executry.⁸ 3. If the money be borrowed while the borrower is on deathbed, and dissipated, or given in donation to younger children or strangers, still the security would seem to be effectual to the lender; but the heir, as before, would have redress against those who have been benefited.

3. ASSIGNATIONS of bonds, whether secured on land, or heritable by destination, as bonds excluding executors, are reducible on deathbed.⁹

¹ See case of Gilbert, 1608, M. 3290.

² Ersk. iii. 8. 97.

³ 'A sale of lands executed by the proprietor *in lecto* is subject to reduction, though the purchaser should have paid full value for it, if the heir be hurt either by the bargain itself, or by the ancestor's dissipating the price gratuitously to strangers.' Ersk. iii. 8. 97.

⁴ Lindsay v Lindsay, 2 Dec. 1819, Hume 156, where an estate was conveyed on deathbed for a price to a second son. The sale was reduced. See also Campbell v Rankin, 1805, M. App. Deathbed, No. 5; 5 Pat. 573.

⁵ Richardson and L. Cranston Riddel v Sinclair, 1635, M. 3210.

⁶ [Gillespie v Gillespie, 1802, Hume 145.]

⁷ Darling v Hay, 1709, M. 3222. The Court distinguished well between the right of an inhibiting creditor and that of the heir.

⁸ Shaw v Gray, 1624, M. 3208. This was a security for drugs and medical attendance. Pollock v Fairholm, 1632, M. 3209; for malt furnished. Stair ii. 4. 30; Ersk. iii. 8. 97.

⁹ M'Kay v Robertson, 1725, M. 3244; Murray v Borthwick's Trs., 1797, M. 3237.

4. LEASES are in this question, as alienations, challengeable on deathbed, where they exceed the ordinary term of duration;¹ but where granted in the fair and reasonable exercise of a landlord's administration, they are not held reducible.² Where a grassum is taken from the tenant on deathbed, it seems to be challengeable, in so far as the money so raised is given to executors to the heir's prejudice; but it is very doubtful whether against the tenant any challenge can be maintained, to the effect of compelling him, without restitution of the grassum, to pay the full rent.

5. A bargain of sale of timber has been sustained as an act of ordinary administration.³

6. A discharge for an heritable debt, paid up by the debtor in *bona fide*, is good.⁴

II. SETTLEMENTS AND DISPOSITIONS *MORTIS CAUSA* are the peculiar objects of this protecting law; and this is the class of deeds on which questions of deathbed most commonly arise. As in alienations *inter vivos* onerosity is no defence against deathbed, so in this class of deeds the greatest rationality and moral obligation will not sustain the settlement.⁵ It is requisite, for its support, that the granter shall be placed under an obligation effectual in law, and which the heir may be compelled to fulfil. Bonds of provision, therefore, [94] however rational, are reducible when granted on deathbed,⁶ unless they be fortified by a legal obligation effectual against the heir.⁷

III. DISCHARGES OF HERITABLE DEBTS OR SECURITIES on deathbed are challengeable if gratuitous. Even if the discharge have proceeded on payment of the debt, the heir has his remedy against the executor, or any person to whom the money had been given.⁸ The only difficulty is on the point of fair administration, where the debtor insists on paying up the debt; or when, on bankruptcy, a dividend is paid, etc. In such cases there would seem to be no reduction on deathbed. It is not then a spontaneous act.

II.—DEEDS INDIRECTLY PREJUDICIAL TO THE HEIR.

Such deeds are reducible, if not as against third parties, at least in so far as the deceased has favoured others gratuitously by the transaction.

1. A voluntary alteration of a subject, converting it from heritable to moveable, is liable to challenge.⁹

2. If a deed prejudicial to the heir be made in liege poustie, though not delivered so as to become effectual till the granter was on deathbed, it rather seems to be unchallengeable, as being the completion of a purpose settled in liege poustie.¹⁰

3. Moveable bonds, legacies, provisions, etc., in so far as they are claimed against the heir, or made the subject of diligence by adjudication or otherwise against the heritable estate, or even so far as they may reduce the fund for payment of moveable debts to the prejudice of the heir, are challengeable.¹¹

¹ *Christison v Ker*, 1733, M. 3226; *Elchies*, Deathbed, No.

2. This was a lease for three nineteen years. *Bogle v Bogle*, 1759, M. 3235. This was a lease for thirty-eight years.

² *Sample v Sample*, 1 June 1813, F. C. Here a lease was subsisting, and thirteen years were to run. The deceased renewed the lease for nineteen years, at an increased rent. It was sustained with great difficulty, but the validity of a lease of ordinary endurance was unanimously taken for granted.

³ *Maxwell v Corrie*, 1724, M. 3329. Here the distinction was drawn between the act of administration and the destination of the price to executors.

⁴ *Brown v Thomson*, 1634, M. 3200; *Stair* iii. 4. 29.

⁵ [*Fairholme v Fairholme's Trs.*, 1856, 19 D. 178; *Jack v Jack*, 1857, 19 D. 747.]

⁶ See this question fully discussed in *Logan v Campbell*, VOL. I.

1757, M. 3230; *Leslie v Leslie*, 1747, M. 3229; *L. Cranston Riddel v Richardson*, 1637, M. 3212; *Sir James Foulis v Foulis*, 1721, M. 3223.

⁷ *Edmonstone v Edmonstone*, 1706, M. 3219. [*Foreman v Foreman's Trs.*, 1829, 7 S. 704.]

⁸ *Gillespie v Marshall*, 1802, Hume 145, where an heritable bond was sold, and the money laid out on a promissory note. Reduction sustained.

⁹ *Ersk.* iii. 8. 98.

¹⁰ *Shorswood's Children v Shorswood*, 1669, 1 Br. Sup. 597, presented this question;—not decided. I find, in perusing the consultations of our older lawyers, some difference on this point; Pitfour holding deathbed not to apply, others that it does.

¹¹ See above, case of *Shaw v Gray*, *supra*, p. 88, note 8, M. M

4. The heir may be prejudiced indirectly by a purchase of lands made on deathbed, with a destination to one not the heir-at-law. The fund here employed, however, is not previously heritable; and the heir suffers only in so far as he might otherwise have collated. But as that right belongs to him only as executor, this seems a case in which deathbed could not be pleaded.

5. Where the deed is in fulfilment of an obligation, which, had it not been so implemented, the heir would have been responsible for, the heir will be barred. So, where there is a previous obligation or provision in a contract of marriage, or where the deed is a security for debt due, or in implement of a sale concluded by minutes in liege poustie,—in all these cases the heir's estate may be affected by adjudication, or adjudication in implement, leaving him only his claim of relief. And so his challenge on deathbed, as against third parties, will be debarred.¹ But if the previous contract or obligation be not complete and binding, it will not support the deathbed deed.²

SUBSECTION III.—MEANS TAKEN FOR EVADING THE LAW OF DEATHBED.

[95] When it is recollected how unjust the restraint must often prove which the protecting genius of the law would extend over every person on deathbed, however secure against the assaults of importunity or selfishness, and how inconvenient and inexpedient the operation of such a rule must be in the case of foreigners having money secured in Scotland, it will not seem unnatural that various devices should have been attempted for evading the law. But those evasions have seldom proved successful. The policy of the law, as a protection not to the heir only, but also to the dying man, has prevailed over and baffled most of the attempts made to defeat it. And,

1. A power granted in a Crown charter to dispoise or contract debt on deathbed seems at one time to have been thought effectual to defeat deathbed; but it was held by Dirleton and other great lawyers of his day to be unavailing.³

2. Reservation of power to convey or burden in a settlement has been held ineffectual to bar the challenge where the conveyance is to the heir, and the power is not expressly reserved to be exercised *etiam in articulo mortis*, but only 'at any time in his life.' This is grounded on the presumption that such a reservation is meant to be consistent with law; *in terminis habilibus juris*, and so to except deathbed.⁴ And even where the reservation is to the full extent—namely, that the power is to be exercised *etiam in articulo mortis*—although collaterally the heir may be barred if the reservation be in a disposition to a stranger, the mere force of the reservation in a settlement on the heir will not validate a deathbed deed, 'since no man can reserve to himself that he shall have then solidity of judgment, without which he ought not to have power.'⁵

3. If by marriage contract a right is given to the heir, subject to provisions to be granted by the father at any time in his life or on deathbed, or if the heir accept of a disposition bur-

3208; *E. of Leven v Montgomery*, 1683, M. 3217; *Cowie and Hardie v Brown*, 1707, M. 3220.

¹ [A deed granted by a liferenter in the exercise of a power of disposal is not liable to challenge *ex capite lecti*. *Morris v Tennant*, 1853, 15 D. 716; aff. 27 Jur. 546. See as to powers exercised under the authority of deeds of entail, *Newton v Newton*, 1867, 5 Macph. 1056. A deed revoking the fetters of an entail is not challengeable. *Miller v Marsh*, 1853, 15 D. 823; 1855, 2 Macq. 284.]

² *Campbell v Rankine*, 1805, M. App. Deathbed, No. 5. Here a minute of sale was entered into, but deposited in neutral custody till called for by both parties. On deathbed

a feu was granted, with an addition of £10 of feu-duty to the original price. The Court reduced the feu-disposition, and held the minute of sale not binding. 5 Pat. 573.

³ *Irvine of Drum's case*, 1 Fount. 479. See 2 Fount. 324-5.

⁴ *Hepburn v Hepburn*, 1663, M. 3177. But it is implied in dispositions to strangers that the power is reserved even in deathbed. *Douglas v Douglas*, 1670, M. 329.

⁵ *Davidson v Davidson*, 1687, M. 3255. See also *Dirleton and Stewart*, 8vo, 334, and p. 137. *Bertram v Vere*, 1706, M. 3250. [*Clyne v Clyne's Trs.*, 1837, 15 S. 911; 1839, M'L. and Rob. 72. *Miller v Marsh*, 1855, 2 Macq. 284.]

dened with a power, the faculty may be exercised, and challenge on deathbed will be barred.¹ Although the heir's acceptance of a deed, with reservation of a precise power, will have effect when it can fairly be ascribed to his approving of the particular deed or act in the contemplation of the power reserved, yet, where the reservation is entirely general to do any deed on deathbed, to give it effect would be equivalent to a defeating of the law of deathbed.²

4. It has been attempted, but ineffectually, to retain power on deathbed by executing a deed in liege poustie, blank in the donee's name, and filling it up on deathbed.³

5. The total exclusion of the heir's right by a deed in liege poustie gives efficacy to a disposition on deathbed altering that settlement. For as the only title to challenge on deathbed belongs to the heir, this is a case in which he cannot allege that his interest is hurt, while the reduction of the new deed cannot benefit him.⁴ But,

6. Where the deed of exclusion in liege poustie contains a power of revocation, and [96] a new settlement is made on deathbed, a question of construction is raised. And, 1. Where there is an express revocation by separate deed or act, the heir's right revives, and with it the challenge on deathbed.⁵ 2. Even where the revocation is in the same deed with a new disposition differing from the liege poustie deed, but the revocation is not made expressly provisional, the same effect follows: the heir's right revives, accompanied by his title to challenge the deathbed deed.⁶ 3. Where the revocation, separate or in the same deed, is expressly made conditional, and the liege poustie deed declared to subsist if the other disposition should prove ineffectual, the heir will be barred of his challenge.⁷ 4. How far the same effect will be produced where the new disposition is in all respects similar to the liege poustie deed, is a question undecided.⁸ And, 5. Where the revocation is not express, but implied only from the deathbed deed, it has been held that the testator is to be regarded as having virtually declared the efficacy of the new deed to be a condition of the revocation of the old. This has been greatly doubted in point of principle; but it is held as a decided point not now to be shaken.⁹

7. It is not competent by the aid of a trust-deed, with reserved powers ('to alter, provide, etc., even on deathbed'), to dispose of heritable subjects by testament.¹⁰ Nor will a trust with such clauses confer a power to execute a conveyance (though in regular form

¹ *Forbes v L. Forbes*, 1755, as decided in H. L., M. 3284, 2 Pat. 8; *Pringle v Pringle*, 1765, decided in H. L. 29 Jan. 1767, M. 3290, 2 Pat. 130.

² *Reeds v Campbell*, 1728, M. 3327; *Inglis v Inglis*, 1733, M. 3327. *Ersk. iii.* 8. 99. [*Morris v Tennant*, 15 D. 716; aff. 18 D. (H. L.) 42, 27 Jur. 546.]

³ *Pennycook v Thomson*, 1687, M. 3243; *Birnies v Laird of Polmaise*, 1678, M. 3242, 3 Br. Sup. 325.

⁴ *D. of Roxburgh v Wauchope*, 13 Dec. 1816, 19 F. C. 238; aff. 3 Bligh 630, 6 Pat. 548.

⁵ *Findlay v Birkmire*, 1779, M. 3188.

⁶ *Coutts v Crawford*, 1795, M. 14958, Bell's Fol. Ca. 207. In the Court of Session the revocation was held to be provisional only, so that the heir's challenge on deathbed was still barred. In the House of Lords the case was viewed differently, and the revocation held to give admission to the heir, no longer excluded by a liege poustie deed. The case was remitted for reconsideration, when the Court of Session confirmed their former judgment, 3 Feb. 1801. But this decision the House of Lords reversed, on a ground on which the opinions of Lord Rosslyn, Lord Thurlow, and Lord Eldon, successively given, concurred,—namely, that the intermediate disposition was absolutely destroyed, and the right of the heir to claim the estate was again set up, opposed only

by a deathbed deed. 14 March 1806, 3 Bligh 655–691, 5 Pat. 73.

The doctrine of that case was confirmed in *Bately v Small*, 2 Feb. 1815, F. C., the deed there being held not to qualify the revocation.

In *Moir v Mudie*, 1820, there was still another confirmation of the rule. Aff. in H. L. 1 March 1824, 2 Sh. App. Ca. 9. [*Anderson v Fleming*, 1833, 11 S. 612; *Ker v Erskine*, 1851, 13 D. 492; *Whitelaw*, 1809, 2 Sh. App. Ca. 13, note; *Neilson v Stewart*, 1860, 22 D. 646.]

⁷ See Lord Chancellor Eldon's opinion in *Coutts' case*, 3 Bligh 686.

⁸ Lord Chancellor Eldon in *Moir's case* (above, note 6) said: 'I give no opinion whatever upon the principles which might or might not rule the case, if the dispositions had been exactly the same.'

⁹ *Rowan v Alexander*, 1775, 5 Br. Sup. 423, Hailes 659. See 3 Bligh 662, 679, 680–1, 687.

D. of Roxburgh v Wauchope, 13 Dec. 1816, F. C., 3 Bligh 619, 5 Pat. 548.

¹⁰ *Willock v Auchterlony*, 1769, as revd. in H. L., 3 Pat. 659. See, for opinion of judges in Court of Session, Hailes 321. [*Erskine v Erskine's Trs.*, 1850, 13 D. 223.]

as a deed *inter vivos*) on deathbed.¹ But where a trust is executed with a complete exclusion of the heirs-at-law, a power to declare uses on deathbed is effectual.²

8. A general obligation by the presumptive heir not to challenge any deed to be granted by the ancestor is ineffectual.³ But his assent to a particular deed or disposition, if fairly obtained, is good, on the principle already stated with regard to acceptance.⁴

The doctrine of Approbate and Reprobate it may be proper to consider afterwards in all its relations, rather than as confined to this case of deathbed.

SUBSECTION IV.—EXERCISE BY CREDITORS OF THE RIGHT OF CHALLENGE.

[97] In considering the doctrine of deathbed relatively to the rights of creditors, and their power to avail themselves of the heir's privilege to challenge a settlement on that ground, there are three points which deserve attention: 1. What heirs are themselves entitled to challenge on deathbed. 2. The title of the creditors to prosecute in the heir's place. 3. The effect of the heir's approbation of the deed in excluding his creditors.

I.—DESCRIPTION OF HEIRS ENTITLED TO CHALLENGE.

The general rule is, that the plea of deathbed is competent to the heir who, *alioquin successurus*, is entitled to be served but for the deathbed deed. So,

1. The heir-at-law, whether of line or of conquest, has the most undoubted title to maintain a challenge on deathbed.

2. The heir of investiture, whether by tailzie, marriage contract, or destination in the investiture, has the privilege, even against the heir of line called to the succession by the deathbed deed; on the principle that the succession, as settled by law or deed previously to deathbed, is not to be altered on importunity during that period of weakness.⁵

3. It does not alter the rule that the heir's right is constituted by personal deed, not completed by infestment.⁶

4. It is not enough, however, that a right of succession, which would have been sufficient if embodied in the investiture, remains *in obligatione*, or as mere matter of contract on the part of the ancestor. The remedy in such a case is by action on the contract, not by reduction on deathbed.⁷

5. The heir of line who has the right of challenge, will of course succeed to that privilege if it have not been renounced; but a remoter heir seems also to have the privilege in his own right, although the immediate heir should not have been injured by

¹ *Ladies Kerr v Wauchope*, 1806, 5 Pat. 559. The Duke of Roxburgh in 1803 made a trust settlement, after having in 1790 conveyed his estates to Ladies Kerr, with a power of revocation. On deathbed he gave directions to his trustees to pay legacies, and divide the residue among certain residuary legatees, but did not revoke the deed 1790. The ladies challenged on deathbed, and were successful.

² *Bellenden v E. of Winchelsea*, 1825, 3 S. 530, N. E. 367. Here the settlement gave the estates primarily to those entitled to succeed under the statute of distributions, which, by excluding the heir, gave full effect to a disposition on deathbed. [*Brack v Hogg*, 1827, 6 S. 113.]

³ *Inglis v Hamilton*, 1733, M. 3327; *Elchies' Deathbed*, No. 1. See above, p. 91, note 2.

⁴ See *Murray v Murray*, 1826, 4 S. 374. [*Richardson v Richardson*, 1840, 10 D. 872.]

⁵ *Hepburn v Hepburn*, 1663, M. 3177; *Porterfield v Cant*, 1672, M. 3179; *Maxwell v Neilson*, 1722, M. 3194. *Ersk.* iii. 8. 100. [*Merry v Howie*, 1806, 5 Pat. 101.]

⁶ *M. of Clydesdale v E. of Dundonald*, 1726, M. 3180.

⁷ *Campbell v Campbell*, 1738, M. 3195. See also *Lord Monboddo's Cases*, 5 Br. Sup. 651. Here the conquest during the marriage was by marriage contract provided to the children of the marriage in fee. The father bought an estate during the marriage, taking the right to himself, and his heirs and assignees; and on deathbed settled his whole property on his eldest son, under the burden of certain provisions. The Court held the privilege of deathbed not to be pleadable by the younger children, whose remedy was only by action. [*Shaw v Campbell's Exrs.*, 1847, 9 D. 782; *Leith v Leith*, 1848, 10 D. 1137.]

the deathbed deed,¹ unless where the heir first succeeding has taken benefit, and approbated the deed.²

6. This is a privilege which the heir-at-law may, on apparency, and without completing his titles, plead.³ Whether the same right is enjoyed by the heir of provision, has been much doubted. It was held at one time that such an heir cannot exercise his privilege without completing his title.⁴ But an opposite opinion was held in the case of one, who, being heir of investiture, his title on apparency was considered as good.⁵

Where a title is necessary, it has been held that a general service to the person [98] last infeft will not entitle him to challenge on deathbed a conveyance of the estate.⁶

7. But if the heir die in his apparency, no right will be transmitted to his representatives or creditors. See below, Commentary on the Act 1695, c. 24.

II.—TITLE OF THE CREDITORS TO PROSECUTE IN ROOM OF THE HEIR.

While the heir lives, his right under his apparency, or in virtue of his service, may be exercised by creditors, either by adjudging his right, or even, as Erskine has laid it down, without any adjudication, by direct action libelling on their right as creditors.⁷ This seems to rest on the ground that the creditors may competently have a declarator that their debts should have free course to attach the estate unobstructed by the deathbed deed.⁸

III.—EXCLUSION OF CREDITORS BY THE HEIR'S APPROBATION.

The privilege is personal to the heir, and no one who comes in his right is entitled to object to the deed; not even the debtor in an heritable bond alienated on deathbed. The heir's approbation, therefore, confirms the deed. And it will be effectual even against creditors, unless the act of the heir is itself subject to exception.

Whether the deed have been truly ratified, is a question of evidence. And, 1. It is not enough that the heir have signed witness to the deed: he is not presumed to know the contents; or if he do, he is held to sign under the influence of feelings which will not bar his right—the principle of homologation ruling the question.⁹ 2. If the deathbed deed be a general disposition requiring to be completed by adjudication in implement, a question may arise as to the effect of the judicial proceedings for that effect.¹⁰ If, in the action of constitution, the heir should not defend himself on deathbed, it would operate as a ratification against which reduction might be competent, or otherwise, as the decree was in absence or in *foro*.

The doctrine of ratification Erskine places on the same footing with an absolute conveyance to the heir, and a reconveyance by him to the stranger.¹¹ But, 1. If the ratification be on deathbed, it is held ineffectual.¹² 2. If the heir be insolvent, and gratuitously assent or ratify, there will be a remedy to the creditors on the Act 1621, c. 18; or, 3. If the person

¹ *Kennedy v Arbuthnot*, 1722, M. 3198; *Craigs v Maltanen of Glasgow*, 1739, M. 3199. The distinction between these cases was, that in the former the nearest heir was not prejudiced; in the latter he was. And it appears from Elchies, that in Craig's case some doubts were suggested of the decision in Kennedy's. The Court held it not right to alter so important a decision; but they held it safe to sustain the challenge, as the deed was in prejudice of the first heir as well as the second, that first heir being an infant. Elchies' Notes, p. 116.

² *Irvine v Tait*, 1808, M. App. Deathbed, No. 6.

³ *Graham v Graham*, 1779, M. 3186.

⁴ *Edmonston v Edmonston*, 1637, M. 16089.

⁵ See above, case of Graham. This was held against the opinion of Lord Braxfield, who considered him as a mere stranger, not having made up titles to the person last infeft.

⁶ See Graham's case, above.

⁷ Ersk. iii. 8. 100.

⁸ *Crs. of Balmerino v Lady Couper*, 1669, M. 3203.

⁹ *Dallas v Paul*, 1704, M. 5677; Ersk. iii. 3. 48. [*Brodie v Brodie*, 1827, 5 S. 835; *Leith v Leith*, 1848, 10 D. 1137; *Murray v Murray's Trs.*, 1826, 4 S. 377.]

¹⁰ [*Gardner v Gardner*, 1830, 9 S. 138.]

¹¹ Ersk. iii. 8. 99.

¹² *Cleuch v Leslie*, 1744, M. 3182. [*Hedderwick v Campbell*, 1740, Elch. *voce* Deathbed, No. 13.]

favoured by the deathbed deed be a creditor of the heir's, and the heir's assent really operate as a preference to that creditor, the others will be entitled to challenge it, either on the Act 1696, c. 5, or at common law.

The creditors of the person who has granted the deathbed deed may suffer by it as much as those of the heir. But their remedy stands upon another footing than deathbed. They are entitled on the Act 1621, c. 18, to reduce the conveyance if gratuitous.¹

SECTION III.

OF THE RIGHT OF CREDITORS TO AVAIL THEMSELVES OF THE DEBTOR'S OTHER PRIVILEGES AS HEIR.

[99] There are other rights which belong to an heir, of which creditors may avail themselves: namely, 1. The right of an apparent heir to continue the possession of the ancestor; and, 2. The heir's right to demand a share of the moveable succession, where he is also one of the next of kin.

SUBSECTION I.—APPARENT HEIR'S RIGHT TO POSSESSION OF THE ANCESTOR'S ESTATES.

Although the right of the heir is not completed without service, and feudal estates require infeftment, yet even during apparenacy the heir has certain privileges by which his creditors may be benefited. An apparent heir is a person to whom the succession to an heritable estate has, on the death of the ancestor, opened either by disposition of the law, or by the destination of the subsisting investiture,² but whose feudal title is not yet completed.

1. He is entitled to enter at once into the natural possession of the estate.³ Where he is opposed by a disponent, holding only a personal right, he seems still entitled to his privilege,⁴ though that has been questioned. So far effect will be given to the doubt, that if the apparent heir's circumstances be such as to put in hazard the rents, the estate will be placed under sequestration till the disponent shall establish his title.

2. The apparent heir is now held entitled (though even that was considered once as doubtful) to levy the rents of the lands from tenants deriving their right from the ancestor. Where a claim for the rents is made by a disponent, it would appear, 1. That if the disposition be *inter vivos*, with an assignation to the rents, it will be a good title to exclude the apparent heir and his creditors; but, 2. If it be a deed of settlement still personal, on which no infeftment has followed, the apparent heir will not be excluded.⁵ Of those rents, such as were still unlevied during the apparent heir's life are held as part of his funds, and attachable by his creditors. But at one time it was conceived, that although the apparent heir had a right to levy the rents, his actual exercise of this right, by obtaining payment of the rents, was the only proper completion of his title; and therefore that those rents which he had not received were still to be considered as *in hæreditate jacente* of the ancestor, so as to devolve along with the land, on the next heir completing his title by service. But this opinion, though it regulated the judgment of the Court in one case,⁶ was completely overturned subsequently, and the doctrine finally established, that as the apparent heir has the undisputed right of levying the rents, the accidental interruptions he

¹ *Crs. of Lindsay* competing, 1714, M. 3204.

² *M'Kie v M'Kie*, 1741, M. 5289; *Sir A. Ogilvie v Reid*, 1727, M. 5242.

³ *Stair* iii. 5. 2.

⁴ See above, note 2.

⁵ See cases in note 2, *supra*. The only remedy in such a case to the disponent, will be by application for sequestrating the rents.

⁶ *Hamilton v Hamilton*, M. 5253, revd. 2 Pat. 137.

may meet with are not to alter the nature of his right; and what he is entitled to take is held as part of his funds, available to his executors or his creditors.¹

3. The apparent heir has right to cut the wood on the estate; but this right expires with his life. The timber then uncut is the heir's, and the benefit of any contract entered into for *silvæ cæduæ* will be his; not available to the creditor of the apparent heir, [100] with whom the contract was made.²

4. If the apparent heir do not himself owe debts, so as to give his creditors a right of adopting his interests in the succession, and choose to renounce the succession and abandon it to the creditors of the ancestor, of course the arrears falling due after the ancestor's death may, as a part of the *hereditas jacens*, be taken up by the ancestor's creditors.

SUBSECTION II.—OF THE HEIR'S RIGHT TO CLAIM A SHARE OF THE MOVEABLE ESTATE,
WITH OR WITHOUT COLLATION.

The equal partition of the succession which prevailed in the Roman law, has place also in the law of Scotland in the succession of moveables.

But with regard to land, the policy of the feudal system has introduced a remarkable change. The sole right of succession has been conferred on the heir; while of the executry nothing was left to him but the heirship moveables, consisting of the best of certain articles of furniture, horses, military accoutrements, and so forth. These were given to him that he might not succeed to a mansion utterly displenished, or incur the disgrace of being found unprepared with horse and harness to attend his lord in the field.³ The heir is thus the exclusive successor to the land; the other nearest of kin the exclusive successors to the moveables; the *portio legitima* of the former being the heritage, the *portio legitima* of the latter the personal estate. But to the heir thus excluded from the moveables, provided he be also one of the next of kin, a privilege has been reserved of throwing the heritable estate into a common stock with the moveables, and demanding as one of the next of kin a share along with the rest. This privilege has, in the natural progress of wealth, come frequently to be of the first importance to the heir or to his creditors. The effect of it is to restore, as to the whole estate, the Roman rule of equal partition among all the nearest of kin, the heir taking his share as one of the number. And it takes place only where there is a moveable as well as an heritable succession, and where the heir, but for the heritage, would divide with the rest the moveable funds. In former times, while the land-estate was the only one of value, the preference of the heir to the land-estate was in general a most valuable right. But in our days the land-estate is often inconsiderable; while the shares belonging to the deceased in national establishments, in government and bank stock, or in public companies, his exchequer bills, his notes and bonds for lying money, the stock of commodities in his warehouse, his property in ships, and other moveables, may amount to an enormous capital, which in its legal description in point of succession is executry, and to a share of which, the heir, in his mere character of heir, has no right whatever.

In the succession to one whose moveable estate is valuable, two questions may be raised: 1. Whether the person who as heir is entitled to the land may reject it, and on collation claim his share of the moveable estate? And, 2. In what cases the person who takes the land is entitled to claim his share as executor, without collation or giving up the land?

¹ Stair ii. 3. 16, p. 207. This controversy was still unsettled in Erskine's time. Ersk. iii. 8. 58. See also Kaimes' Law Tracts, No. 5.

Houston v Nicolson Stewart, 1756, M. 2338, 5250; *L. Banff v Joass*, 1763, M. 5257, note. In both these cases the right was held to be with the executors of the apparent heir. And this was confirmed by a judgment of reversal by the House of

Lords of the decision of the Court of Session in the above case of *Hamilton*, 8 April 1767, 2 Pat. 137.

² *Taylor v Veitch*, 24 June 1796, Sir Ilay Campbell's Sess. Pap. [See *Paul v Outhbertson*, 1840, 2 D. 1286.]

³ [The right to heirship moveables is abolished by 31 and 32 Vict. c. 101, sec. 160.]

The consideration of these questions, and of the interest of the heir and of the executors in consequence of collation, will exhaust all that is useful in this matter.

I.—RIGHT TO COLLATE THE SUCCESSION.

[101] This is a right which by law belongs to the heir *ab intestato* (being himself one of the nearest in kin), where the deceased has left both an heritable and a moveable estate.

1. If the heir be also the sole executor, he is not required to collate in settling with the relict.¹

2. This right to collate holds not only in the direct and descending line of succession, but also in the collateral.² As, in the descending line, the eldest son may insist on collating with his brothers and sisters; so in the collateral, the elder or the younger brother, who as heir of line or of conquest has right to the heritable estate of a brother deceased, may insist on collating with the rest of his brothers and sisters who have right to the executry.

3. The heir of conquest as well as the heir of line has right to collate, and it may happen that two heirs may thus become entitled to a share of the moveable estate along with the executors—the heir of line and the heir of conquest. In this there is no inconsistency.

It has been doubted whether one of these heirs would be entitled to collate without the concurrence of the other. But the executors certainly cannot insist on a collation from both, where the privilege is claimed by one only.

It has also been questioned what share one of several heirs entitled to collate may demand of the executors, if all the heirs do not concur? It would seem that the heir thus collating comes to the division of the mingled succession, just as if that succession formed the only estate, and as if the executors and he were the sole heirs.

4. If the heir be not also one of the next of kin, he has no right by collation of the heritage to demand a share of the executry.³ The grandson by the eldest son is heir to the exclusion of his uncles, the younger sons of his grandfather; but he cannot collate and claim a share of the moveable succession with his uncles, for there is no representation in moveables, and he is not one of the next of kin. So, if one of two heirs-portioners die, her child cannot collate: he will take his mother's share of the heritage by representation, but his aunt is the sole executor, and as such is alone entitled to the moveable succession.⁴

5. There is no collation in heritable succession; among heirs-portioners, for example. So, where one heir-portioner receives a preference by deed of the ancestor, she is still entitled to her share of the residue of the heritable estate.⁵

6. The privilege of collation may be excluded by the will of the deceased, where he has the uncontrolled power of disposing of his moveables. If the ancestor have died intestate as to his land, but leaving a will ordering the disposition of his moveables, that will, if exclusive of the right of legal succession, bars the heir from collation. Thus, if the will bequeath legacies, and leave the residue to an executor or residuary legatee, or clearly bequeath the

¹ *Trotter v Rocheid*, 1681, M. 2375.

² *Chancellor v Chancellor*, 1742, M. 2379; Elch. Succession, No. 8.

³ Erskine states the opposite to be law, which it is not. Ersk. iii. 9. 3. His doctrine was overruled in *M'Caw v M'Caws*, 1787, M. 2383.

⁴ [But by 18 Vict. c. 23, sec. 2, it is enacted that, 'Where the person predeceasing would have been the heir in heritage of an intestate leaving heritable as well as moveable estate, had he survived such intestate, his child, being the heir in heritage of such intestate, shall be entitled to collate the heritage, to the effect of claiming for himself alone, if there be no other issue of the predeceaser, or for himself and the other

issue of the predeceaser, if there be such other issue, the share of the moveable estate of the intestate which might have been claimed by the predeceaser upon collation, if he had survived the intestate; and daughters of the predeceaser, being heirs-portioners of the intestate, shall be entitled to collate to the like effect; and where, in the case aforesaid, the heir shall not collate, his brothers and sisters, and their descendants in their place, shall have right to a share of the moveable estate, equal in amount to the excess in value over the value of the heritage of such share of the whole estate, heritable and moveable, as their predeceasing parent, had he survived the intestate, would have taken on collation.']

⁵ *Jack v Jacks*, 1673, M. 2369.

succession to the next of kin as specifically under the will, the heir will have no right to demand collation. This power, however, of debarring collation, cannot be exercised to the prejudice of the legitim, where a will is made by the father, and the legitim is not discharged. For the father has no power to exclude the heir from his legitim.¹

II.—RIGHT OF THE HEIR TO SHARE THE MOVEABLES WITHOUT COLLATION.

The same character of next of kin which entitles the heir to collate, gives a right [102] to demand a share of the moveable succession without collation, either, 1. Where the person so claiming (not being heir *alioquin successurus*) takes the heritable estate of him whose succession is in question, not as heir *ab intestato*, but either as heir of provision or by conveyance; or, 2. Where he takes the estate not directly from the deceased, but from one more remote. But wherever the heir claiming a share of moveables is *alioquin successurus*, he must collate not merely the estate which he takes as heir of line, but everything forming the proper subject of descent to an heir of line, whether enjoyed by him in that precise character or not. It seems as if the law held the heir as in all cases bound to purchase the privilege of being admitted to a share in the moveables, by giving up all that he has received as heir, or *præceptione hæreditatis*, before he can take his place as an executor;² while one who is executor *proprio jure*, and holds not the exclusive character of heir, has a right already vested, of which he must be deprived before forfeiting his share of the executry. Thus,—

1. One who, although he holds the character of heir, takes nothing in that capacity, is entitled to his share as next of kin, without collating what he may have derived from a more remote ancestor; although it is by the death of him whose succession is in question that the succession opens to him. So, on the death of a father who is a mere liferenter by grant from another, his heir taking as fiar will not be required to collate in claiming a share of the executry. Again, where the deceased has not completed his titles, but possessed only on apparency, his heir, though it is by means of his death that the succession opens, and he takes in virtue of being his son, yet succeeds as heir of the person last infeft.³

2. An executor not being heir *alioquin successurus*, but taking the land by destination, was found entitled to enjoy his share as executor, notwithstanding his being also heir of provision to the land-estate.⁴

3. But if the person so claiming be heir *alioquin successurus*, although the legal title has been superseded by conveyance, he *must* collate. So, 1. An heir succeeding by disposition, in which the purchaser, to save expense, takes the land in liferent to himself, with power to burden, sell, or dispoise, and in fee to his son, must collate.⁵ 2. Where the heir receives the

¹ [Lord Panmure v Crockat, 1856, 18 D. 703.]

² [See Stewart v M'Naughton, 1824, 3 S. 250; Fisher v Fisher's Trs., 1844, 7 D. 129.]

³ Spalding v Farquharson, 11 Dec. 1812, F. C. Here the point seems to have been assumed without much argument. The question arose on the death of Daniel Spalding. His heir served, not to him, who never was infeft, but to his father David, the last infeft; and so, in claiming a share of Daniel's executry, he refused to collate. It was held that there was no reason for the plea of collation between the executors and the heir, as the heir claims the heritable estate which he has from one source, and his right as executor, along with the other executors, from a different source. This was adhered to.

Russell v Russell, 1822, 1 S., N. E. 435, note. Thomas Russell left a son and two daughters. He had, as apparent heir of his brother, succeeded to the farm of Foldhouse, but

never made up titles. He died after ten years' possession, and a question arose of collation, Whether the son was entitled to a share of the moveables, without collating the farm to which his titles were to be made up, not to his father, but to his uncle? Lord Gillies held him bound to collate, but the Court reversed this judgment.

⁴ Rae Crawford v Stewart, 1794, M. 2384. Lord Braxfield, in a judgment confirmed by the Court, 'in respect that Mrs. Rae Crawford was not heir of line, but only heir of provision in a particular estate, which she takes under a deed of entail, found her entitled to her share, along with her brother and sister, without collating the tailzied estate.'

See D. of Buccleuch v E. of Tweeddale, 1677, M. 2369.

⁵ Baillie v Clerk, 23 Feb. 1809, F. C. The heir here was considered as having not the fee, but merely a *spes successionis*.

land by disposition from his ancestor, he is not held by this *præceptio hæreditatis* to have [103] acquired right to the executry without collation.¹ 3. It was supposed that succession under an entail, in which the heir is placed under trammels, raised an insurmountable difficulty in applying this doctrine; but the rule is held not to be disturbed by this peculiarity. The heir of entail, being also heir of line, cannot claim a share of the moveable estate without collation of the rents or value of his heritable right.²

4. But it has been said, that a distinction is to be made in the case of an heir-portioner claiming a share of the moveables: that she stands not in a state of exclusion, like the heir, from her share of the moveable succession, but has right as her *portio legitima* to a proportion of both estates; and that she cannot be deprived of her share of the moveables by a conveyance meant to better her condition.³ But this is a distinction which has not been confirmed. On the contrary, in a later case, the doctrine of Riccart's case has been denied;⁴ and, on the whole, it rather seems to be law, that the heir-portioner is bound to collate her own share.

5. If the estate to which the heir succeeds be real estate, situate in another country, he is bound to collate, in claiming as a Scottish executor, a share of the moveable estate in Scotland. Coming forward as a Scottish heir, to avail himself of a Scottish privilege, and to take something from the executors, they are entitled to insist that he shall comply with the condition annexed to the exercise of that privilege in Scotland, by throwing the real estate into the common fund, that equality may be preserved.⁵

But if he claim not as a Scottish executor, but under the English statute of distributions, the heir is not bound thus to collate.⁶

III.—MODE OF GIVING EFFECT TO THE SEVERAL RIGHTS IN COLLATION.

In contemplating the effect of collation on creditors, although the heir may dispense with his privilege, he cannot do so effectually in a state of insolvency to the prejudice of his [104] creditors. The liability of the executors to the demand of the heir, on the other hand,

¹ *Murray v Murray*, 1678, M. 2374. Here the heir held the land partly by succession, partly by disposition, from his father. He offered to collate the former, but refused the latter. The Court 'admitted him to a share with the other bairns, provided he communicate all that he had of the heritable estate by disposition or by succession.'

² *Little Gilmour v Little Gilmour*, 13 Dec. 1809, F. C. 449. [*Anstruther v Anstruther*, 12 S. 140, 14 S. 272; aff. 1 S. and M'L. 463, and 2 S. and M'L. 369. *M. of Breadalbane's Trs. v M. of Chandos*, 12 S. 309, aff. 2 S. and M'L. 377. The heir seems to have the option of either collating the specific estate or its value in money. *Fisher's Trs. v Fisher*, 1850, 13 D. 245.]

³ *Riccart v Riccart*, 1720, M. 2378. See observations of Lord Meadowbank on this case in *Little Gilmour's* case (above, note 2), F. C. 457.

⁴ *Hay Balfour v Scott*, 1787, M. 2379, 4617. In this case, on the supposition that the succession was to be regulated by the law of Scotland (see below, note 6), it was held that the eldest heir-female succeeding by destination without division was, in claiming a share of her uncle's moveable succession, bound to collate. 'The defender, Miss Scott, was not entitled to claim any part of the executry of her uncle David Scott of Scotstarvit, without collating his heritable estate, to which she succeeds as heir.' Lord Meadowbank, in his remarks on this question, above referred to, says: 'This, perhaps, is the most nice and subtle view of the case, but the answer is plain and obvious,' etc. See 3 Pat. 300.

⁵ *Robertson v Macvean*, 18 Feb. 1817, F. C. 297. The Court held, 'That James Robertson is not entitled to claim legitim, unless he collate such right as he has to the estate situated in the island of Jamaica, as well as the other provisions and possessions received by him as devolving upon him by the death of his father.'

⁶ In *Hay Balfour v Scott* (above, note 4), as decided in the House of Lords, the distinction drawn here between the heir's claim to English moveables, and to those situate in Scotland, was disregarded, and the case was determined on this principle, that the domicile and death of David Scott having been both in England, and the rule being, that the whole moveable succession, wherever situate, follows the person, and is regulated by the law of his domicile, the whole moveable succession was in this case English, and to be regulated by the law of England. The judgment of the House of Lords, as given in the Faculty Collection and in Morrison's Dictionary, is incorrect. The words of the judgment are these: 'That the said Henrietta Scott is entitled to claim her distributive share in the whole personal estate of her uncle, David Scott of Scotstarvit, in Scotland, without collating his heritable estate, to which she succeeded as heir, inasmuch as she claims the said share of the said personal estate, by the law of England, where the said David Scott had his domicile at the time of his death.' 11 March 1793. See 3 Pat. 300.

is one which gives to the heir not merely a personal claim for a dividend, but a *jus in re*—a real interest in the executry while extant and distinguishable.

Several situations may be distinguished as giving rise to questions relative to the rights which have just been considered; and,

1. Where collation is not required as the condition or consideration for the heir's admission to the privilege, there is little difficulty. The heir then takes his place from the first with the other executors, and his right is completed as theirs is. It is like the case of a succession entirely moveable, in which the whole of the next of kin are executors, and so entitled to confirmation. The late statute applies to the heir in such a case, as it does to the others, vesting the right *ipso jure* to the effect of transmitting it to his representatives;¹ and he is entitled to take out an edict and be confirmed, or to insist on being joined in the confirmation with the other next of kin.

2. Where the heir purchases his privilege by collation, the only difference seems to be that the heir shall first effectually renounce his preference, before he is entitled to his right as executor. It is only by massing the whole succession that he acquires right, as if there were no heritage, to confirm as executor with the rest. And it would appear that, from the moment he makes up his titles to the heritage, and disposes, he is entitled to assume and assert the character of executor: so that, if no application for an edict has been made, he may take out his edict for confirmation; and if opposed, his conveyance is a good reply. Or if the other executors have applied to be confirmed, he may appear and desire to be conjoined as one of the executors; and his conveyance of the heritage will entitle him to be conjoined.

The transaction is in general settled either by private contract or judicially:—

1. By PRIVATE CONTRACT the heir and executors, on a recital of their intention to divide the whole succession, reciprocally dispose and assign; the heir the heritable subjects, the executors the moveable funds; and bind themselves to complete titles, and make all necessary conveyances for accomplishing their purpose. If the title of the executors is not yet completed, there is no occasion for anything on their part but the admission of the heir to his place in the confirmation; and it lies with the heir to complete his title and grant the necessary conveyance for giving to the rest of the next of kin their proportions of the heritage. If the executors have already completed their right by confirmation, they must of course grant assignations, deliver a share of the moveables, and pay money to the heir, to the effect of equalizing their mutual rights. It would seem that from the moment of irrevocable declaration on the part of the heir, his right vests as executor; while the right of the executors is precisely of the same nature with that of a purchaser of land under missives of sale.

2. JUDICIAL SETTLEMENT of collation is by an action at the instance of the heir against the executors, stating his right to collate as one of the next of kin, and his offer to do so; and concluding, *first*, that his right should be declared; *secondly*, that the defenders should be ordained to produce all bonds, bills, account-books, etc., with a full state of their intrusions; *thirdly*, that on the heir completing his title, and disposing to the defenders their shares, they should be ordained to convey and pay over to him his share. There is commonly a conclusion that the defenders should complete their titles to the moveables; instead of which the heir seems entitled to conclude, that he should be found and declared entitled to confirm as one of the next of kin.

This faculty or privilege the creditors of the heir are entitled to exercise, and this is done without any adjudication or previous process.

¹ 4 Geo. IV. c. 98, sec. 1.

PART II.

OF INCORPOREAL RIGHTS, NOT CONNECTED WITH LAND, CONSIDERED AS A FUND FOR THE PAYMENT OF DEBT.

[105] NEXT to his property in land, a man's available funds in debts and moveables are of importance in the eyes of those with whom he deals. In England, debts are called Property in ACTION, or Choses in Action; Moveables, Property in POSSESSION. With us, the former is called INCORPOREAL RIGHT; the latter CORPOREAL, according with the language of the Roman law.

CORPOREAL property comprehends such subjects as are palpable to sense; INCORPOREAL, such as consist in legal right merely. Incorporeal rights may exist as connected with land; but at present the inquiry is limited to such rights not connected with land. These form often a fund of the greatest value to creditors, and to which chiefly they trust for their payment. They include: ordinary debts; debts which are connected with public establishments and government funds; rights of privilege or monopoly, as patent rights and literary property; rights which have for their object the restitution of property illegally or imperfectly alienated; rights which arise in the way of succession, testate or intestate. These are proposed to be discussed in the nine following chapters.

CHAPTER I.

OF ORDINARY DEBTS.

THIS class of incorporeal rights may be more conveniently considered afterwards, in discussing the rights of creditors as claimants against the estate of their debtor.¹

CHAPTER II.

OF GOVERNMENT FUNDS, AND OTHER PUBLIC DEBTS.

SECTION I.—GOVERNMENT STOCK.

THE National Debt is either funded or unfunded.

1. FUNDED DEBT is that towards payment of the interest of which certain funds are appropriated. At first, each loan was secured by the appropriation of particular taxes; [106] but on an extension of this enormous system, certain capital funds have been formed, the aggregate produce of which forms the general fund, out of which the interest of all the several debts of Government are defrayed,—a surplus being destined as a sinking fund for the gradual redemption of the principal. The right which the public creditor holds is merely to demand the interest or annuity, which is payable in the Bank of England; with

¹ See below, Book III.

a power to transfer his right with the greatest possible facility. The principal cannot be demanded, but the same effect is produced to the creditor by a sale at market; the employment of a stockbroker depending on the frequency of those sales, proceeding from the necessity or the speculation of the holders.¹ The statutes declare that the annuitants shall be possessed thereof as of personal estate.² And in a question respecting legitim in the Court of Session, this right was held as moveable.³ Nothing seems to have been appointed as to the diligence by which the right of the public creditor is to be affected. The Scottish diligence of arrestment, of course, cannot reach even the dividends due to the stockholder; and no other Scottish diligence but adjudication seems competent to carry the entire right. This is a form of diligence which appears to be competent where there is none other provided by law. But there is great difficulty in getting a transfer made at the Bank of England; for, by law, each transfer must be entered, and the entry signed by the person making the transfer, or by his attorney. And in the Act providing that the Court of Chancery or Exchequer may order a transfer by the secretary of the Bank, there are only three cases mentioned,—absence of trustee, bankruptcy, and lunacy.⁴

2. **UNFUNDED DEBT.**—This debt may be constituted in a variety of ways. But the chief documents of it are Exchequer and Navy bills, which bear interest from their dates, or from six months after they are issued. These are undoubtedly moveable funds, and the right goes with the possession of the document. These documents confer a preference by certain statutes, which will afterwards demand attention.⁵

SECTION II.—BANK STOCK.

The important operations of banking are carried on partly by chartered companies, partly by private adventurers. In England, the latter have till lately been under restraint by the monopoly given to the Bank of England, that not more than six persons should be allowed to join in a private banking company. The peculiar sort of property called banking stock, is to be understood only of the shares of the public chartered banks. It is alienable, and may be attached by creditors directly or indirectly.

1. The **BANK OF ENGLAND** was incorporated in the reign of William and Mary, in consideration of a loan of a million and a half to Government. It is managed by a governor, deputy-governor, and twenty-four directors, elected by the general court of stockholders. By the 8 and 9 Will. III. the Bank was allowed considerably to augment its capital stock; and in consequence of repeated loans to Government, that stock has been allowed to be further enlarged, till at present the value of the stock, with the increase of undivided profits, amounts to more than twenty-five millions. The shares of this immense capital held by individuals are declared to be of the nature of personal estate, and to be transferred only by contracts registered in the books of the Bank within seven days, and on which the stock shall be transferred within fourteen days. The profits are divided half-yearly, and the dividends are payable at the Bank.

2. In **SCOTLAND** there are three⁶ public or national banks:—

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¹ There are certain restraints on the traffic in this sort of property which will require attention hereafter. See below, Book III. [The transfer of stock is made by entry in the books of the Bank of England. The statutes 11 Geo. IV. and 1 Will. IV. c. 13, sec. 13, require persons to whom transfers of stock are made in the books of the Bank to underwrite their acceptances. Their neglect to do so does not entitle the transferrer to treat the transfer as a nullity. *Foster v Bank of England*, 8 Q. B. 705; Add. on Cont., 6th ed. 134.]

² 25 Geo. III. c. 32, sec. 7, and all the other Acts.

³ *Hog v Hog*, 1791, M. 5479.

⁴ See 36 Geo. III. c. 90; 12 and 13 Vict. c. 106, sec. 128. [See also 13 and 14 Vict. c. 60, secs. 22–26; 15 and 16 Vict. c. 55, as to mode of getting a title to stock by vesting order of the Court of Chancery; 26 and 27 Vict. c. 28, as to certificates of stock with dividend coupons attached; extended by 32 and 33 Vict. c. 104.]

⁵ 57 Geo. III. c. 34, 124; and 1 Geo. IV. c. 60. See below, Book IV. Of Privileged Debts.

⁶ [It is scarcely necessary to add that other banking establishments have since been incorporated by Royal Charter or Act of Parliament.]

(1.) THE BANK OF SCOTLAND was erected into a body corporate in 1695 by an Act of Parliament, which is among the unprinted Acts of that year, but is recited in 14 Geo. III. c. 32, and in successive Acts down to 44 Geo. III. c. 23. The fund is declared assignable, the transfers being entered in a book subscribed by the assignor and assignee: it is also disposable by will entered in the book of transfers, without confirmation. It is also declared, that the shares may be transmitted 'by adjudication or other legal conveyance, in favour of one person alienably, who in like manner shall succeed to be a partner in his predecessor's place; so that the foresaid sums of subscription may neither be taken out of the stock, nor parcelled among more persons by legal diligence in any sort to the diminishing or disturbing of the stock of the said company, and good order thereof.' It is also provided, that on bankruptcy or forfeiture, the governor and directors may order the bankrupt or forfeited person's share to be sold by public roup, after such intimations as are prescribed for the sale of bankrupt lands.¹ The Act does not contain any declaration respecting the condition of the stock as heritable or moveable. And in the only case in the books respecting it, the sole plea maintained was, that the holder being entitled only to dividends, the right, as having a tract of future time, was heritable. But this was not sustained.²

(2.) The ROYAL BANK OF SCOTLAND was established by a charter of erection, in pursuance of 5 Geo. I. c. 20. The stock was declared moveable, descendible to executors; but, at the same time, not liable to arrestment or attachment. And, by a by-law, no proprietor can transfer but in the presence of a Court of Directors, who may stop the transfer till he find surety for what he owes the Bank. The creditors of a stockholder of this Bank may by personal diligence indirectly force a sale, even should the words of the charter passed in fulfilment of the statute prevent direct attachment.

(3.) The BRITISH LINEN COMPANY was erected into a body corporate in the reign of George II. The shares of the stock are declared to be of the nature of personal estate, and to be transferable by certain forms. The charter was confirmed and enlarged in 1806 by royal charter. Nothing is said in the charter relative to the mode of attaching the stock.³

CHAPTER III.

OF RIGHTS UNDER POLICIES OF INSURANCE.

[108] THE subject of insurance shall be fully considered hereafter, in discussing the contracts out of which claims of debt arise. At present we look only to the right of which creditors

¹ Doubts having been entertained respecting the proper diligence for attaching the stock, the Bank took this course to try it:—Fairholme, on his bankruptcy, was due £3000 to the Royal Bank; and they adjudged his bank stock, with a view to sell it, for payment of this debt: but it was questioned whether this was a title so secure that purchasers would think it eligible. The Bank therefore called on the cautioner for Fairholme to pay up the debt, and he suspended, insisting on the benefit of the stock. The Bank stated that they could make no transfer, but (1) on a conveyance from the proprietor; or (2) in favour of an executor on production of his confirmed testament; and that no instance of a transfer on adjudication had occurred. The Court held the adjudication to be a good title, on which the Bank could transfer. The judgment therefore ordered the cautioner to pay, 'upon the

Bank conveying to him the bank shares which belonged to Fairholme, with such diligence as they have used for affecting the same, with warrandice from fact and deed; and found that, in consequence thereof, the Bank was bound to receive the purchaser or his assignee in Fairholme's place, with regard to the said shares, in the same manner as they are in use to do in other sales or transactions of their stock.' *Bank of Scotland v Fairholme*, 14 Feb. 1770, Hamilt. 46.

² *Sir J. Dalrymple*, 1735, M. 5478. See also, 1. As to the privilege of Naturalization, *Macao v Officers of State*, in H. L., 1 Sh. App. Ca. 138; and, 2. As to the designation of the stock by sterling or Scottish money, *Fraser v M'Donald*, 1821, 1 S. 223, N. E. 213.

³ [A banking company, indebted to the holder of stock for dividends, was held not liable for interest on those dividends

may avail themselves under the several policies of insurance, considered as a fund for the payment of debt.¹

Policies of insurance are used not only for protecting commodities exposed to sea-risk, but for indemnifying against fire, and providing a fund in the event of death. Insurances on lives form a valuable estate, to the benefit of which creditors may be entitled. An insurance against fire or sea-risk produces no advantage, and cannot be regarded as of any value to creditors, independently of a loss covered by the policy. But an insurance on life becomes more valuable by lapse of time, the premium of an uninsured life increasing with every year that passes, while a policy opened continues at the same premium after the lapse of ever so many years.

The value of a life-policy may accrue to creditors, either, 1. On the death of the person insured; or, 2. By the sale of the policy, while yet the risk is undetermined,—the purchaser continuing to pay the premium, and being entitled, on the death of the person insured, to the sum in the policy; or, 3. By treating with the insurance office for a renunciation of the policy.

Policies may be opened either by the person himself; or by a creditor in a lawful debt, the creditor having an interest in the life of his debtor, as affording part of his security and means of payment. After a policy has been opened by a person on his own life, it may be assigned to another for a valuable consideration, or even, as it would seem, gratuitously. But if a policy has been opened by a creditor for the interest which he has in his debtor's life, the interest expires with the payment of the debt, and the policy becomes void.² This is to be attended to in constructing securities for the loan of money; as the law of usury may perhaps apply where premiums are stipulated to be paid for keeping up the insurance, unless they be also useful in constituting an absolute estate, available to the debtor on payment of the debt.

CHAPTER IV.

OF PATENT RIGHTS AND LITERARY PROPERTY.

THE right of exclusive sale enjoyed under patents for useful inventions, and the property now secured by statute to authors of literary compositions, form estates available to creditors.

Of all things, the produce of a man's intellectual labour is most peculiarly distinguishable as his own; and the Patents, or the statutes on which Copyright now rests, are intended not so much to create a right, as to protect it against invasion. The right which a man has to the produce of his own mental labour, if sought to be referred to any of the ordinary sources of property, may well be grounded on occupancy and personal exertion; and it deserves [109] the support of law, as securing to the inventor the creations of his own genius, and as encouraging that most useful exertion of mind, by which manufactures are improved and enriched, or the stores of knowledge and intellectual improvement augmented. All admit the justice of thus protecting the right of an inventor or of an author, and are sensible of

(*Fraser v Morrice*, 1826, 4 S. 770); and the Bank is entitled to retain stock in security of debt due to it by the stockholder (*Burns v Lawrie*, 1840, 2 D. 1348). This rule does not entitle the Bank to retain a wife's separate estate in security of the debts of her husband (*Gairdner v Royal Bank*, 22 June 1815, F. C.).]

¹ See below, Book III. Of Insurance.

² [The doctrine stated in the text is founded on the now exploded case of *Godsall v Boldero*, 9 East 72. See the more recent and authoritative decision in *Dalby v India L. Ins. Co.*, 15 C. B. 365, as explained *infra*, *voce* Life Insurance.]

the public expediency of such encouragement. The only doubt which disturbs the doctrine, proceeds from the operation of the common right of property in things corporal; according to which, the purchaser of a machine or of a book may apply it to what use, or draw from it what advantage it may be calculated to afford, producing by the application of his own industry other machines or books exactly similar, and disposing of those by sale or by gift.

Confining the doctrine to the common law principles of property, those valuable interests which belong to the inventor might thus be outraged, or could be protected only by concealment of the principle on which the invention proceeds. Hence the compromise which has been made for the public benefit, by which the otherwise elusory right of the inventor is secured for a season, as effectually in relation to all *possible* exemplifications of the machine or book which he has made, as by the common law his right of property is secured in the individual machine or book which he has mechanically prepared; while, in return for this, the public receives the benefit of a full disclosure of the invention for their unrestricted use, after the term of exclusive privilege is expired.

SECTION I.

OF INVENTIONS SECURED BY PATENT.

PATENTS are granted by the king, under reserved powers conferred by the statutes abolishing the ancient and much contested practice of granting monopolies. Before the union of the crowns, this prerogative had in England been much abused, and in Scotland matters had gone much in the same course. The granting of monopolies furnished one source of power to monarchs whose affluence and means of rewarding fidelity or indulging favourites were exceedingly limited.

The abuses practised by the Duke of Buckingham, the favourite of James I., seem to have given the death-blow to this dangerous prerogative. After judicial proceedings against some of the creatures of Buckingham whose oppressions were the most flagrant, an Act was prepared by a Committee of the House of Commons, of which Sir Edward Coke, the great English lawyer, was chairman. This is the Act of James I., whereby, 1. All monopolies and letters-patent for the sole buying, selling, making, working, etc., of anything within the realm of England, are declared to be contrary to the laws of England, and utterly void and null. And, 2. A power is reserved to the king to grant letters-patent and grants of privilege for fourteen years or under, for 'the sole working or making of any new manufacture within this nation, to the true and first inventor of such manufacture, which others at the time of making such letters-patent and grants shall not use; so as they be not contrary to the law, or mischievous to the State, by raising prices of commodities at home, or hurt of trade, or generally inconvenient.'¹

The vicious practice of monopolies certainly did not cease on this Act.—It continued during the reign of Charles I., who granted many oppressive and scandalous patents.

In Scotland, during this prince's time, a statute passed in 1641, c. 76 (5 Act. Parliament. p. 496), declaring all such patents ineffectual. It proceeds on a preamble of 'the great hurt and prejudice sustained by sundry His Majesty's lieges, by the monopolies used [110] and exacted within this kingdom, and which have been conferred to the use of any particular person or persons, to the great hurt and prejudice of others His Majesty's lieges.' Then, after enumerating and recalling some particular patents, the law ordains the same, and all other patents of that nature, purchased or to be purchased, for the benefit of particular persons in prejudice of the public, to cease and be ineffectual.

¹ 21 James I. c. 3, sec. 6. This Act has always been held merely declaratory of the common law prerogative of granting patents.

This, with the declaratory Act of James I., settled the law as to the king's prerogative in this matter; and since the Union, the same law rules both parts of the kingdom.¹

The principle on which the reservation of the power to grant patents proceeds is public expediency: 1. The encouragement of invention by the prospect of reward to be derived from the profits of the exclusive privilege. And, 2. The benefit derivable by the public from the full knowledge and disclosure of the invention in its best state. And yet it is a curious circumstance, that it was not till the reign of Queen Anne that any proviso was inserted in the patent, that a specification of it should be enrolled in Chancery within a given time.

Patents for new inventions are granted for the encouragement and protection of useful discoveries, on condition of a full and fair disclosure of the nature of the invention, so that the public may profit by it after the time of the patent has expired. They may be granted either to extend over the whole of the king's dominions, or to extend to England, or Scotland, or Ireland alone. Distinct patents must pass for each: that for Scotland, under the Scottish seals. The application is made by petition to the king through the Secretary of State, accompanied by an affidavit that the petitioner is the true and first inventor, and that he believes the invention to be useful. This in England is referred to the Attorney-General, in Scotland to the Lord Advocate, who report to the king what is fit to be done. The patent bears as a condition: 1. That the specification shall be sufficient. 2. That it shall be made by instrument under hand and seal, enrolled in Chancery within a month.²

The right is useful as property in these respects: 1. It secures to the patentee the profits of the sale of the thing invented. 2. The privilege may be assigned in whole or in part. The patent generally bears a restriction not to be communicated to more than five. But the whole privilege may be sold.

¹ *Astley v Taylor*, 17 Nov. 1813, F. C.

² As to extending of the term, see *Watson v Pears*, 2 Camp. 294, where a proviso, that specification should be enrolled within a month after the date, which was 10th May, was held satisfied by an enrolment on 10th June. [New rules are established by the Act 15 and 16 Vict. c. 83, of which the following are the chief:—1. Commissioners are appointed, to whom the petition for a patent, a relative declaration, and a 'provisional specification' are to be delivered, and to be referred by them to one of the law officers (secs. 6, 7). The law officer may take the aid of scientific or other persons; and if he be satisfied that the provisional specification describes the nature of the invention, he is to allow it, and give a certificate to be filed in the office of the Commissioners; and then the invention may, for six months from the date of the petition, be used and published without prejudice to any patent to be granted for it, and with provisional protection. But if the title or provisional specification be too large or insufficient, he may require it to be amended (sec. 8). 2. The petitioner, instead of a provisional specification, may file with the petition a complete specification, particularly describing and ascertaining the nature of this invention, and the manner of its performance (sec. 9). The petition is to be advertised for six months from the date of the application, the petitioner having the rights during this time of a patentee; and the invention may be used and published without prejudice to any letters-patent to be granted (secs. 9, 12). 3. When the patent is granted (instead of a condition for voiding it if the invention be not described and ascertained by the subsequent specification), it becomes void if not sufficiently described in the 'complete specification' (sec. 9). In case of protection being obtained, in fraud of the first inven-

tor, his right is not thereby invalidated, nor by the subsequent use or publication (sec. 10). 4. The petitioner, after having obtained 'provisional protection,' may give notice of his intention of proceeding with his application, when the Commissioners are to cause his petition to be advertised, and persons having interest to oppose may lodge objections (secs. 11, 12). The law officer after hearing may, if he think fit, issue a warrant for sealing letters-patent by the Commissioners, setting forth their tenor and effect, with the necessary and usual restrictions and conditions (secs. 13–15). Nothing is to affect the prerogative in the granting or withholding of patents; and Her Majesty may direct the law officer to withhold his warrant, or prohibit any patent for which he has given his warrant from issuing, or direct the insertion of any special conditions in addition to or in place of any which would otherwise be inserted under the Act; and may direct any complete specification on which no patent has followed to be cancelled, in which case the protection obtained by filing it ceases (sec. 16). 5. After the sealing of the warrant, the letters-patent are to be prepared according to the tenor of the warrant, and the Lord Chancellor is to cause them to be sealed with the great seal of the United Kingdom; and so sanctioned, they are to embrace the United Kingdom, with the Channel Islands and the Isle of Man, and may also include the colonies. In Scotland they are to be recorded in the Chancery Office (sec. 18). 6. All patents under this Act are subject to the condition of payment of stamp duties at the periods specified in the Act. The stamp duties payable in respect of letters-patent are further regulated by 16 and 17 Vict. c. 5. 7. Patents for warlike inventions may be purchased by the State, in which case they are kept secret, and no specification is filed. 22 Vict. c. 13.]

In distinguishing the cases in which patents are competent, I shall mark, 1. The nature of the invention that may thus be monopolized; and, 2. What sort of description is necessary in the patent.

I. PROPER SUBJECT OF PATENT.—It is worthy of particular observation that the word used in the statute is *Manufacture*—‘for working or making of any new manufacture.’ This has been judicially held to be a word used with great care and selection, to intimate that the proviso was introduced for the benefit of trade, and as applicable to a *subject vendible*.¹ The great doubt which arose upon the validity of a patent under these restrictive terms was, how far a mere principle, or even a method of operating or producing an effect, could be the subject of the patent? And, 1. It was held, that if the invention go only to the disclosure of a philosophical principle, not embodied in any manufacture, nor reduced to any practical result, but a mere element or rudiment of science, it will not be sufficient. Such, for example, [111] was the discovery of the *expansive force of steam*, which could not be the subject of patent; otherwise, every future invention proceeding on that principle would be comprehended. But the application of that principle to the *construction of the steam-engine*, the vendible matter or thing in which the principle is embodied, was a fit subject of patent. But, 2. If an effect be actually produced, *the thing produced by that method* is a subject for patent, although it may be erroneously described as a method of producing the effect; nor will the Courts act with so impolitic a degree of strictness as to throw impediments in the way of a patent, on account of such error in the mode of describing the invention.³ 3. Under the description of manufacture, the king may grant a patent for anything made by the hand of man: New articles or commodities produced; or new instruments or machines for producing new commodities, or commodities already known; or new applications, combinations, or compounds of old materials, whether substances or machinery, either to produce new effects, or old effects with new advantages in economy or in time, or in correctness and superiority of manufacture. A manufacture, as well described in a recent English case, is either a thing made which is useful for its own sake,—as a medicine, a stove, a telescope, etc.; or an engine, or instrument, to be employed in making some article known or new,—as a stocking-frame, or a steam-engine; or some new part or addition to a machine or engine, by which its operation or effect is improved.⁴

It is only for a new invention, however, and the disclosure of what the public has not hitherto used, or for the importation of an invention not before known or used in this kingdom, that a patent can be granted. So, 1. If not truly invented by the patentee (unless imported from abroad), or, though invented by him, if not then first disclosed by him to the public, the patent is bad. The merit of invention may be great, and the patentee may have been the acknowledged inventor: yet, if he has already disclosed the invention to the public;⁵ or used the article, though under another name, so that by that means the public have, or may have, acquired the knowledge and use of it; or if, by the accidental discovery of another from the suggestions supplied by the inventor,⁶ or by having formerly been published, though neglected among other things, the public has had the necessary knowledge or use of his invention, he can have no patent to protect it. The

¹ *Bolton and Watt v Bull*, 2 H. Blackst. 463, 482.

Hornblower v Bolton, 8 Term. Rep. 95.

These were both trials on the subject of Mr. Watt's improvements on the steam-engine. The Court of Common Pleas was divided in opinion, but the judges of the King's Bench were unanimous in favour of the patent.

² This point is well illustrated in the above-mentioned case of *Bolton and Watt*. See also *Hadden v Pirie & Co.*, 1823, 2 S. 423, N. E. 376. [See *Neilson v Baird*, 1843, 6 D. 51; *Gibson v Brand*, 4 Man. and G. 179; *Crane v Price*, 4 Man. and G. 580.]

³ Mr. Watt had described his inventions in this way: ‘My method of lessening the consumption of steam consists of the following principles.’ [See *Mintner v Wells*, 5 Tyrwhit 163.]

⁴ *The King v Wheeler*, 2 Barn. and Ald. 349. [See *Lewis v Marling*, 10 Barn. and Cress. 22; *Hullet v Hague*, 2 Barn. and Ad. 370; *Saunders v Aston*, 3 Barn. and Ad. 881.]

⁵ See *Wood v Zimmar*, Holt 58.

⁶ It is not settled how far experiments are using. See *Hill v Thomson*, 2 B. Moore 457.

consideration for the grant is the disclosure, but that is not true in the case supposed.¹ 2. The articles of which a compound manufacture is composed may have been known before, without furnishing any ground of objection to the patent. A new combination of old materials, either in mechanism or in chemistry, may be protected by patent.² But, 3. A patent may be had for an improvement or addition, as well as for a thing entirely new. If the patent is granted for a manufacture, however, of which any part is old, the whole must not be represented as new, otherwise it is void even as to what is new. For the consideration of the grant is the whole of what is stated; and it does not appear that the king would have granted it for only a part of what is specified as the discovery.³ What is new will not entitle the patentee to use the old still under patent; he must wait till [112] the old patent expire. But he may have a patent for what is new, and sell it.⁴ 4. The privilege is not necessarily confined to the first inventors. The first *discloser* of the invention, provided he is also a discoverer or importer of it, is the man to whom the public is truly indebted, and who on that ground is entitled to the benefit of the patent. So, 1. If one have discovered and brought into use what another has only discovered in his closet, the former is entitled to the patent, without distinguishing who was the first inventor, or whether the merit of the discovery may not have been due to both.⁵ 2. If one have imported a discovery from abroad, although he has no merit as a discoverer, he is, on the doctrine of the law of patent, entitled to the privilege.⁶ This is grounded on the words of the statute, which gives to the king the power of granting a privilege for any new manufactures '*within the realm*.' Whether this would rule the case of a patent taken out in England for an invention disclosed in a specification then recorded, but for which no patent was taken out in Scotland, may be doubted. It would rather appear that this would be regarded as a publication within the realm, and the manufacture as therefore not new within the realm, to the effect of barring a patent for the manufacture in Scotland.⁷ If so, it does not appear how either the original inventor or a stranger could, after such publication, apply for a Scottish patent. Accordingly, in practice, this danger seems to be under-

¹ *Tenant's case*, Dav. on Patents 429; *Bovill v Moore*, *ib.* 399. [See also *Brown v Annandale*, 1841, 3 D. 1189, aff. 1 Bell 70. In *Neilson v Househill Co.*, 6 March 1843, 2 Bell 1, it was laid down (reversing the decision of the Court of Session), that if use had been made of the invention, in the eye and in the presence of the public, it was not necessary that it should come down to the time when the patent was granted. In *Neilson v Baird & Co.*, 1843, 6 D. 51, it was held that, however nearly experiments had approached to the discovery of the invention, they were unavailing to invalidate the patent, unless that discovery had been perfected and applied to public use. In *Wilson v Black*, 1847, 10 D. 1, and *Templeton v Macfarlane*, 1847, 10 D. 4, it was held to be no evidence of prior use that the invention had been employed in some manufacture different from that for which the patent had been taken out; nor if, while the patentee is perfecting his invention, his workmen should divulge it, and a partial use of it should thereupon take place.]

² *Huddart v Grimshaw*, Dav. on Patents 278. [It is now settled that an application of an old process or piece of mechanism to a new purpose, without any invention in the mode of applying it, is not the subject of a patent. *Harwood v Great Northern Railway Co.*, 31 L. J. Q. B. 198. Here the Exch. Ch., reversing the judgment in B. R., decided against the validity of a patent for applying fish-joints to iron rails. A similar decision (against a patent for casting tubular boilers in one piece) was given in *Ormsen v Clark*, 32 L. J. C. P. 8, and in Ex. Ch. 291. See, on the question what

amounts to an invention in the application of old processes, the judgment of the H. L. in *Betts v Menzies* (as to capsules for bottles), 31 L. J. Q. B. 233.]

³ This is well illustrated in the case of *Brunton v Hawkes*, 4 Barn. and Ald. 541, with regard to a patent for improvements in ship-anchors, windlasses, and chain-cables. See also *M'Farlan v Price*, 1 Starkie 199; *Hill v Thomson*, 2 B. Moore 424; *Wallis v Smith*, 5 Barn. and Ald. 439.

⁴ *Ex parte Fox*, 1 Ves. and Beames 67.

⁵ See *Dolland's case* in 2 H. Blackst. 487, as to the object-glass of a telescope, first discovered by Hall in his closet, but not only also discovered by Dolland, but by him disclosed to practical use.

See also *Forsyth v Reviers*, Chitty, Prerog. of Crown, 182. [See also *Smith and Davidson v Wilson*, 1857, 19 D. 691. By 5 and 6 Will. iv. c. 83, power is conferred on a patentee who has learned that, unknown to him, the invention, or part of it, had been known to or used by another before his patent, to apply to the Judicial Committee of the Privy Council for a confirmation of his patent, the Committee being empowered, on hearing all parties interested, to report to the Crown that such confirmation ought to be granted. See also 15 and 16 Vict. c. 83, sec. 40.]

⁶ *Edgebury v Stephens*, 2 Salkeld 417; also *Wood v Zimmar*, Holt 58. [See, as to patents for foreign inventions, 15 and 16 Vict. c. 83, secs. 25, 26.]

⁷ See *Roebuck & Co. v Stirling*, 1774, 5 Br. Sup. 522.

stood, and provision made against it, by allowing a longer time for the specification where it is intended to have a patent for both countries.¹

The article must be not only new, but *useful*.²

II. NATURE OF THE SPECIFICATION.—The above propositions rest on the condition implied, that the patent is conceded in the way of bargain for the public, that the inventor shall disclose the nature of the invention, so as in the first place to regulate and direct the energies and further invention of others, but chiefly in order to enable the public to profit by the invention with all its advantages on the expiration of the patent right. This is an important point in the law of patent. The disclosure is made in what is called the specification. The condition of the grant (*formerly* implied, now the *express* one) is, that the application shall be accompanied with such a specification as shall put the public in full possession of the invention. This specification is enrolled in Chancery.³ If the specification be not ready for enrolment when the application is to be made for the patent, the inventor may lodge a caveat, setting forth that he has made a certain invention, for which he wishes to obtain a patent; and praying that the ground may remain unoccupied, by withholding any patent from others until notice be given to the person lodging the caveat, calling on him for a specification of the nature of his invention. If there should in the meanwhile be another application for the same patent, the Officers of State will, on hearing the rival pretensions, [113] decide which of the applicants has the best right to the patent. The caveat remains on the books for a year, and may be renewed from year to year. The caveat does not serve as a patent. The inventor runs every risk of his invention being brought into use in the meanwhile, which would bar his patent or defeat it.

The proviso which, since the time of Queen Anne, has been inserted in letters-patent, is that 'the patentee shall particularly describe and ascertain the nature of his said invention, and in what manner the same is to be performed, by an instrument in writing under his hand and seal, and cause the same to be enrolled in the Court of Chancery within a specified time after the date of the patent.' The prohibition commences with the patent, and from the day of the date of the letters-patent. It must be enrolled within two months; though in particular circumstances the time is sometimes extended, especially when it is intended to apply for patents also in England and Ireland. The enrolment of the specification within the time is a condition subsequent, the failure of which is fatal to the patent.

The patent and the specification must precisely accord with each other. The specification may be more precise and explanatory; but unless the patent describes the invention consistently with the specification, and in terms sufficiently distinct, it is bad. In the former case the patent is challengeable, as proceeding on a statement of an invention different from that which the patent is to cover; and being false, it is ineffectual.⁴ In the latter case, it is too general to put the public on their guard.⁵

A specification is a description of the invention, its principles, method, and practical effect. It must be expressed in plain, unambiguous, and intelligible words; not omitting any part that is necessary or useful; containing nothing to mislead; specifying all the best modes and ingredients which are used by or known to the inventor; and, on the whole, such as, without further instruction or inventions of their own, will, after the patent is expired, teach mechanical men of common understanding to prepare the manufacture with a degree

¹ See below, of Specification.

² See *Manton v Manton*, Davis. 348; *Walker v Congreve*, before Vice-Ch. Leach; *Brunton and Hawkes*, 4 Barn. and Ald. 455.

³ In England the specification may be inspected in the Petty Bag Office; in Scotland, in the Chancery Office. It is an instrument enrolled for the use of the public, and which, on occasion of a trial requiring it to be produced, the Court

will order to be delivered up on due precautions for its return. *Bloxam v E. of Roselyn*, 1825, 3 S. 428, N. E. 300.

⁴ *The King v Else*, 11 East 109, note; *The King v Wheeler*, 2 Bar. and Alder. 345.

⁵ *L. Cochrane v Smethurst*, 1 Starkie 208, [where a patent for a lamp was described as 'an improved method of lighting cities, towns, and villages.']

of certainty which shall not require experiment in following the directions,¹ and shall give the same advantage in all respects which the inventor himself enjoys.²

On this footing it is held, 1st, That if to the necessary ingredients, process, or method, there be added in the description others unnecessary for the purpose, or to the effect of puzzling or misleading, the patent will be bad.³ 2^d, That if the specification contain materials which are quite well suited for the purpose, but more expensive or less beneficial than the inventor himself uses, he has not made a fair disclosure, and will lose his privilege.⁴ 3^d, That if any ingredient or method in the invention be omitted or concealed, the patent is bad;⁵ and this even although such ingredient or method be not necessary, but only useful, in facilitating the operation: for at the expiration of the patent the inventor and the world do not start equal.⁶ 4th, If there be any ambiguity in the specification, it will be fatal [114] to the patent: for example, in the patent for making hair-brushes, the patent described them as tapering; but the specification did not sufficiently explain how the brush was to be formed, having merely directed a method of manufacture by which the bristles were made of unequal lengths; and although the meaning of this might have been discovered at once by looking at the brush, yet the description was held so ambiguous, that working solely by that guide, one could not produce such a brush; and taking the specification, therefore, as the only rule of the privilege, the patent was held to be bad.⁷ 5th, That if several methods be specified, and some of them do not work, although the others be perfect, the patent will be void.⁸ 6th, That in a patent for an improved instrument, if the specification do not distinguish what is new in the invention, and what is old, the patent will be void. The discrimination must appear on the face of the specification; but this may be by reference made to the former specifications, or by the recital of the first patent in the second.⁹

What is already before the public cannot be the subject of a patent; and if the patent be for an improvement on an old machine, for which there is an existing patent, the inventor can make his improvement, if inseparable from the original machine, only after the expiration of the old patent, or by agreement with the patentee of the original machine.

While the public is entitled to all this fair disclosure, there is a degree of painful and distressing technicality which is too often destructive of all the hopes of fair profit which an inventor is entitled to expect. For it frequently happens, that the inventive genius which discovers the nature or the useful application of the principles of philosophy to the arts of life, is not always the fittest to describe in plain intelligible language the mode and details of the operation. It will be the duty of judges, therefore, so to deal between the public and the inventor, as not to encourage, on the one hand, substantially defective or fraudulent specifications; nor, on the other, to defeat the just rights of an ingenious man, and the fair returns of expensive experiments and loss of time, on account of some verbal incorrectness or technical blunder.¹⁰ On what is so entirely either matter of fact or matter of technical

¹ *Arkwright v Nightingale*, Dav. on Pat. 56.

² If by subsequent discovery the patentee improve his method, his original patent will stand subject to the imputation of concealment, which, if not refuted, will prove fatal. *Boville v Moore*, Davis. 401. [*Campion v Benyon*, 3 Brod. and B. 5; *Felton v Greaves*, 3 Car. and P. 611; *Crossly v Beverley*, 1 Mood. and M. 283. The description in the specification must be sufficient not only to enable a skilled workman to use the patented process, but also to show the public what they cannot use without infringing the patent. *Morton v Middleton*, 1863, 1 Macph. 718.]

³ *Turner v Winter*, 1 Term. Rep. 602. [*Savory v Price*, Ryan and M. 1.]

⁴ *Boville v Moore*, Dav. 398; and *Turner's case*, *supra*, note 3.

⁵ *Wood v Zimmers*, Holt's Cases 58.

⁶ *Liardet v Johnson*, 1 Term. Rep. 608, note; *The King v Arkwright*, Davis. 61.

⁷ *The King v Metcalf*, 2 Starkie, N. P. C. 249.

⁸ [*Simpson v Holliday*, L. R. 1 Eng. and Ir. App. 315, the Magenta dye case. The specification stated: 'I mix aniline with dry arsenic acid, and allow the mixture to stand for some time; or I accelerate the operation by heating it to, or near to, its boiling point, until it assumes a rich purple colour.' It was proved that it was necessary to apply heat in order to produce the colour; but evidence was given that a competent workman would apply heat. Held that the patent was invalidated by error in the specification.]

⁹ *Harmer v Plane*, 14 Ves. Jun. 130, 11 East 101.

¹⁰ [By statute, power has been conferred on the Judicial Committee of the Privy Council to allow specifications to be corrected, which by innocent mistake or ignorance have been

knowledge or of common intelligence to practical men, though far removed from the habits of judges, the proper criterion is the verdict of a jury.¹

III. PERIOD OF MONOPOLY.—The time for which a patent may be granted is fourteen years; but in particular cases, where the inventor has been at great expense, or where the invention has peculiar merit, Parliament may interfere to prolong the time, as was done in the case of Watt and Bolton's steam-engines. Without legislative authority this cannot be done.²

IV. HOW THE BENEFIT IS COMMUNICATED.—Considered as an estate in the patentee, [115] available to creditors, the patent privilege may either be assigned or made the subject of diligence and attachment, or of sequestration.

1. By voluntary transference the privilege may, in whole or in part, be assigned. If the patentee do not wish to part with his right, he may grant licences to persons to use it. The patent contains a command that none shall, without licence of the patentee, in writing under his hand and seal, imitate or make addition to or subtraction from it; and such licences give right to maintain action of damages.³ The patentee may not only thus grant permission to others to manufacture the subject of the patent, but he may transfer by one general deed of assignment the entire right, accompanying the transfer with delivery of the patent. And so, indirectly, his creditors may take advantage of this power, by compelling the patentee to raise money for their payment. The only restraint on the alienation of a patent right is one imposed by the conditions of the grant itself, which has a proviso that the patentee shall not make any transfer or assignment of the privilege, or of any share of the benefit or profit thereof; or declare any trust thereof to or for any number of persons exceeding five; or shall open books for subscriptions to be made by any number of persons exceeding five; or shall receive money from more than five persons for the privilege; or act as a body corporate, or divide the benefit or privilege into any number of shares exceeding five: otherwise the patent to be void and ineffectual.⁴ This is a provision intended to enforce the provisions of the Act of 6 Geo. 1. c. 18, which has yet been held an ambiguous and unintelligible Act. Probably some regulations touching this matter may be introduced during this session of Parliament, of which notice shall be given in the Appendix.

2. On bankruptcy, the privilege is a part of the estate taken under sequestration, referred to the trustee, and vendible for the benefit of the creditors, whether the bankrupt hold the entire patent, or a share, or only a licence.

V. NATURE OF THE RIGHT.—The benefit of the exclusive privilege is of the nature of an recorded erroneously; and for this purpose the patentee may, with leave of the Lord Advocate or Solicitor-General (on hearing parties who by caveat or on advertisement have appeared to oppose), enter a disclaimer of any part of the title or specification, or a memorandum of an alteration of them, not extending the right. 5 and 6 Will. IV. c. 83; 15 and 16 Vict. c. 83, sec. 39.]

¹ A very ingenious man had discovered certain improvements in the process of manufacturing sal ammoniac, and he obtained a patent for this manufacture. Another person was accused by him of having imitated or stolen his process, and he brought an action of damages. The question turned on the specification, and on the nature of the acts of the defender charged as invasions of the privilege. A most distressing succession of remits were made to professional men, chemists and others; and at last a proof after the old method of commission was taken, on which the Court pronounced judgment, finding the process not to have been duly described in the specification. When the cause came into the House of Lords, they sent it back to be remitted to the Jury Court for trial of

the questions, 1. Whether the defender had made use of all or any, and which, of the alleged improvements described in the specification? 2. Whether any and what part or parts of that which is so described was or were known or used before the date of the letters-patent? And, 3. Whether the specification contains a particular description of the nature of the invention, and in what manner the same is to be executed, according to the true intent and meaning of the letters-patent? *Astley v Taylor*, 3 June 1817, F. C.; H. L. 25 June 1821, 1 Sh. App. Ca. 54.

² [By statute, the Judicial Committee of the Privy Council are empowered in special circumstances to grant a prolongation of the privilege for the further period of seven years. Notice must be given of the application by advertisement, in order that opposing parties may appear. See 5 and 6 Will. IV. c. 83, sec. 4; 2 and 3 Vict. c. 67; 15 and 16 Vict. c. 83, sec. 40.]

³ *George v Wackerbach*, Godson on Patents, p. 169.

⁴ [The restrictions on the number of persons to whom the benefit of a patent right may be communicated have been

heritable right, as bearing a tract of future time; and adjudication seems to be the only diligence by which it can be affected.¹

Although one cannot have a patent for an invention which he has already disclosed for public use, he may prevent any person from vending a machine or manufacture as *his*, so as to take, without authority, the advantage of his personal character and credit as an artist.²

SECTION II.

OF LITERARY PROPERTY.

Analogous to the subject just discussed is Copyright, or Literary Property. Whether resting or not on any foundation of property by the law of nature, this right has been placed by express statute on a footing in which it has been attempted to reconcile the interests of the author with those of the public. And if in this the Legislature has not been perfectly successful, at least there seems to have been as near an approximation to the object in view as can well be expected.

Copyright is a valuable property, from which frequently a fund may arise of great importance to creditors. It rests now exclusively on statute; the great question having been settled with respect to an author's right at common law. But at the same time we must not lose sight of the original right of an author previous to publication; for on that may [116] arise several questions of no light importance, not only respecting the protection of an author's pecuniary rights, but in relation to the rights of his creditors to publish his manuscript productions.

I.—PROPERTY IN UNPUBLISHED WORKS.

An author has an undoubted right or uncontrolled power over his unpublished compositions. The ideas of a man's mind are so identified with himself, in respect of everything which can interest him or his friends, that whether they can be regarded as of pecuniary value in the way of property or not, he ought to be the sole arbiter of their fate, to authorize or to prevent their publication. If ever they are to be exposed to the public eye, the author ought at least to have full control over them before they are made up for publication, and actually submitted to public inspection. No man has a right to publish another's thoughts to the world, or to propagate their publication beyond the point to which he has given consent. His reputation is concerned, and he has a right to defend it by stopping the publication. Once committed to the public by printing, he is committed for ever: '*Reliqua rerum tuarum, post te alium atque alium dominum sortientur; hoc nunquam tuum desinet esse, si semel coeperit.*' The author, then, ought to have reserved to him, till the moment of final and conclusive consent, the right of rejecting—the power of judging what it may be most useful, or creditable, or reputable to publish.

The question of a right to restrain publication may arise in several classes of cases.

I. PRIVATE LETTERS.—In relation to private correspondence, a very curious question has occurred, which has been viewed somewhat differently in this country and in England. It is not properly a question under the statute of copyright, otherwise the decisions in either country would be precedents equally in both. But it is of some importance to observe how this difference arises. In Scotland, the Court of Session is held to have jurisdiction, by interdict, to protect not property merely, but reputation, and even private feelings, from out-

removed by 15 and 16 Vict. c. 83, sec. 36. See Addison on Contracts, 6th ed. 121.]

¹ [In *Adv.-Gen. v Oswald*, 1848, 10 D. 969, the judges in

Exchequer held that a patent right is personal property, and so liable to legacy-duty.]

² *Wilkie v M'Culloch & Co.*, 1823, 2 S. 413, N. E. 369.

rage and invasion. In one respect the publication of private letters may outrage both ; and the question has been, Whether, where letters have been written and sent to a correspondent, the author, by sending them to his friend, authorizes him to disseminate them, or to publish them for gain? Now the purpose of the communication is quite different. It rather implies a veto on publication. Composition for the public and for the eye of a friend are in a different spirit. It is one of the great charms of epistolary correspondence, that one writes not under the awe of a misjudging world ; but throws out unscrupulously his genuine and undisguised sentiments, utters his most secret thoughts, and, with as little reserve as in the secrecy of his own chamber, expresses his feelings of affection, or his murmurs of disapprobation and of censure, in full reliance that they are confided to a friendly ear. By the publication of such effusions, confidential, careless, unthinking of consequences, a man may be wounded in the tenderest part ; his literary reputation hurt ; his character traduced. It is, accordingly, the understood or implied condition of the communication, the implied limitation of the right conferred, that such communications are not to be published. With these natural feelings on the breach of epistolary confidence, the determinations of the Court of Session have accorded.¹

[117] In England several cases have occurred of a similar nature.² But in all of them there has been an admixture of the question of property in the letters, as literary compositions under the Act, which would scarcely have entered into consideration with us ; and which suggests doubts whether, independently of such idea of property, the Courts would have interfered to grant injunction. But this matter rests now on a footing which brings it, in England, nearly to the footing on which it stands with us. 1. The injunction jurisdiction of Chancery seems to require property as its groundwork, for it has been doubted whether on any other ground, as of libel, an injunction could be granted. 2. Lord Hardwicke in *Pope's case*, and Lord Apsley in *Chesterfield's*, held that there was a species of property in letters, a joint property in the writer and receiver ; a special property only in the receiver, which did not authorize the invasion of the joint right of the writer. 3. Lord Eldon, in a case decided in 1818, entertaining great doubts whether, correctly speaking, there be such property, has yet expressed his determination to adhere to the decisions which fixed that point ; and has said, that although he is not 'to declare that I am to interfere because the letters were written in confidence, or because the publication of them may wound the feelings of the plaintiff, yet if mischievous effects of this kind can be apprehended in cases in which this Court has been accustomed on the ground of property to forbid publication, it would not become me to abandon the jurisdiction which my predecessors have exercised, and refuse to forbid it.'³ Where the publication of letters, however, is a breach of trust, the Courts of England restrain the publication ;⁴ and yet doubts seem to be entertained in England, whether letters falling into the hands of the assignees of bankrupts could be secured from publication by injunction.⁵ With us, I think, there would be no such doubt.

There are exceptions, however, to the author's right of restraining publication in such cases : As, 1. Where the purposes of public justice require the disclosure ; in which cases

¹ So it was held in *Dodsley v M'Farquhar*, in 1775, relative to the publication of Lord Chesterfield's Letters (5 Br. Sup. 509, M. App. Literary Pr. No. 1) ; and again, more solemnly, in *Cadell and Davies v Stewart*, 1804, M. App. Literary Pr. No. 4. But see 5 Pat. 493. Here letters written by the poet Burns to a lady whom he distinguished by the name of Clarinda, had been by her given to a bookseller of the name of Stewart, who published them. The children of Burns, as interested in his literary reputation, applied for a remedy, and after full discussion they were found entitled to an interdict.

² One case of Pope and Swift's correspondence, *Pope v Curl*,

2 Atk. 342 ; *Thomson v Stanhope*, Ambler 737. Another, of letters by an old woman under the influence of a weak attachment to a young man. *Eaton's case*, mentioned in 2 Vesey and Beames 27.

³ *Gee v Pritchard*, 2 Swanst. Rep. in Chancery 402.

⁴ So, in *Eaton's case*, *supra*, where a bargain was made for the delivering up of the letters.

And in the *E. of Granard v Dunken*, in Ireland, 1 Ball. and Beatty 209, where a relation living in the family had got possession of private letters, and threatened to publish them.

⁵ See Sir T. Plumer's opinion in *Perceval v Phipps*, 2 Vesey and Beames 28.

it is to be made under the order of a Court.¹ 2. There may be cases where one may be entitled to publish, as by authority of the party.²

II. PUBLICATION BY ACTING OR RECITING.³—Where the composition has been made public, not by printing or selling, but by recitation or acting, the person who for money gets access to the work as thus delivered, may be said to have purchased the property of those ideas and words which he can catch and remember. It has, however, been held that such communication is not to be taken as thus unreservedly given, but that only the right has been given to the pleasure derivable from hearing the composition.⁴

III. GIFT OR SALE OF MANUSCRIPTS.—Where compositions *intended for publication*, or [118] *fit for it*, by accident, or donation, or other title short of an authority to publish, come into the hands of another person, law protects the author in his right of reputation as well as in his proprietary rights.⁵

Thus it is not in literary property, as in the law of patents, that the circumstance of being already known or used gives a right to the public against the inventor. For though a book has been given out in manuscript, and extensively read and copied, still, for printing and publication, the author's right is entire.⁶

IV. BOOK PRINTED, OR IN PRINTER'S HANDS.—Such a work, not yet published, and still in the hands of a printer, seems to be in the same situation with the cases already discussed; for although the printer may have a *lien* over the book, he seems to have no right to publish it.⁷

Before leaving this subject, it may be proper to take notice of a peculiar feature in English practice (already seen to influence some of the cases quoted), which ought to be kept in view, and contrasted with our own.

¹ 'For the purposes of public justice' (Lord Eldon, Chancellor, has said), 'publicly administered according to the established institutions of the country, the letters must always be produced. I do not say *that* of justice administered by private hands.' 2 Swanst. 427.

² As in the above case of *Lord and Lady Perceval v Phipps*, in 1813, where Sir T. Plumer held the lady to have given Phipps authority to publish in his own vindication. 2 Ves. and Beames 19.

³ [A valuable species of composition, in the form of lectures publicly delivered, is exposed to the same sort of invasion as dramatic pieces. On this subject a statute was passed in 1835, which affects the right of lectures in particular situations; and it is important to observe the several cases which fall under that statute, and those which are still left to the common law. See the statute 5 and 6 Will. IV. c. 65. There are in the statute express exceptions: of lectures already published with consent of the authors or their assignees, and of which the term of copyright has not expired; of lectures delivered without previous notice given to two justices of the peace, and of lectures delivered in any university, public school, or college, or public foundation, as to which the law is declared to remain the same as if the Act had not been passed. In practice, therefore, the lecturer's best protection will be found in the common law or in the ordinary copyright statutes. See *Abernethy v Hutchinson*, 1825, 3 Law Journal 209.]

⁴ So, one who took down Macklin's comedy of *Love à la Mode* in shorthand, was prohibited by injunction from publishing it. *Macklin v Richardson*, Ambler 694; *Coleman v Walker*, 5 Term. Rep. 245.

⁵ On this ground, in various cases, Courts have interfered. So, 1. In the case of Lord Clarendon's History, one copy had been lodged by his son in the Petersham Library, and another

given to a Mr. Gwyane. The copy in the library was destroyed by fire, and Mr. Gwynne's copy was published. The question was tried at the instance of Lord Clarendon's heirs, and the donation of this copy was found not to give a right to publish. *D. of Queensberry v Shebbeare*, 1758, Burrow, vol. iv. p. 2330. 2. The same principle was applied where a person, having obtained an *unpublished book*, translated and published it. That was held to be a breach of confidence: for although, if the original had been *published*, there could have been no objection to a *translation* of it; yet, while the original remained still unpublished, the publication of the translation was held not to be justifiable. 3. Another question occurred between Mr. Southey and Sherwood. Mr. Southey, when a very young man, had gone to London with his poem of *Wat Tyler*, and after a negotiation with a bookseller, who declined to publish it, Mr. Southey left it in the bookseller's hands, where it remained forgotten (as it was said) for twenty-three years, when it was published by Sherwood; and Southey applied for an *injunction* against the publication, as injurious to his reputation, and without his authority. The principles which I have stated were fully recognised in that case; but the Lord Chancellor went on this ground, that there was so great a doubt as to the property of the work, it being incredible that it should have been left so long without some intention of alienation, gift, etc., and also so much reason on another account to refuse an injunction (in so far as the book was of a nature which a court of law would not have protected on an action for penalties under the Act), that the Court of Chancery could not interfere till the right was established at law. *Southey v Sherwood*, 2 Merivale 435.

⁶ See *White v Geroch*, 2 Barn. and Ald. 298.

⁷ [See *Davis v Miller*, 1855, 17 D. 1166, where a person who had sent a letter to a newspaper for publication was held entitled to countermand his order.]

Of all the judicial remedies against the invasion of an author's right, that of interdict in Scotland, or injunction in England, is perhaps the most valuable. It is, in cases where low booksellers alone are likely to invade, easier and better to prevent than to indemnify. But this sort of jurisdiction in England proceeds on the sole ground of property, and will not be exercised either where that property is questionable; or where, instead of property, the right is merely to have reputation protected; or where, although the property be clear, it is not such a property as at law, for the purpose of having damages or a valuable pecuniary right established, could be maintained.¹

[119] On these peculiarities of English practice, Wat Tyler and Don Juan, and every other infamous publication, seem to have free circulation by means of the English press.

In Scotland this question is disposed of otherwise: the principle adopted in English practice is not sanctioned. Even if property in the work be the sole ground of interdict, it is the proof of property alone (undistracted by any inquiry into the nature or value or subject of it) that with us guides judicial interference. For the uses to be made, or the abuses, of that property, the law provides another remedy, in administering which that particular use forms the true point of inquiry.

From what has now been stated, it is on the whole to be concluded, 1. That the right of the author in his unpublished work, whether intended to be published for profit or otherwise, is an exclusive right, which no stranger can interfere with to disturb or invade. And, 2. That creditors seem to have no right (except indirectly by the operation of personal execution) to insist on compromising their debtor's reputation by the publication of manuscript compositions.

II.—PUBLISHED WORKS.

Works which have already been published stand on a different footing from those which are still unpublished. The ideas which form the composition, the language in which they are clothed, are by the act of publication in the hands of the world. The question was difficult and interesting, whether at common law the right to multiply and make profit by the sale of works in this situation could be protected? When this question first occurred, the difficulty was of the same kind with that already taken notice of in relation to inventions. The book being published, and so by sale or gift transferred, the universal use of the contents for reading, reciting, transcribing, printing, etc., seem to be conferred. The question admitted of many doubts and much controversy. Both in England and in Scotland it was judicially tried. In England, the discussion was carried on in the several Courts for some years from 1768 to 1774. The question in King's Bench was decided in favour of the author,—namely, that he had a right of property at common law, and that he did not part with this right by publication. But this was reversed in the House of Lords, after the opinions of the judges were heard, who greatly differed.² In Scotland, this question had been tried twenty years before, and decided against the author's right;³ and the Scottish

¹ This doctrine was first introduced by Lord Chief-Justice Eyre. When Dr. Priestley sought damages for the injury done by the mob at Birmingham, one article consisted of certain manuscript volumes for publication. The answer was, that the doctor was in use to publish dangerous books; and the Chief-Justice said, that he would hold evidence to that effect good against the claim for indemnification. 2 Merivale 437.

In a case of *Dr. Walcot* (Peter Pindar), 7 Ves. 1, and in *Southey's case*, 2 Merivale 435, this doctrine was applied to injunctions.

See also *Murray v Benbow*, as to Lord Byron's *Cain*, Jacob 474, note.

See also the case of *Lawrence v Smith* in 1822, Jacob 471.

² A very interesting account of this great question will be found in 4 Burrow 2303, 2417.

³ *Midwinter and others v Hamilton*, 1748, M. 8295. On appeal, the case went off upon informality in the original summons.

Hinton v Donaldson, 1773, 5 Br. Sup. 508, affirmed on appeal.

It may be added that, in *Cadell and Davies v Robertson*, 1804, as determined in H. L. 16 July 1811, 5 Pat. 493, the author's right was held to depend entirely on the Act of Queen Anne.

determination came by appeal to the House of Lords at the same time with the English question. So that the law in both ends of the island was settled on this question.

The right thus resting solely on statute is defined by the Act of Queen Anne, as qualified by subsequent statutes.¹ The 8 Anne, c. 19, proceeds on a preamble that printers and others had taken the liberty of printing, etc. books and other writings, without the consent of the authors or proprietors, to their great detriment; and so it is enacted: 1. That the author of any book already printed, who has not transferred to any other the copy or copies thereof, or the bookseller, etc. who has purchased or acquired the copy or copies in order to print or reprint the same, shall have the sole right and liberty of printing such book [120] for twenty-one years. 2. That the author of any book already composed, and not printed or published, or that shall hereafter be composed, and his assigns, shall have the sole liberty of printing, etc. for fourteen years from the day of first publishing the same; to be, on the author's survivance, prolonged for other fourteen years. 3. That any printer, etc. printing, etc. such book, without consent of the proprietors thereof in writing, signed before two credible witnesses; or any one who, knowing the same to be printed without consent of the proprietor, shall sell, publish, etc., shall forfeit the book or books, and each sheet shall be damasked and made waste paper of, and he shall forfeit one penny for each sheet found in his custody, half to the king, half to the informer. By the second part of the Act it is provided, on a preamble that many persons may offend through ignorance, unless provision be made for ascertaining the property and consent of the author, that none shall be subject to the penalties or forfeitures unless the title to the copy of the book shall, before publication, be entered in Stationers Hall. There is also a provision that nine copies of each book shall be delivered for the use of certain libraries in England and Scotland.

To prevent the bad effect of the monopoly thus granted, provision was made: 1. As already said, That the privilege should endure only for fourteen, or at most twenty-eight years; and, 2. That if the price should be exorbitant, application might be made to certain judges to have it abated.

Under this Act it was first questioned, whether, admitting that at common law there was no exclusive right, the author's title to protection was to depend on his entry of his book in Stationers Hall? There could be no doubt that, to recover the penalties, this was necessary (by sec. 2). But it was held in England, that the general right of property, under the protection of common law remedies, by injunction, damages, etc., was vested by the Act itself from the moment of publication.² And although in Scotland the question was decided differently,³ this was reversed in the House of Lords; and it was held, 1. That no one is liable to be sued for the penalties under the Act, without an entry in Stationers Hall; 2. That the person having the right bestowed by the Act, is entitled to maintain a suit in order to prevent the violation thereof, by interdict, for the term or terms during which the statute has given them such sole liberty, although there should not have been such entry made before the publication.

The whole of this matter is placed upon a new footing by the Act 54 Geo. III. c. 156. This Act has three objects: 1. To confer a right on certain libraries to demand copies of each book printed for sale; 2. To declare the author's right for a certain time independent of any entry in Stationers Hall; and, 3. To extend the right conferred by the Act on authors of books already published, living at the time.

¹ [The statutes on this subject are: 8 Anne, c. 19; 12 Geo. II. c. 36; 15 Geo. III. c. 107; 34 Geo. III. c. 20; 54 Geo. III. c. 156; 6 and 7 Will. IV. c. 110; 5 and 6 Vict. c. 45 (prints, engravings, etc.); 5 and 6 Vict. c. 100, and 6 and 7 Vict. c. 65 (designs); 7 and 8 Vict. c. 12 (international); *ibid.* c. 73 (engravings); 8 and 9 Vict. c. 57 (art unions); 10 and 11 Vict. c. 95 (colonies); 13 and 14 Vict. c. 104 (designs); 14 and 15 Vict. c. 8 (designs); 15 and 16 Vict. c. 12

(international); 21 and 22 Vict. c. 70, and 24 and 25 Vict. c. 73 (designs); 25 and 26 Vict. c. 68 (paintings, drawings, and photographs).]

² *Tonson v Collins*, 1 Blackst. Rep. 330; *Miller v Taylor*, 4 Burr. 2380; *Beckford v Hood*, 7 Term. Rep. 620.

³ *Cadell and Davies v Robertson*, 1804, revd. in H. L. 16 July 1811, 5 Pat. 493.

1. The first part of the Act orders that, after the date of the Act, eleven copies of every book, and of every volume thereof printed, on the paper on which the largest number or impression shall be published (except for the British Museum, which shall be the best), together with all maps and prints belonging thereto, shall be delivered on demand in writing to certain libraries; but not of any second or subsequent edition, unless it shall contain alterations; and if the alterations shall be published separately, a copy only of such alterations.

2. From the date of the Act, the author of any book or books composed, and not printed and published, or hereafter to be printed and published, and his assigns, shall have the sole liberty of printing, etc., for the full term of twenty-eight years; and if the author be alive at the end of that period, for the residue of his natural life, saving to the assignees the right of selling copies printed within the twenty-eight years, and also saving any agreement respecting this survivance term which may have been made between the author and [121] his assignees. And printers who shall print without the consent of the author or proprietor in writing, or persons who, knowing it to be printed without consent, shall sell or have in possession such book, without consent in writing, shall be liable to a special action on the case, or an action of damages in Scotland. And also, the offender shall forfeit and deliver to the author such books, or sheets thereof, and threepence for each sheet printed or published and exposed to sale, half to the king, half to the informer.

3. In order to ascertain what books shall from time to time be published, the title of every book demandable under the Act, published after it, shall, within a month after publication if in London, or three months if published elsewhere, be entered in the register book of Stationers Hall, open to inspection, under the penalty of £5, and forfeiture of eleven times the price of the book, to be recovered by those entitled to sue, and first suing for the same.¹

4. Authors of books not published fourteen years, and of which the authors were alive at the date of the Act, have the full benefit of it.

5. Penal actions are limited to twelve months.

[COPYRIGHT OF BOOKS.—The statutes cited by the author are repealed, and the law of copyright placed on a new footing, by 5 and 6 Vict. c. 45. It is enacted by sec. 3: ‘That the copyright in every book which shall, after the passing of this Act (1st July 1842), be published in the lifetime of the author, shall endure for the lifetime of such author, and for the further term of seven years, commencing at the time of his death, and shall be the property of such author and his assigns; provided always, that if the said term of seven years shall expire before the end of forty-two years from the first publication of such book, the copyright shall in that case endure for such period of forty-two years, and that the copyright in every book which shall be published after the death of its author shall endure for the term of forty-two years from the first publication thereof, and shall be the property of the proprietor of the author’s manuscript, from which such book shall be first published, and his assigns.’ By sec. 4: ‘The copyright which at the time of passing this Act shall subsist in every book theretofore published (except as hereinafter mentioned) shall be extended and endure for the full term provided by this Act in cases of books thereafter published, and shall be the property of the person who at the time of the passing of this Act shall be the proprietor of such copyright; provided always, that in all cases in which such copyright shall belong, in whole or in part, to a publisher or other person, who shall have acquired it for other consideration than that of natural love and affection, such copyright shall not be extended by this Act, but shall endure for the term which shall subsist therein at the time of the passing of this Act and no longer, unless the author of such book, if he shall be living, or the personal

¹ [Registration at Stationers Hall is by statute declared to be *prima facie* evidence of proprietorship of copyright. It seems that, in case of this *prima facie* title being disputed, it

may be supported by other evidence, and that an assignment attested by two witnesses is not essential. *Kyle v Jeffreys*, 1856, 18 D. 906; 1859, 21 D. (H. L.) 8, 3 Macq. 611.]

[representatives of such author, if he shall be dead, and the proprietor of such copyright, shall, before the expiration of such term, consent and agree to accept of the benefits of this Act in respect of such book, and shall cause a minute of such consent (according to a schedule annexed to the Act) to be entered in the book of registry; in which case such copyright shall endure for the full term by this Act provided in cases of books to be published after the passing of this Act, and shall be the property of such person or persons as in such minute shall be expressed.]

Thus it appears that the statute confers or confirms the copyright of such literary works only as 'shall be published' either during the life of the author or after his death, or in which at the date of the Act there was still a subsisting copyright; the right extending, by secs. 17 and 29, to all the British dominions. In all other respects the right of authors is left unaffected, it being by sec. 28 declared that 'nothing in this Act contained shall affect, alter, or vary any right subsisting at the time of passing of the Act, except as herein expressly enacted.' The right of the author of any unpublished composition is thus left unaltered.

PERIODICAL WORKS.—By secs. 18 and 19, copyright in periodical works, such as encyclopædias, reviews, magazines, or works published in a series of articles, parts, essays, or portions of such publications, is secured to the proprietor or publisher, where the author has been employed and paid by such proprietor or publisher; but this only under the condition of not publishing for the term of twenty-eight years the article separately without the consent of the author; the property of the article being reserved to the author for the remainder of the term of copyright given by the Act to authors, and full power of bargaining with the publisher or proprietor for a right to publish separately during the twenty-eight years. The right of such periodical work is secured to the proprietor by entering in the registry the title of such work, or of any part published, after the date of the Act, of a work commenced previously, though then of the first publication, and the names and places of abode of the proprietor and of the publisher.

Under the former statutes, it was doubted how far, under the word *Book*, a literary composition consisting of a single sheet or part of a book, as a poem, song, etc., was a subject of copyright. But all these difficulties are removed by the second section of this Act, which under the word book includes 'every volume, part or division of a volume, pamphlet, sheet of letterpress, sheet of music, map, chart, or plan separately published.' It is also by this section declared, that under the words 'dramatic piece' shall be comprehended 'every tragedy, comedy, play, opera, farce, or other scenic, musical, or dramatic entertainment.'

The title of a periodical publication or newspaper was held under the former statutes to be a proper subject of copyright, as characterizing the particular publication,¹ that it cannot therefore be assumed by another without injury, although a similar title distinguishable may be assumed.² On this point nothing is said in the present statute, unless the words 'sheet of letterpress' be held to include a title; but there is at least nothing to sanction any alteration of the grounds upon which the former judgments were based.]

The questions which arise in respect to literary property under this statute generally turn on identity, Whether the identical work of the author has been invaded? In regard to an original work this can seldom present a question of any great difficulty; so peculiar in the conception or in the expression is every man's literary composition, and so small is the chance of similarity in any case of the kind.

1. Where, in encyclopædias or reviews, quotations have been made so extensive as to extract the whole value, or the most valuable part of the work of an author, this has been held to amount to invasion of the right, so as to entitle the author to protection.³

¹ *Hay v Kirby*, 8 Ves. 215; *Keene v Harris*, cited 17 Ves. 338; *Constable and Co. v Brewster*, 3 S. 152.

² See 8 Ves. 222.

³ So, under the old Act of Queen Anne, a question arose relative to Stuart's History of the Reformation, which had been almost verbatim inserted in an Encyclopædia, and it

2. But it is difficult to define what is fair quotation. The best method of settling such a question conclusively is by jury trial; when the jury, with the aid of such observations as the judge shall deliver relative to any mixture of law in the question, will declare what is fair and honest in such a case.¹

3. The substance of a book may be given in other words without being held an encroachment. So, also, an abridgment may be made; but in neither of these cases must the deviation or abridgment be only colourable. The substance must not be given in the author's words.²

4. In such questions, the great difficulty arises in regard to those works which proceed on and profess to deliver information which is equally accessible to all; as in the case of almanacs, directories, road-books. There is undoubtedly no property in the information itself, but there is in the labour of collecting and arranging it; so that if one, without surveys, or going to the original sources, publish the information collected by another, it is an encroachment. The piracy has generally been detected by the slavishness with which the very words of the original have been copied. Where there is this or any other indication that the information has been taken from the previous work, and not from the original sources, the statute will apply;³ and although the substance of both works may necessarily be [122] the same, the subsequent work will not escape the imputation of an unfair encroachment.⁴

5. The statute of Anne, in the enacting part, speaks only of book or books, although in the preamble it speaks of books or other writings. Under these words it was doubted whether a single sheet was a book. It was held in the affirmative.⁵ So a part of a book as a tale, printed and bound up with others.⁶

6. There may be copyright in part of a work without any right to the whole. The author of notes on a work which is itself beyond the term of monopoly, has property in those notes.⁷

7. There may be property in a title, and in the way of giving a book to the world. This is a very peculiar sort of right, not capable of being grounded on the same precise foundations with literary property under the Act, but rather on a sort of association with, or as an accessory of, that right. A periodical publication, as a magazine, review, or encyclopædia, published periodically or in parts, is in this situation. There is no piracy of the actual composition perhaps; but, by assuming the same title, those who may be attracted by the reputation of the work which goes under that title, may be drawn off to purchase the new one,—the very assumption of an appropriate title being evidence of the loss to the one party in proportion to the gain expected by the other.⁸ The same title cannot therefore be taken; but a similar and distinguishable title may be assumed.⁹

8. A book published abroad seems still to continue property to the author for a reasonable time to have it published in Great Britain. But if he neglect this opportunity, the

was held an invasion of the right. *Murray v M'Farquhar*, 1785, M. 8309. [*Sayere v Moore*, 1 East 361, note.]

¹ See, in illustration of this point, *Rowarth v Willis*, 1 Camp. 94; and *Wilkins v Aikin*, 17 Vesey 422, where the Lord Chancellor sent a case to be tried at law for the purpose of settling the question by a verdict.

² See this subject illustrated, and the distinction between fair and colourable abridgments, in *Gyles v Wilcox*, 2 Atk. 143; *Bell v Walker*, 1 Brown Chan. Cases 451; *Butterworth v Robinson*, 5 Vesey 709; and *Whittingham v Wooler*, 17 Vesey 424, as to quotations. [*Pike v Nicolas*, L. R. 5 Ch. App. 251.]

³ It must, of course, be distinguished correctly how far the proof legitimately goes; for a mistake transcribed goes only to that particular passage, and by inference only can be extended further. Of this the jury will judge.—Dict. of Lord Ellenborough. *Cary v Kearsley*, 4 Esp. 168.

⁴ The whole of this subject is fully discussed in *Longman v Winchester*, 16 Ves. 269, and *Wilkins v Aikin*, 17 Ves. 422, and the cases there referred to; and in the Scottish case of *Taylor and Skinner v Bayne and Wilsons*, 1776, M. 8308. See also an elaborate opinion of Lord Erskine, Chan., in *Matherson v Stockdale*, 12 Ves. 273. [*Kelly v Morris*, L. R. 1 Eq. 697; *Morris v Ashbee*, L. R. 7 Eq. 34; *Morris v Wright*, L. R. 5 Ch. App. 279.]

⁵ *Huie v Dale*, 1803, 11 East 244.

⁶ *White v Geroch*, 2 Barnw. and Ald. 298.

⁷ See *Cary v Longman*, 1 East 358, and the cases there referred to.

⁸ So, in *Hog v Kirby*, a magazine publishing in numbers was thus invaded, and protected by injunction, 8 Ves. 215. So of a newspaper, *Keene v Harris*, 17 Ves. 342. *Constable & Co. v Brewster*, 1824, 3 S. 215, N. E. 152.

⁹ See 8 Ves. 222.

work is open to others to publish; and the person first lawfully publishing in this country seems to have the privilege.¹

9. The right is by the statute confirmed to the author (or his assigns having his authority in writing) during a period of twenty-eight years from the day of publishing; and if he shall be alive at the expiration of that term, during his natural life.² The right after the expiration of the twenty-eight years is the author's alone; saving, however, to the assignee such copies as have been printed during the twenty-eight years (sec. 9). It is held under this Act, 1. That the author, when he sells, in *general terms*, without any limitation, has no resulting right against his own assignee by survivorship.³ 2. That if the book was published more than twenty-eight years before the passing of the Act, the author has not the remainder copy-right.⁴ The transfer of the copyright is by assignation, but there seems to be no precise method whereby in a competition the transfer is to be completed. It seems to class with heritable rights, as bearing a tract of future time, and as unattachable by any diligence but adjudication.⁵

A written title is required in all cases where the action is not by the author [123] himself;⁶ and acquiescence in a publication is not enough to confer the right.⁷

As a sequel to the law of literary property, it may be fit to mention some other particulars analogous in principle.

1. Engravings may be the subject of a kind of property much of the same description with literary compositions. This sort of property was first regulated by the 8 Geo. II. c. 13; a statute of which the celebrated Hogarth was the author. He prepared it in order to protect those engravings of his which, the instant they were published, were exposed to all sorts of piracies. This defective statute was reformed by the 7 Geo. III. c. 38, and 17 Geo. III. c. 57.⁸ These Acts protect, 1. Engravings, etchings, or works in mezzotinto or chiaro-oscuro, of any historical or other print or prints which any one shall invent or engrave; or, 2. Such as one shall, from his own works, design or invention, cause to be engraved, etc.

In these, as in the information generally contained in almanacs, etc., there is no property in the subject where it is not an original design of the engraver. The property is only in the engraving itself, from which no copy can be made without piracy.⁹

2. There is also a similar property conferred on the first maker of busts, models, casts, etc., by 38 Geo. III. c. 71; amended by 54 Geo. III. c. 56.

3. And a similar protection is by 54 Geo. III. c. 23 given to the inventors of original patterns for printing linens, cottons, etc. But this is granted only for the brief term of three months.¹⁰

4. Musical compositions fall under the Act of Queen Anne;¹¹ and on the same principle under the 54 Geo. III. c. 156. We have already had occasion to take notice of a case where, as such, they were found to be protected, though consisting only of a single sheet.¹²

¹ *Clementi v Walker*, 1824, 2 Barn. and Cress. 861.

² 54 Geo. III. c. 156, sec. 4.

³ *Cannan v Bowles*, 1 Cox. 288; *Rennet v Thomson*, *ib.*

⁴ *Boork v Clarke*, 1 Barn. and Ald. 396.

⁵ [On the analogy of patent right, it may be laid down that copyright is personal property. *Supra*, p. 111, note 1.]

⁶ *Powers v Walker*, 1814, 4 Camp. 8; *Morris v Kelly*, 1820, 1 Jacob and Walker 481.

⁷ *Latour v Bland*, 2 Starkie 382.

⁸ [Also 5 and 6 Vict. c. 100; 7 and 8 Vict. c. 73; 25 and 26 Vict. c. 68.]

⁹ See *De Berrenger v Whible*, 2 Starkie 548.

¹⁰ [See 6 and 7 Vict. c. 65; 13 and 14 Vict. c. 104, and 14

and 15 Vict. c. 8 (which apply also to sculpture); 24 and 25 Vict. c. 73.]

¹¹ *Bach v Longman*, Cowp. 628.

¹² *Huie v Dale*, 2 Camp. 28; *Clementi v Golding*, 2 Camp. 25, and 11 East 248. See also *White v Geroch*, 2 Barnw. and Ald. 298. [Allied to these peculiar rights of property is the property in trade-marks, which is now protected by statute. If a manufacturer uses a symbol to denote that certain goods upon which it is affixed are manufactured by him, and the goods are put into the market, a certain reputation, accompanied by substantial advantages, accrues to them. By 25 and 26 Vict. c. 88, such symbols or trade-marks are protected against forgery. Independently of statute, Courts of Equity

EFFECT OF THE EXCLUSIVE PRIVILEGE OF PATENT OR COPYRIGHT.—For the protection of a patent privilege, or of literary property, two several remedies are provided: 1. Interdict; and, 2. An action of damages.

1. INTERDICT is summarily obtained by application to the Lord Ordinary on the Bills, accompanied by the proofs of a *prima facie* case; and when obtained, it has the effect of preventing the encroachment threatened or commenced, till a full judicial investigation shall take place, in order to decide whether the interdict shall be confirmed and made perpetual. This is the remedy which in most cases (of literary property especially) is the most useful; it being easier to prevent than to remedy the invasion and injury. But it will be remembered, that by an inconsiderate interdict a court may occasion irreparable damage; since, in the case both of machinery and of literary publications, a great expense may have been incurred, which, if the favourable moment be not seized, is entirely lost. In such cases it is the duty of a court of equity interposing, *first*, to require the best possible proofs which the suddenness of the occasion may allow, and to give as much opportunity of discussion and discovery as circumstances admit; and, *secondly*, if those proofs are in any danger of not standing the test ultimately, to allow the operation to proceed, in the meanwhile ordering [124] an account to be kept, by which indemnification may be given when the matter is finally decided.

In England, when a patent is new, but objected to on the ground of imperfect specification, or as otherwise exceptionable, the practice seems to be to require a trial at law before the Court of Chancery will interfere;¹ and in copyright the same principle directs the Court.² But when possession has been enjoyed exclusively for any considerable time under a patent or copyright, injunction is granted in England.³ With us, the same reluctance to interfere is not observed in this department of jurisdiction; but on evidence, *prima facie* satisfactory, the Court sanctions the remedy of interdict, as merely a temporary protection of the apparent right.

2. DAMAGES.—Action for damages lies, either accompanied by a declarator of the right or otherwise.

CHAPTER V.

OF HONOURS AND DIGNITIES.

IN former times, honours and dignities were annexed to land and castles rather than to the person; and when the land was alienated, the dignity passed with it. But now they are strictly personal; descendible to the heirs in the patent, but not capable of transference by alienation, nor attachable for debt. The territory of a peer, however, when unentailed, may be sold, and is open to the diligence of creditors: even that estate from which the title is assumed, may be adjudged and sold for debt.⁴

have interfered by injunction to protect the maker of the goods represented by the trade-mark in the exclusive use of it. *Hall v Barrows*, 32 L. J. Ch. 548, 33 *ib.* 204; *Leather Cloth Co. v American Leather Cloth Co.*, 11 H. L. 523. According to these cases, the right is viewed as a species of property.]

¹ *Hill v Thomson*, 3 Merivale 624.

² 6 Ves. 707, Lord Eldon, Chanc.

³ As to patents, 3 Merivale 624-8, 14 Ves. 130 As to copyright, 6 Ves. 707.

⁴ Dirleton and Stewart agree, 1st, That personal honours are not the subject of execution and diligence; 2d, That even honours annexed to land do not go with the land to disponees or comprisers; and, 3d, Although Dirleton seems to stickle a little for a distinction between territorial and personal honours, Stewart is clear 'that there would be no distinction made with us between a title of honour given by patent, and the same title annexed to and joined with lands, but the same judgment made of the title in both cases.' 314 and 315.

CHAPTER VI.

OF OFFICES.

AN office is a right to exercise a public or private employment, and to take the fees and emoluments which belong to it. In considering offices as responsible for debt, three questions may be raised: 1st, Whether the office itself may be attached, or transferred by the operation of legal diligence, or sold for the behoof of creditors? 2^d, Whether the power of recommending or appointing a deputy can be made a source of gain and fund of payment? And, 3^d, Whether the wages, profits, or salary can be taken by the creditors of him who holds the office?

1. By edicts of Justinian, venality in public offices was forbidden in the Roman law;¹ and this continued long to be the law of all the European nations established on the ruins of the empire. It seems first to have been departed from in France, where the sale [125] of offices became a source of public revenue.² In England, no public office (a few only excepted) can be sold. This law is most especially directed against venality in offices connected with the administration of justice.³ In Scotland, all heritable offices may be voluntarily sold, or adjudged, and judicially sold for debt.⁴ So all patrimonial offices, such as are descendible to heirs and assignees, may be sold or adjudged.⁵ Offices which are not patrimonial, but in which there is a personal trust reposed, are not saleable, nor capable of being attached by diligence.⁶ The practice in Scotland has been extremely loose; and examples have occurred of the sale even of offices connected with the administration of justice.⁷ But of all offices, the purity of these is to be preserved with the greatest delicacy;

¹ Nov. 8 pr. and c. 1 and 11.

² The French, long wedded to the institutions of the civil law, adhered with great strictness to the laws against venality in offices, and even enforced them by very strong ordinances. But Francis I., amidst the disorder of his finances, was betrayed into the unworthy expedient of converting the sale of offices into a source of revenue. All offices might be purchased by certain payments to the royal treasury, and, when thus purchased, might be transferred for money, the king approving of the resignee. That Montesquieu should justify such venality (*Esprit des Loix* liv. v. c. 19), is by Voltaire attributed to his holding the presidency which his uncle had purchased. Vol. ix. p. 208.

³ By 5 and 6 Edward VI. sec. 16, the sale for money, directly or indirectly, is prohibited, of offices or deputations of offices, touching or concerning, 1. The administration or execution of justice; or, 2. The receipt of the king's treasure, etc.; or, 3. The receipt of the king's customs, or any administration or attendance in the king's custom-house; or, 4. The keeping of castles, etc. for the king; or, 5. Clerkships in courts of record: And it is provided that the prohibition shall not extend to any offices whereof a person is seised of inheritance, or to the keeping of any park, house, etc. But offices of inheritance, or for terms of years, are saleable.

² Blackst. 36. See *Garforth v Fearon*, 1 H. Blackst. 327, where Lord Loughborough delivers an elaborate opinion on the effect of bargains for the sale of offices.

The sale of public offices to the highest bidder leads to extortion, and some degree of corruption in the execution of them. The person who has the power of selling is induced to demand as high a price as the largest calculation of the emolu-

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ment will sanction; and the purchaser, when installed, makes the best advantage of the power which his office puts into his hands. Neither can anything be a greater 'temptation to officers to abuse their power by bribery and extortion, and other acts of injustice, than the consideration of the great expense they were at in gaining their places, and the necessity of sometimes straining a point to make their bargain answer their expectations.' Hawkins' Pleas of Crown 198.

See Cook's B. L. 298. *Schilinger v Blackerby*, 1 Ves. 347, holding the offices of the Palace and House of Lords liable to creditors.

⁴ As the heritable ushership (*Cockburn*, 1747, M. 150, 1 Pat. 603), so heritable sheriffships, etc. in former times. 2 Bankt. 219.

⁵ As the office of king's printer (*Blair*, 1737, M. 148), so the right of presenting a pauper to a public charity, 1 July 1796, in a question with the town of Edinburgh. [See *Gardner v Grant*, 1835, 13 S. 664; *Bruce v Grant*, 1839, 1 D. 583.]

⁶ So the office of keeper of the Register of Sasines is not adjudgeable. *Wilson*, 1759, M. 165. [See *Paul v Hill*, 1841, 2 Rob. 524; *Ord v Hill*, 1847, 9 D. 1118.]

⁷ In the case of *Waddel v Inglis*, 1770, M. 13134, 1 Pat. 205, and in the case of *Stewart v Miller*, determined in the House of Lords 25 Feb. 1802, 4 Pat. 286, it was clearly proved that such offices had frequently been sold and bargained for in Scotland. But in the last of these cases, the Lord Chancellor Eldon delivered his opinion strongly against venality in all public offices, and was peculiarly anxious (in moving the judgment of affirmance in the House of Lords sustaining the bargain between the parties) to guard against the belief that there was any intention to decide the general question, far less to give the sanction of their high authority to the sale of

and the provisions of the English statute of Edward Sixth are now extended to Scotland and Ireland.¹ The prohibition to sell offices and deputations is by the same Act extended to all offices in the gift of the Crown, and in the public departments of Government, in the United Kingdom, or in the colonies, or under the East India Company. But an exception is made: *First*, Of certain offices in the palace; and *secondly*, Of sales and exchange of commissions in His Majesty's forces, for the regulation price, and under such rules and restrictions as His Majesty from time to time shall establish.

[126] Under the exception contained in this Act, it may be questioned whether an officer in the army can be compelled to sell his commission for the benefit of his creditors. Certainly creditors may not directly attach the office by adjudication; and it would also appear that an officer, either on whole or half pay, would not be compelled in a sequestration to assign to his trustee, or in a cessio to authorize the sale of his commission.

If a commission is to be sold voluntarily for the benefit of creditors, the officer must first, on the proper application, obtain leave to sell; and those who conduct the transaction must agree with the purchaser, and then get the sale negotiated in the common way.

2. DEPUTATIONS OF OFFICES.—The doctrine relating to offices applies also to the power of deputation, on the same principle which bars the diligence of creditors in the case of the principal office. The right of appointing deputies cannot become a source of gain to the creditors of the principal; or be claimed by them as affording a fund of division, where the office is of the nature of a public trust, or relates to the administration of justice.²

3. SALARY OF OFFICE.—The salary of an office stands on a different footing from the office itself. Although the *delectus personæ*, which an office implies, may effectually prevent the office itself from being exposed to sale, to be purchased perhaps by one who is quite unable to discharge its duties, this principle at least can never stand in the way of creditors proceeding to attach the salary, or the accruing perquisites and profits as they arise, and converting them into a fund of payment.³

But any restraint on the right of attaching the salary of an office proceeds on other principles. 1. A proper salary is in its nature alimentary. In its very constitution and appropriation, the fund set apart for it is separated from common purposes, and from its destination it may fairly be regarded as under specific appropriation. And, 2. With this appropriation, the public policy concurs in requiring that officers should at all times be ready, without interruption, to perform the duties which the public expects from them. A

offices. See a note of part of this speech in the Fac. Coll. vol. xiv. p. 197. [Thomson v Dove, 16 Feb. 1811, F. C.]

¹ 49 Geo. III. c. 126.

² See the above-quoted Act, 49 Geo. III. c. 126.

Lord Chancellor Thurlow held that where His Majesty empowers an officer, for the benefit of the public, to recommend, and much more to appoint, a person to an office, whether in the administration of justice or in matters of less consequence, the law supposes the Crown to repose the trust in him, that he will appoint a person worthy to fill the place; that he will not permit his judgment to be corrupted by entering into a consideration of the question who would give most for his recommendation or appointment; and any traffic which he enters into to make a personal benefit of his power and trust, is traffic which a court of equity will cut down. *Hamington v Du Chattel*, 1 Br. Ch. Cases 124. The report of this case, as in Brown, was said by Lord Eldon in the House of Lords to be very bad. 'A judgment,' said he, 'very ill reported, but most ably delivered.'

It was formerly a practice in Scotland, in the case of some offices, to take money for deputations; but such practices will

not probably be continued, now that the opinion of the court of the last resort has so directly discountenanced them upon the broad ground of public expediency and constitutional law. It seems at one time to have been the resolution of Lord Chancellor Eldon to move, in *Stewart and Miller's case*, for a judgment annulling the whole bargain upon which the parties had come before the Court; and he was restrained only by the consideration that the Court of Session had not decided the case on the general question, so that it would have been an *original* discussion in the House of Lords, and that it would have occasioned an enormous expense to the parties to return to Scotland for a trial of the point.

³ Lord Kames, in his remarks on the case of *Wilson v Falconer*, delivers an opinion, that wherever there is a power of deputation, the emoluments may be adjudged, however personal the office, as the deputy there may easily account to the adjudger instead of the principal; that where there is no power of deputation, the emoluments cannot be adjudged. *Select Decisions*, p. 219. If this opinion is to be followed, it must be limited to offices which are mere sinecures, or to the surplus of a due subsistence.

doubt naturally suggests itself, whether, in deciding on such cases, the former of the considerations now stated has always been sufficiently recognised, or the latter enough attended to in its remote and in its immediate consequences. It is quite true that the law will not recognise as a sufficient characteristic of the alimentary nature of a fund, that it is necessary for the subsistence of the person favoured. But the particular appropriation to sub- [127] sistence is the decisive mark of an alimentary fund; and this seems to be necessarily implied in the appointment of a salary to a public office. On the other hand, it is consistent with the policy of thus securing the service and uninterrupted readiness of public officers for their duties, that their salaries should not serve as a fund of credit. It is at least sometimes true that credit is pernicious. And if the speculative opinion is not to be assented to universally, that to deny action for small sums would prove salutary in stopping such debts in their origin, yet in some cases a policy like this is unquestionably good. So it has been found in the Liquor Acts;¹ so it probably would prove in regard to the salaries of public officers, in stopping false credit beyond the amount of the salary, in preventing an officer from thus by anticipation dissipating the public provision for his services. Nothing can be more indecent than to see clergymen trafficking with their creditors for that stipend which is a provision for the undisturbed performance of their sacred functions; nothing more inconsistent with the very nature of the appropriation of military or naval pay, or half-pay, than that the officer whose services are thus purchased for the public, shall, by the consequences of a credit obtained by reliance on this fund as directly attachable, or indirectly to be reached by imprisonment, be placed in a state of incapacity for the performance of his duties. Yet these are views which have not been uniformly adopted in questions of this sort. Some salaries of a public nature have been allowed to be assigned or attached; others, though not attachable, have been ordered in cessio to be given up, or in part at least relinquished.

1. In England, a clergyman's benefice is held to be liable to sequestration, and the proceeds to distribution among creditors.² But neither the pay nor half-pay of an officer in the army or navy is in England held assignable; and although at one time it was found that they might be assigned in equity,³ this was afterwards held bad, and all assignments considered as ineffectual.⁴ The pay is not taken under a commission. Arrears seem to be held attachable.⁵ But that has been doubted.⁶

2. In the law of Scotland, the salary of a judge, the pay or half-pay of an officer, and the salary of other inalienable public offices, as the funds assigned by the statute for enabling those who hold them to discharge the duties of their place, have been supposed to be [128]

¹ 24 Geo. II. c. 40. See Index, Liquor Acts.

² *Ex parte Meymot*, 1 Atk. 196; *Arbuckle v Cowtan*, 3 Bos. and Pull. 321.

³ *Stewart v Tucker*, 1777, 2 Blackst. Rep. 1137.

⁴ *Odium*, a half-pay lieutenant of a reduced regiment of foot, was imprisoned for debt by Flarty; and in a question concerning his liberation, under the Lords' Act, he objected to the inclusion of his half-pay in his schedule of funds to be given up to his creditors. The prisoner was ordered to be discharged without giving up his half-pay. Lord Kenyon said: 'Emoluments of this sort are granted for the dignity of the state, and for the decent support of those persons who are engaged in the service of it. It would therefore be highly impolitic to permit them to be assigned; for persons who are liable to be called out in the service of their country ought not to be taken from a state of poverty.' Judge Buller said: 'I know of no authority by which an officer may sell his half-pay, and on principles of policy he ought not to be permitted to do it. If the question was whether or not the pay which was actually due might be assigned, I should have thought

it, like any other existing debt, assignable, but that does not extend to future accruing payments.' *Flarty v Odium*, 3 Term. Rep. 3.

This decision was at the time highly approved of, as we learn from Lord Alvanly, *Arbuckle v Cowtan*, 3 Bos. and Pull. 328. And a similar judgment had been given in Chancery, in the case of Captain Kennedy, a bankrupt, about the year 1788.

The decision in *Flarty v Odium* was strongly confirmed—first in the King's Bench, the Court holding that both on grounds of public expediency and on account of the officers themselves, half-pay is not assignable at law (*Lidderdale v D. of Montrose*, 4 Term. Rep. 248); and afterwards in Exchequer, in *Stone and Lidderdale*, 2 Anstruth. 533, where it was held not assignable in equity.

⁵ *Barwick v Read*, 1 Henry Blackst. 627. An opinion the other way seems to have been delivered by Lord Hardwicke, but not relied on. Cook 285.

⁶ 1 Montagu, Bankrupt Law, 1819, 446. [See Sm. Merc. Law, 7th ed. 679.]

not attachable by creditors; but this doctrine has been called in question, and in modern practice is not admitted without limitation.

1. Minister's stipend has been held arrestable, and to fall under sequestration;¹ while the salary of a private lecturer in a chapel has been deemed alimentary, and exempt from attachment.²

2. A professor's salary has been held arrestable.³

3. Salaries of judges and other public officers of state have, however, been held not to be arrestable.⁴

4. It has not been left entirely on the general principle to dispose of the pay and half-pay of the army or navy. Special statute has declared in confirmation of the common law, that all assignments of such pay are void and null.⁵

Whether, indirectly, salaries, pensions, and stipends may become available to creditors, in so far as the relief from imprisonment by *cessio bonorum* is qualified by the necessity of giving up to creditors all that exceeds the necessary means of subsistence, will be discussed hereafter.⁶

5. Arrears have been considered as attachable, whether of pay or of salary.⁷

6. The salary of a public officer cannot lawfully be burdened with the payment of any sum as a consideration for the exertion of influence to procure the nomination.⁸ Neither can those who hold the power of nomination stipulate that a part of the salary shall be paid to a candidate who retires from the contest.⁹ These are *pacta illicita*, forbidden by the clearest considerations of public good. But it is left doubtful whether the allotment of a share of the salary by agreement between two candidates is legal.¹⁰ An agreement by an officer in bad health to share the emoluments with an assistant is effectual.¹¹

CHAPTER VII.

OF ALIMENTARY FUNDS.

THE power to give or to withhold a fund implies also a power to qualify the grant with such a restriction as shall exclude creditors. No one can so vest his own funds in himself, [129] or for his own use, as to exclude his creditors. But he may, by conveying his estate or funds to another, under a condition that it shall be applied only for a particular purpose,

¹ *Anonymous*, 1824, 3 S. 195, N. E. 133.

² See 1 Fount. 46 for the original doubts. *Hall*, 1736, M. 711. *Hogg*, 1743, M. 722; *Elchies*, Stipend, No. 5. *Smith v E. of Moray*, 13 Dec. 1815, Fac. Coll. [*A. B. v Sloan*, 1824, 3 S. 195, N. E. 133.]

³ *Laidlaw v Wylde*, 1801, M. App. Arrestment, No. 4. But this *salvo beneficio competentiae*.

⁴ There is an Act of Sederunt, 11 June 1613, declaring that it shall not be lawful to arrest in the hands of the treasurer, or receiver's hands, any pension, fees, etc., directed to be paid to any by precept from His Majesty. *Spottiswood's Prac. voce Pension*; *Sir Ilay Campbell's Acts of Sederunt*, p. 9.

The salaries of *judges* and public ministers held not to be attachable. *Stair iii.* 1. 37; Act of Sed. 20 Nov. 1626, and decree in terms thereof, 27 Feb. 1662.

The salary of a *member to the Parliament of Scotland* not arrestable. *Mollison v Clark*, 1707, 2 Fount. 362.

⁵ 47 Geo. III. c. 25, sec. 4.

⁶ See below, of *Cessio Bonorum*.

⁷ *Brodie v Campbell*, 1715, M. 709, as to arrears of officer's pay.

⁸ See the case of *Dalrymple v Shaw*, 1786, M. 9531, where an *opinion* at least to this extent was delivered. See 49 Geo. III. c. 126. [*Gardner v Grant*, 1835, 13 S. 664, relative to an agreement to pay an annuity to one who had procured the officer's appointment. See also *Bruce v Grant*, 1839, 1 D. 583.]

⁹ *Thomson v Dove*, 16 Feb. 1811, 14 Fac. Coll. 196.

¹⁰ In the above case of *Thomson v Dove*, Lord President Blair expressly reserved his opinion on this question as more doubtful, though I confess that I cannot see much reason to hesitate in discountenancing a transaction which substantially destroys the freedom of election.

¹¹ See *Haldane v De Maria*, 6 May 1812, 14 Fac. Coll. 536. See 49 Geo. III. c. 126, sec. 11.

and that no creditor shall have the power of attaching it by diligence, place it beyond the reach of creditors while it continues in its original form, unmixed with the *universitas* of the holder's funds.¹ And so, where an estate is created and the proceeds appropriated, or a debt is constituted, and the obligation undertaken expressly for the purpose of alimentering and subsisting the person for whose use it is given, it is (at least so far as it exceeds not a moderate aliment) protected from creditors.²

Property conveyed to a wife, excluding the *jus mariti*, is not attachable by creditors.³ An aliment granted to a wife does not fall under the *jus mariti* so as to be affectable by her husband's creditors, or liable to compensation by debts due by him.⁴ But in order to protect a fund in this way, it is necessary that it should be properly constituted as an aliment. It is not enough that it be given as an annuity or liferent; it must be declared expressly alimentary.⁵

It is not sufficient to give the character of an alimentary provision, that it is the sole fund of subsistence.⁶ Thus, where a wife has an annuity secured to her by marriage contract, and on her husband's death marries again, her annuity from the first husband's estate will go to her second husband's creditors, leaving to her only the eventual survivorship. Neither is the maintenance of the wife an inherent burden on the *jus mariti*, so as to entitle her to claim a portion of the rents of her lands, free from the diligence of her husband's creditors.⁷ It seems, on the same ground, very doubtful whether the annuity settled on a wife on separation is attachable by the husband's creditors. See below, of Marriage Contracts and Bonds of Provision.

Pensions from the king are held as alimentary, although they do not expressly [130] bear a declaration to that effect.⁸

¹ [Baillie v Nasmyth, 1674, M. 703.]

² As the principles of the law of France were drawn from the same sources with those from which our law flowed, I make use, without scruple, of the admirable work of Pothier for the illustration of our jurisprudence. According to him, the French law gives effect to the constitution of such alimentary rights. 'A debt,' says he, 'which is given or bequeathed to me to serve for my aliment, with a provision that it shall not be seized by my creditors, is a debt against which no compensation can be opposed. For as this clause is effectual to prevent it from being seized by a third party, and applied in payment of my debt, so must it also for the same reason be effectual to prevent it from being applied, by means of compensation, in payment of what I owe to the debtor in it.' *Traité des Obligations*, tom. i. p. 314. This might stand as a passage in a book of Scottish law. Dirleton says, in reporting the case of *Broomhall v Darsie*, 'Constituto semel alimento, quo nihil in jure magis favorable, aut magis personale, de eo nec alienatio nec transactio rite celebratur; datur enim ut persona exhibeatur et utcunque vitam tolleretur.' 7 July 1678, Dirleton, *voce Alimenta*, p. 3.

³ Ersk. i. 6. 14.

⁴ *Broomhall v Darsie*, 1678, *ut supra*; *Tenant*, 1637, M. 10372; *Westnisbet v Morrison*, 1627, M. 10368; *Lady Pinkell*, 1709, M. 5999, 10399. [See *Harvey v Calder*, 1840, 2 D. 1095, as to whether an express exclusion of the diligence of creditors is necessary; also *Waddell v Waddell*, 1836, 15 S. 151; *Rennie v Ritchie*, 1845, 4 Bell 221.]

⁵ *Kilcadron*, 1639, M. 10372. A subject, the rents of which would in the common case fall to the husband *jure mariti*, was found not attachable by the husband's creditors, in respect that he lived separate from his wife, and gave her no aliment, so that her own rents were to be regarded as alimentary; or

rather, the true principle of the decision was this, that a wife is entitled to a preference by retention of her tocher, or of the rents of her own estate, for her aliment, where she and her husband do not live together and share their fortunes. *Jameson v Houston*, 1770, Hamilton's Decisions, p. 128. In the case of a provision left by our great lawyer Dirleton to his niece, of the liferent of 20,000 merks (the fee to her son), 'for her better support and maintenance,' the Lords found it attachable by her husband's creditors, as not being declared expressly alimentary. *Gordon of Pencaitland v Blackburn*, 1697, M. 10394.

⁶ See *Smith v E. of Moray*, 13 Dec. 1815, Fac. Coll.

⁷ *Turnbull*, 1709, M. 5895; *Robb*, 1794, M. 5900. An opposite decision in the case of *Lisk*, 1785, was settled in consequence of an observation of the Lord Chancellor.

⁸ *Dick v Sir A. Dick*, 1676, M. 10387; *Stair's Inst.* ii. 5. 18, iii. 1. 37; *Ersk.* iii. 6. 7. A decision has been pronounced in England which I scarcely think could have been given in this country, and which appears contrary to the very intention of the bequest out of which it arose. A person bequeathed an annuity for life to another, with a proviso that it should be paid only into the annuitant's own hand, and that, if alienated, it should immediately cease. He became a bankrupt, and it was included by the commissioners. The question occurred in Chancery, and was sent to the King's Bench. The creditors claimed the annuity. The heir of the testator contended that it had ceased and determined, which the bankrupt denied, as he had given no voluntary alienation. The Court of King's Bench reported their opinion that the annuity had determined. *Dommet v Bedford*, etc., 6 Term. Rep. 684. See also 3 Vesey 149. [The reference to this somewhat exceptional case is scarcely sufficient for the purposes of illustration. See *Wills and Succession* i. 293, and ii. 65.]

The annuities due to the widows of Scottish clergymen, or of principals or professors in Scottish universities, and the provisions to their children, are not subject to arrestment,¹ nor can they be assigned.²

When, instead of an *yearly sum*, there is a residuary principal sum destined for aliment, and declared alimentary, it would seem that while the fund remains as a *jus incorporale*, distinct and unmixed with the debtor's effects, it is exempt from diligence.³

Although no person can reserve to himself any part of his own property so as to withdraw it from the diligence of creditors, a fund already protected as alimentary may be converted into another shape with an effectual reservation of its privilege.⁴ So, perhaps, it would be held where an office is abolished on a salary, or where the officer retires on a salary.

Persons who furnish subsistence are entitled by diligence to attach the alimentary fund of the year for which they made furnishings.⁵ It has been imagined that their diligence is limited to the year's fund; but the better opinion seems to be, that the furnishers of the year have a preference on that year's fund over furnishers of former years, but that the latter are not precluded from attaching the fund.

Where the alimentary fund is exorbitant, or where several alimentary funds concur, the debtor will not be privileged to enjoy the superfluity, while his creditors are deprived of their payment. The creditors may throw the debtor into prison; from which he will not be relieved by *cessio bonorum* till he give up a part of his aliment to his creditors, and restrict himself to such moderate competency as becomes his condition; but even, directly, a court would probably not feel themselves authorized to stop diligence intended to attach the excess of an exorbitant aliment.⁶

Sometimes the friends of a bankrupt appear at the sale of his property, and purchase goods or furniture for the aliment or personal use of him and his family. As a bankrupt may enjoy an alimentary fund acquired before bankruptcy, he may also enjoy it when bestowed upon him after bankruptcy. The only difficulty seems to be, whether he can hold moveable property under any condition that will protect it. At least it seems to be [131] competent to settle household furniture, etc., effectually upon his wife or children for their subsistence and aliment, so as to save it from the diligence of the creditors. Questions in such cases can arise only from the doubtful mode in which the fund is vested: 1st, If the fund or subject be vested strictly as alimentary, it would seem to be effectually guarded from the diligence of former creditors; for they have received the price of this fund, and are not misled into credit by the false reputation of ownership. 2d, Furniture or clothes may also be effectually bestowed upon him in the same manner. 3d, It would appear to be safe to vest property of any kind in him as trustee, for the use of his children or his wife. And 4th, Although a bankrupt cannot, without a discharge, be enabled to carry on trade again on his own account, without subjecting to payment of his former debts all his new acquisitions, yet the friends of the bankrupt's family may safely carry on trade for their behoof. They may purchase the bankrupt's stock, and, vesting it in themselves or in

¹ 17 Geo. II. c. 11, sec. 68; 19 Geo. III. c. 20, sec. 78. In establishing the Schoolmasters' Widows' Fund this was neglected. 47 Geo. III. c. 85, sec. 2. [Irvine v M'Laren, 1829, 7 S. 317.]

² M'Kenzie v Morrison, 1791, M. 10413.

³ Urquhart, 1738, M. 10403. Lord Elchies raised the doubt in this case, whether, the fund being *assignable*, it might not be *arrested*; but the Court held the word assignees to mean 'assignees for aliment.' Elch. Notes, p. 20, No. 8. See also Kilk. 21. Qu. Would the Court have held an assignation bad?

⁴ Ersk. iii. 6. 7. The clerk of the Canongate sold his office, taking a bond for an annuity in lieu of it, not to be arrestable.

It was held to be free from diligence, so far as a moderate provision. Swinton, 1738, Elchies, Aliment, No. 7, and notes, p. 20.

⁵ Bankt. i. 159. 14; Lady Caithness v Seaton, M. App. Pers. and Real, No. 1. The President held the fund not attachable for furnishings of a former year. The other judges seem to have held otherwise, with perhaps a preference to the furnishers within the year. The case was decided by an arrangement. See Kilkerran's note, 5 Br. Sup. 338. [Greig v Christie, 1837, 16 S. 242.]

⁶ [The subsequent decisions of the Court have not given much encouragement to creditors to attach alimentary funds. See Monnypenny v E. of Buchan, 1835, 13 S. 1112; Harvey v Calder, 1840, 2 D. 1099.]

trustees, proceed with the trade, making their manager or trustee account to the bankrupt's family, and appropriate the profits partly to the subsistence of the bankrupt himself, and partly to that of his family. Nay, there seems to be no obstacle to their employing the bankrupt himself, if not in prison, to superintend the business.¹

Where a bankrupt holds a lease excluding assignees and subtenants, the creditors cannot take that lease without the landlord's consent; but the stock and accruing profits may be taken. It would seem that the bankrupt's friends may supply a stock, which, if properly settled on him, may be free from the diligence of creditors. But still the profits will be attachable. Perhaps, however, they may, by means of a trust, be so fixed upon the family of the bankrupt as to save them from his creditors. To accomplish this, the only unexceptionable way seems to be to constitute a trust for the family.

The wages or fees of servants constitute a fund properly alimentary, and can be attached only so far as they exceed what is necessary for their subsistence.²

The salary of a comedian is held to be alimentary on a similar principle. The debtor, indeed, may be imprisoned, and thus forced to bargain with his creditors; but if the creditors should prefer the attachment of his gains, they must leave untouched a reasonable maintenance conformable to his condition.³

Although alimentary funds, salaries, and pensions are not attachable for debt, it is held that the arrears of them may be attached.

CHAPTER VIII.

FACULTIES OR RIGHTS OF RESTITUTION AVAILABLE TO CREDITORS.

[132] CREDITORS have the right of following out actions of restitution, arising from illegal or challengeable alienations, direct or indirect, of property belonging to their debtor, or to which he may have succeeded. Without discussing the whole doctrine of restitution in all its parts and relations, it may be sufficient to select those examples which are of chief importance. Deeds, whether of alienation or of obligation, granted by minors, by persons insane, by persons interdicted, by persons of weak capacity imposed on by fraud, are subject to restitution on certain conditions, and within certain terms; and of this right creditors may avail themselves.

¹ In Forrester's sequestration, some friends purchased the stock in hand for the benefit of his children, to be sold under their father's management, as a fund of subsistence to the family, the shop being opened in the children's name. In the course of the trade new goods were commissioned; and after some time, certain creditors thought proper to insist in their personal diligence against the bankrupt, which forced him into the Abbey, and obliged the friends to dispose of the stock at once. They accordingly sold the whole to Crooks and Burns, in whose hands two creditors of the bankrupt arrested the price. The question was, Whether the arrestment was effectual? or, Whether the fund was not the property of the children and their friends, and not of the bankrupt? The Court preferred the children and their friends. *Montgomery and Campbell v Sibbald*, 1799 and 1800, n. r. [A

husband cannot, by ante-nuptial contract, convey his furniture to his wife by declaring it alimentary, and exclusive of her creditors, so as to prevent it being attached by his own creditors. *Brown v Fleming*, 1850, 13 D. 373, and cases there cited.]

² Stair iii. 1. 37. In the case of *Boog v Davidson*, 1668, M. 10380, 'the Lords found that a servant's fee, in so far as was necessary for the servant's aliment, conform to his condition of service, could not be reached by his creditors to whom he had made a *cessio bonorum*, except as to the surplus more than what was necessary, and they found no surplus in this case.' [See 1 Vict. c. 41, sec. 7; 8 and 9 Vict. c. 39; *Shanks v Thomson*, 1838, 16 S. 1353.]

³ In France, 'les parts revenantes aux comédiens François, jusqu'à concurrence d'une portion seulement, sont insaisissables; le surplus de ces parts peut être saisi.' 4 Denisart 418.

SECTION I.—RESTITUTION AGAINST THE DEEDS OF PUPILS AND MINORS.

After a minor has arrived at majority, he may, by insolvency, open to his creditors a right to challenge alienations made in minority. But a case still more likely to arise, is where a minor is succeeded by one whose insolvency gives to his creditors the property and the rights to which he may have succeeded of challenging the reducible acts of his predecessor.

There is a remarkable difference between deeds done in pupillarity and deeds done in minority. A pupil is absolutely incapable of consent; a minor, though peculiarly subject to imposition, has legal capacity to contract, engage, or convey. This is a distinction important to be observed in considering the right of restitution in those several cases.

I.—DEEDS IN PUPILLARITY.

1. Deeds of conveyance, and contracts, executed by pupils themselves, are null and void, on the ground of that absolute incapacity of legal consent which has just been stated. This, of course, holds true whether the pupil has tutors or not. And such deeds, although not challenged till after the *anni utiles* have expired,¹ will be ineffectual.

2. Deeds which are made by the tutors of a pupil for him, stand so far in a different situation, that they are not null; the necessary consent being interposed, and the incapacity of the pupil supplied by the interposition of the tutors. But still the deed is subject to challenge, and the property alienated to restitution, if judicially questioned within four years after the pupil has attained majority.²

3. The favour of the law towards landed proprietors goes even further than this, in regard to deeds of alienation of the pupil's land, or deeds burdening his heritage. These are held to be beyond the tutor's power; or at least the presumption of lesion is so strong, that it is not to be refuted otherwise than by the previous sanction of the Court of Session. This necessity for judicial sanction appears to have been introduced with us after the example of the Roman law, which required the previous decree of the prætor to make valid the sale of a pupil's immoveable estate.³ By the original rule in the Roman law, it was [133] only for payment of debt that the pupil's land could be sold.⁴ But this rule was greatly relaxed, so as to introduce a sort of discretionary power, or judicial tutory, under which the prætor authorized such sales as were for the manifest benefit of the pupil. In adopting the original rule, we at first adopted also the relaxation. But this has been reformed in our more recent practice, and judicial sanction is now refused in all cases where the sale is not necessary: *First*, For the payment of debts for which the pupil is answerable;⁵ and to this extent the judicial authority may be regarded as only an anticipation of what might subsequently be accomplished by diligence at greater disadvantage: or, *secondly*,

¹ *Rankine v Rankine*, 1821, 1 S. 43. [*M'Gibbon v M'Gibbon*, 1852, 14 D. 605.]

² See below, p. 130. [The difference between the laws of England and Scotland on this matter is thus stated in the report of the Law Commissioners of 1855, p. 11: 'In England and Ireland, a minor, or person under the age of twenty-one, is not liable on any contract except for necessaries, as food, lodging, and clothing. In Scotland, males under the age of fourteen, and females under twelve, are not bound by any contract, although their property is liable for necessaries furnished for their benefit; but after those ages, if in trade alone or in partnership, they are bound by contracts made in that trade.]

³ See Dig. lib. 27, tit. 9. *De rebus eorum qui sub tut. l. i. et seq.* and Cod. de Admin. Tut. l. 22. *Sandilands v Laird of Niddry*, 1692, quoted by Stair, i. 6. 18.

⁴ Dig. *ut sup.* lib. 27, tit. 9, l. 1, sec. 2.

⁵ The case of Vere, in which, after the discretionary power of the Court had been exercised, it was, after an interval of fifteen years, recalled, shows the principle while it illustrates the doctrine. On the authority of our institutional writers, the Court authorized a sale by the tutors of Mr. Vere, in circumstances of most decided advantage (as it speculatively appeared) to the pupil and to the estate, though there was not the least call of necessity so to interpose. *Tutors of Vere*, 1787. In 1802 this was challenged by the pupil on his attaining majority, and the Court reduced the whole proceeding, reserving the purchaser's claim for meliorations. *Vere v Dale*, 1804, M. 16389.

See *Ross v Ross*, 9 March 1820, 20 F. C. 126; *Finlaysons v Finlaysons*, 22 Dec. 1810, 16 F. C. 114.

The sale must be obviously necessary for the safety of the pupil,¹ mere expediency never being admitted as a sufficient ground to justify the granting of such warrants to tutors.

4. Tutors may effectually grant deeds of ordinary administration of their pupil's estate. And, 1. The Court will not interfere so as in any degree to lessen the responsibility of tutors in such cases. 2. Although the act which the tutors are called upon to perform be one which, if done by a person in full capacity, would have the effect of altering the succession, this effect will not follow as a consequence of any change on the subject made by the tutors. The administration of tutors for the pupil's benefit is thus relieved from a restraint under which at one time it was supposed to labour.²

5. Acts of extraordinary administration, however, are beyond a tutor's powers; such as engaging a pupil in a mercantile partnership, however advantageous,³ or granting leases of extraordinary duration. Nay, it has been held that no lease by tutors is effectual beyond the duration of their office. And although there seems to be no sound principle for such a rule,⁴ it has been so long adopted and relied on, that the matter is now not to be held open for decision;⁵ and the only corrective which the Court has held competent (though far from being complete), is to interpose their authority in such cases as suggest a necessity for judicial aid.⁶

II.—DEEDS IN MINORITY.

In regard to deeds granted in minority, the minor being by law capable of [134] consent, the rules are these:—

1. A minor who has no curators may effectually enter into obligations, or grant conveyances *inter vivos* even of his heritage, subject to restitution for 'enorm lesion.'⁷

2. If a minor have curators, either his father as administrator-in-law, or curators appointed by testament or on his own choice, his obligations and deeds of conveyance granted without their concurrence, though not null as those of a pupil, are challengeable at any time without the necessity of proving lesion.⁸ The presumption of law is, that they are to the minor's lesion; and so a mere exception is sufficient in pleading. But, *first*, A minor may make a will, disposing of his moveable estate, without consent of his curators, although he cannot thus settle his heritable succession.⁹ *Secondly*, He may effectually marry

¹ The case of debt presents a necessity, accompanied with a power on the part of the creditors to compel the sale, by judicial proceedings and diligence. But there is also a necessity leading more indirectly to the same result, to which the Court has yielded; as in the case of a lease, where the obligations incumbent on the pupil, as heir of the tenant, threaten an accumulation of debt that would be ruinous to him. *Meikle v Meikle*, 1823, 2 S. 274. *Cockburn's Tutors v Cockburn*, 1825, 3 S. 642, N. E. 449.

² See *Ersk. i. 7. 18*, as corrected by *Graham v E. of Hoptoun*, 1798, M. 5599; *Ross v Ross's Trs.*, 1793, M. 5545; *Morton v Young*, 11 Feb. 1813, 17 F. C. 179.

³ See below, of Partnership.

⁴ It may be observed, 1. That the principle of law on which tutors are held to supply the defect of capacity of their pupils, in all that is necessary in the proper and reasonable administration of their affairs, seems fairly to authorize the granting of agricultural leases of ordinary duration; 2. That tutory is different from *negotiorum gestio*, of which the acts are valid only for preservation in a case of temporary necessity by absence; and, 3. That it seems enough to protect pupils, that the tutors cannot lower the rent but by auction, and that there is restitution on lesion. See *Ersk. i. 7. 16*. [By the Pupils'

Protection Act, 12 and 13 Vict. c. 51, sec. 7, provisions are made by applying to the Court of Session, 'where there is a strong expediency,' for granting abatement of rent, renewing or granting a lease for a period of years for draining or otherwise improving the estate.]

⁵ *L. Reay v Anderson*, 1800, M. 16385.

⁶ *Hallows*, 1794, M. 14981. But see *Ross v Ross*, 9 March 1820, 20 F. C. 126. In this last case the Court seem to have thought, that if they should authorize such leases on views of expediency, they would become the administrators of the estates of all pupils. The true remedy would have been to hold this a point of ordinary administration, leaving it on the responsibility of the tutors, and the remedy against lesion.

⁷ *Thomson v Stevenson*, 1666, M. 8982; *Crs. of Clerk v Gordon*, 1699, M. 3668.

⁸ [There are certain exceptions: *e.g.* if a minor be engaged in trade, *v. infra*; or if he make an ante-nuptial contract. *Bruce v Hamilton*, 23 Dec. 1854, 17 D. 265.]

⁹ *Cunningham v Whiteford*, 1797, M. 8966. In *Wauchope v Wauchope*, 1738, Elchies, Minor, No. 6, and notes, p. 291, the change of bonds moveable to bonds secluding executors was held ineffectual, unless with the minor's consent, and this proved by parole. Aff. 1 Cr. and St. 200.

without consent of his curators, though he cannot make a marriage contract different from the disposition of the law itself, without their concurrence.¹ And, *thirdly*, If the consideration money or effects given for the obligation or conveyance shall be proved to have been profitably applied to the minor's use, the presumption of lesion is removed, and the transaction will be held unchallengeable.²

3. Where the curators concur with the minor, the act is legitimate, even if it be a sale of land;³ and accordingly the Court will not interfere in such a case.⁴

III.—RESTITUTION ON LESION AGAINST DEEDS IN MINORITY.

1. Deeds which are *ipso jure* null, as those of pupils, do not require reduction, but may be challenged at any time as void and ineffectual, without even alleging lesion.⁵

2. Deeds of minors having curators, without their concurrence, if not null, are at least, by the absolute presumption of lesion already taken notice of,⁶ exceptionable at any time, even after the *anni utiles*, without the necessity of a formal reduction.⁷

3. Although the deed of a pupil or minor have been made with the full advice of his tutors or curators, still it is subject to reduction, in an action in the Court of Session instituted within four years from attaining majority, either at the instance of the minor, or of his [135] heir, or of his creditors. The summons must be raised and executed against the person who received the conveyance within the four years. It is therefore a fatal objection to the action if the *quadriennium utile* has expired; and it is presumed (*presumptio juris et de jure*) that the minor has not been hurt by the deed.⁸ It is also a good defence against the action, that the minor has ratified or even homologated the act.⁹ But the oath of the minor never to call the deed in question will not ground a good defence.¹⁰

If the reduction have been once properly raised, it may be prosecuted after the *quadriennium utile*; or creditors may bring a reduction, adopting the original reduction properly raised within the term, although in the interval, before their own action has begun, the term should have expired.¹¹ When creditors thus adopt the challenge, it is either in the room of the minor himself, their debtor; or in the room of one entitled to succeed to the

¹ *Anderson v Abercromby's Trs.*, 1824, 2 S. 662, N. E. 557. [But see *Bruce v Hamilton*, *supra*.]

² *Gordon v E. of Galloway*, 1629, M. 8941.

³ *Thomson v Stevenson*, 1666, M. 8982.

⁴ *Wallace v Wallace*, 1817, F. C. A lease, on the same principle, is good not only during the curatory, but during its whole term, subject to restitution on lesion. [*Alexander v Thomson*, 1813, Hume 411; *Munro v Munro*, 1735, Elch. Minor 1; *Gibson v Scoon*, 6 June 1809, F. C.]

⁵ *Bruce*, 1577, M. 8979.

⁶ See above, p. 128.

⁷ *Kincaid*, 1561, M. 8979; *Robertson v Oswald*, 1584, M. 8980, where there was silence for twenty years; *Bell v Sutherland*, 1728, M. 8985. [See *Pr.* 2099; *Thomson v Pagan*, 1781, M. 8985; *M'Gibbon v M'Gibbon*, 5 March 1852, 14 D. 605; *Manuel v Manuel*, 15 Jan. 1853, 15 D. 284; *Rankine v Rankine*, 31 May 1831, 1 S. 43, N. E. 47. The consent of a tutor, curator, or of a father, to a deed *in rem suam* has no effect, and the deed is objectionable without a reduction. *Anderson v Cation*, 28 Nov. 1828, 7 S. 78; 15 Nov. 1832, 11 S. 10. *M'Gibbon*, *supra*. *Manuel*, *supra*.]

⁸ *Ersk.* i. 7. 35. It is not enough to have executed a deed of revocation. *Ramsay v Maxwell*, 1672, M. 9043. [Or to have pleaded minority and lesion as a defence. *Stewart v Snodgrass*, 20 Dec. 1860, 23 D. 187. But see alleged exceptions in *Crawford v Bennet*, 19 June 1827, 2 W. and S. 608; *Hark-*

ness v Graham, 20 June 1833, 11 S. 760, and other cases in *Fraser, Parent and Child*, 426.]

It was held that reduction raised and executed against the original donee within the *quadriennium utile* was effectual, although the possessor of the lands acquiring from him was not called till after the expiration of the term. *Belches v Calderwood*, 1687, M. 9045. This is not, however, to be relied on in practice. [In order that the *quadriennium utile* may be available, a reduction on the ground of minority and lesion must be brought within the four years. It is not enough that the plea shall have been stated within the four years in defence to an action on a document granted during minority. *Stewart v Snodgrass*, 1860, 23 D. 187.]

⁹ *Melvil v Arnot*, 1782, M. 8998. [See *Kyle v Allan*, 23 Nov. 1832, 11 S. 87; *Dempster v Potts*, 31 Dec. 1837, 15 S. 364, 12 F. C. App. 25; *Forrest v Campbell*, 4 Nov. 1853, 16 D. 16; *Rose v Rose*, 20 Nov. 1821, 1 S. 154, N. E. 148. But a ratification after majority will receive no effect if the transaction ratified bears evidence *in gremio* of fraud—*Leiper v Cochran*, 9 July 1822, 1 S. 552, N. E. 506; or if it has already been challenged even by way of exception by the minor's creditors—*Harkness v Graham*, 20 June 1833, 11 S. 760.]

¹⁰ *Ersk.* i. 7. 39.

¹¹ *Stair* i. 6. 44. *Hamilton v Sharp*, 1630, M. 8981. [*Harkness v Graham*, 20 June 1833, 11 S. 760.]

minor. In the former case, they of course must take the privilege as it stands in the minor, and bring the challenge within the term. In the latter case, these distinctions are observable: 1. That if the ancestor died in minority, they have four years from the time of his death during which to bring their action. 2. That if part of the *quadriennium utile* had expired at the predecessor's death, they can have only what remains, counting from that point of time. 3. That if the case should happen, that a minor having creditors should succeed to the minor whose deed is to be challenged, the creditors would seem to have the full extent of their debtor's minority, as well as what remains of the quadriennium unexpired, according to the common rule of minor succeeding minor.¹

The two points of the pursuer's case in the action are: 1. Minority; 2. Lesion.

1. MINORITY is fact, and may partake of all the difficulty of proving a point of chronology. It will be a good answer to this point of the pursuer's case, 1. That the minor was in trade, the transaction being mercantile; or in the exercise of an employment by which he gained his livelihood, the act being in the common course of that employment.² 2. That he represented himself as major, and thereby deceived the party, ignorant of his true age, to contract with him.³

2. LESION.—This point of the case is made out, 1. By presumption: for example, in deeds without onerous consideration on the minor's part, as cautionary engagements; or in loans of money contracted by the minor, where misapplication is presumed, and the [136] money must be proved to have been profitably applied.⁴ Or, 2. By proof: As to which, lesion less flagrant, and more slender evidence of it, will be received where a minor has no curators, or where the transaction relates to land, or where ready money is put into the power of a youth under age. But there will be much greater difficulty in the reduction where tutors or curators have authorized the transaction, or where previous judicial sanction has been given.⁵

It is necessary to the reduction that the lesion shall have proceeded directly from the transaction. Where a house has been advantageously purchased, and afterwards by accident has been burnt, the lesion is not thus direct. But it may be sufficient if greater hazard has been thrown on the minor, or greater temptation to imprudence and loss occasioned by the fault of the party; an illustration of which is found in the case of voluntary as contrasted with necessary payments.⁶

The condition on which restitution is granted is, that the restitution shall be reciprocal,—the price with interest repaid, meliorations indemnified,⁷ etc. But if the transaction has been voluntary, and the interest of the minor has suffered by the extravagance or waste

¹ *M'Math v Baron of Broughton*, 1628, M. 9040.

² This is partly grounded on the consideration of the interest of minors themselves in this situation, as giving them admission to the exercise of such lucrative occupations. See *Galbraith v Lesly*, 1676, M. 9027; *Heddel v Duncan*, 5 June 1810, 15 F. C. 681. See also *Craig v Grant*, 1732, M. 9035.

But see *Dick v Cumming and Smith*, 1824, 3 S. 231, N. E. 162, where a bill in a company name was suspended on the ground of minority, and the unauthorized act of the minor's father including his name in the firm. [See *Macdonald*, 1789, M. 9038; *Crawford v Bennet*, 19 June 1827, 2 W. and S. 608; *M'Michael v Barbour*, 17 Dec. 1840, 3 D. 279.]

³ *Ersk. i. 7. 36. Kennedy v Weir*, 1665, M. 11658. The bond in this case bore majority, which was held a good objection, unless the minor could prove the creditor's knowledge of his minority, or that he was fraudulently induced to assert majority in the bond. In a case where a minor became cautioner, he was held not barred from pleading minority, by having received the degree of Doctor of Medicine on falsely

(under a mistake) swearing to his majority, a year before the contract. *Sutherland v Morson*, 1825, 3 S. 449, N. E. 313. [A similar bar to restitution was held to exist where a minor had falsely represented his brother as his curator, in the indenture sought to be reduced. *Harvie v M'Intyre*, 7 March 1829, 7 S. 561. Where the appearance of a minor *proximus majorennitati* is not such as to put persons dealing with him on their guard, his inducing them by his *silence* to trust him excludes the claim to restitution. *Macdougall v Marshall*, 1705, M. 8995, 421; *Wilkie v Dunlop*, 28 Feb. 1834, 12 S. 506. See *Dennistoun v Mudie*, 31 Jan. 1850, 12 D. 613.]

⁴ See *V. of Arbuthnot v Morrison*, 1716, M. 9487, 1 Cr. and St. 7.

⁵ This previous sanction does not preclude a challenge on lesion, but the proof of lesion must be very decisive. *Vere v Dale*, 1804, M. 16389.

⁶ *Ersk. i. 7. 36, 41* [sec. 38, and *Ersk. Pr. i. 7. 20*].

⁷ This rule applied where the transaction with the minor was necessary. *E. of Aberdeen v Gordon*, 1708, M. 9031.

proceeding as the direct consequence of the dealing,—as in voluntary loans of money, or even voluntary purchases of the property of a minor without curators,—in such cases the reciprocal restitution will not be extended beyond the fund profitably employed for the minor.¹

The extent of restitution is only so far as the minor's estate is lesed, or injury sustained. This will not, however, where *restitutio in integrum* can be given, entitle a purchaser to keep the subject, offering the balance of the value of the land or other property, but only to demand mutual restitution or indemnification.

SECTION II.—RESTITUTION AGAINST DEEDS BY PERSONS INSANE OR FATUOUS.

The interest of creditors may be deeply concerned in questions of insanity; not only by the circumstance of their debtor's succeeding to a person in that unhappy state, but by the supervening insanity of their debtor himself, or by the circumstance of the debtor's property consisting partly of estates purchased from an insane person. The legal effect of insanity attaching to any deed or contract is to give restitution *in integrum* to the person injured, whether the insane person himself, or his heir, or his creditors; and this without any other limitation of time for the challenge than the years of the long prescription.

For the purpose of establishing a similar guardianship over persons incapable by disease, with that which is provided for persons under lawful age, the incapacity is to be ascertained by the verdict of a jury under a brieve of IDIOTRY or of FURIOSITY.

This is a very old proceeding in the law of Scotland; and at first the question for the jury was confined to the present state of the person. In 1475 (by c. 67 of that year) the jury were directed further to ascertain the time to which the malady had retrospect, 'How lang tyme he was of thay conditions;—'and fra it be knawin be the inquest that the persone be fule or furious, and the time thereof, the alienation maid by him after the time that the inquest finds that he was either fule or furious, sall be of na vail, bot retrexit and [137] brought again to him, as weil as the alienation made after the pursuing of the brieve.' The effect, however, of such a verdict is not conclusive either way. The object of the inquisition, properly speaking, is to authorize the guardianship of the law; and to give to the guardian, as the rule and also as the aid of his interference, the presumption arising from this inquiry.

The effect of the verdict may be questioned in various circumstances:—1. A deed granted *before* the time so fixed is not by the verdict excluded from reduction, if competent evidence should be brought to establish insanity as in relation to that deed.² 2. A deed may be effectual, although made *after* the period fixed in the verdict as the commencement of the insanity. The trial on the brieve is *ex parte*, and that evidence which the holder of the deed may possess of a lucid interval during which the deed was made may still be produced.³ 3. A deed may be challenged on the ground of insanity, although the brieve of furiosity or idiocy has not been followed by a verdict of insanity. There may be insanity sufficient to reduce a particular transaction, though not enough for making out a case of status.

In the action of reduction the rules of law are: 1. That a person of mature age is

¹ Thomson v Stevenson, 1666, M. 8983.

² Hay v Kiell, July 1810, n. r. Here a verdict found that the person was *incompos mentis*, or of insane mind, in the end of 1804; that he was of insane mind on 7th January 1807; and that he has been in that state of insanity ever since the last-mentioned period, and continues so at present. This person, after public advertisement, sold an estate in 1805 to a stranger for a full price. The cognition and verdict was in 1807, and then a reduction was raised. The question was of the state of mind during the period excluded from the verdict. The Court, according to the mode then in

practice, allowed a proof, and two questions were raised: 1. Whether the verdict was not equal to a verdict of sanity during the interval omitted? It was held otherwise. 2. Whether there was insanity at the time of bargain? which made a very curious case of evidence.

³ In several early cases, it was found that a deed within the term in the verdict is not null by exception, but only reducible by action; and this in order to give room for the requisite inquiry relative to the particular deed, as perhaps made in lucid interval. Crawford, 1583, M. 6276. See also Loch v Dick, 1638, M. 6278.

presumed to be in full capacity; and, 2. That a verdict of idiocy or of furiosity inverts this presumption; and from its date, or from the point of time specified in the verdict, raises the opposite presumption of incapacity.¹ The action of restitution, then, on the ground of insanity, commencing with a presumption in the one way or the other, resolves into a proof on the one hand of idiocy or furiosity at the time of making the deed, or on the other of lucid interval at the time the transaction was entered into. It is an inquiry which now, by the Judicature Act,² must proceed in the Jury Court. And in the issue of capacity or incapacity, the *onus probandi* will be laid on the reducer or on the maintainer of the deed, as there is a previous verdict of furiosity or idiocy, or as the inquiry into the state of mind first begins in the action of reduction.³

1. The proof of insanity is chiefly matter of fact for a jury, and commonly disposed of under the brieve of idiocy or furiosity. The point is, whether the person is of mind and capacity fit to understand and transact the business in question? Each case must depend upon its own circumstances: in some, the most common observer may distinguish the incapacity; in others, there is so much method in the madness, that to perceive the doubtful and uncertain point at which reason disappears, and lurking incapacity manifests itself, often requires the most skilful development and experienced observation.⁴ The degrees of capacity required by law for different acts are various, and may so far be generally discriminated, that less capacity is required to make a will or settlement than to transact [138] a bargain. Little more is required for the former, than that one should be able to understand the effect of so far yielding to his affection or aversion as to alter the disposition of the law of succession; while in bargains, though greater capacity is required to chaffer and avoid deception, there is a natural and just limitation, that where the transaction is in the course of the person's trade, courts of law must be more averse to give relief.⁵

Physicians have distinguished, both by their symptoms and effects, many classes of this unhappy malady; but in law these are all reduced to two—IDIOCY and FURIOSITY.

The idiot is described in our brieve as '*Incompos mentis, fatuus, et naturaliter idiota*;' and this consisting chiefly in absolute imbecility of mind, seems to be incapacity of a more incurable kind, more permanent, more exclusive of those intervals of intelligence by which the violence of the lunatic is occasionally relieved.⁶

Furiosity comprehends all those more violent species of the disease which are designated in common speech as madness, lunacy, or mania. We have not in the language of the law of Scotland the word Lunacy, by which the law of England so unphilosophically distinguishes the state of insanity.⁷ The term with us is more correct—Furiosity; the person being described in the brieve as '*Incompos mentis, prodigus, et furiosus, qui nec tempus, nec modum impensarum habet, sed bona dilacerando profundit*.' In this class of the maladies which affect human capacity there is greater violence, but there is also occasional relief by lucid interval; during which legal capacity returns, and deeds of conveyance and engagement may effectually be made.

¹ This is law in England also. See Collinson on Idiocy and Lunacy, i. 396. [2 Evans' Pothier, 332; answer of the judges to the House of Lords, 8 Sc. N. R. 895, 1 Car. and K. 131. See *Lindsay's Trs. v Watson*, 14 June 1843, 5 D. 1194.]

² 6 Geo. IV. c. 120, sec. 28. [It is not necessarily, though still usually, before a jury. 13. and 14 Vict. c. 36, sec. 49; 29 and 30 Vict. c. 90, sec. 4.]

³ [As to onus where the deed to be reduced is holograph, and hence does not prove its date, see *Waddell v Waddell's Trs.*, 16 May 1845, 7 D. 605; cf. 12 July 1845, *ib.* 1017.]

⁴ See observations of Lord Stowell, *Turner v Meyers*, 1808, 1 Hagg. Cons. 417.

⁵ [*Gibson v Watson*, 18 Nov. 1825, 4 S. 202, aff. 2 W. and

S. 648; *Fraser v Fraser's Trs.*, 7 Nov. 1834, 13 S. 703; *Morrison v Maclean's Trs.*, 27 Feb. 1862, 24 D. 625.]

⁶ In the class of idiocy are ranked those who are deaf, dumb, and blind. [See 1585, c. 18; *Stair* i. 6. 25, i. 10. 13; *Ersk.* iii. 1. 16. But now it would seem to be necessary to prove the incapacity of deaf and dumb persons in the ordinary way. *Montgomerie Bell's Lect. on Conveyancing*, i. 129; *Craigie v Gordon*, 17 June 1837, 15 S. 1157; *Kirkpatrick*, 8 June 1853, 15 D. 734. Blind persons can contract and execute deeds. See *E. of Fife v Duff*, 30 Nov. 1819, F. C., revd. 1 S. App. 498; *Reid v Baxter*, 19 Dec. 1837, 16 S. 273.]

⁷ See 1 Blackst. 304. *Ex parte Barnsby*, 3 Atk. 174.

In the trial of both sorts of insanity, it is an essential point that the jury should themselves see and examine the person, if still alive.¹

2. Against the presumption induced by a verdict of insanity, or in the proper discrimination which belongs to the original inquiry, the most difficult question relates to LUCID INTERVAL. It has been well said, that it is scarcely possible to be too strongly impressed with the great degree of caution necessary in examining the proof of lucid interval. But the law does recognise as valid acts done during such an interval,² and this rule of law must not be defeated by overstrained demands of the proof of the fact. It may be observed in general, that the lucid interval may be either in relation to time or to subject. 1. If in point of time there is proof of remission or of intermission, either periodical or at a particular date, including the interval during which the deed was made, it is enough to sustain the deed. There is no rule in law fixing any precise duration for a lucid interval—a week, a day, an hour: the point truly for inquiry is, Whether there was time sufficient for the rational doing of the act in question? 2. If the description of the malady be such that the person is insane on particular topics only, and the act done, with all its associations, form no insane topic, this will be enough. 3. In either inquiry, the act itself, and the manner of performing it, are of the first importance. If it be a rational act, rationally done,³ without the guidance and control of another; if there be no delusion, no insane irritation, or hallucination inducing it; if from the deed or the manner no indication of frenzy or of folly can be gathered, it will be sustained. 4. It is very important that facts, not opinions, shall be relied on in matters of this sort. The opinions of calm and skilful observers may be useful to guide the jury; but even from such persons no opinion is of weight independently of the fact on which it rests. And to the evidence of keepers, and of nurses, and of the vulgar, who, with [139] a carelessness or a prejudice which overlooks all the necessary discriminations, and misinterprets every action of a person pronounced to be insane, this observation requires to be very vigilantly applied.⁴ 5. Some difference of opinion has arisen as to the strength of proof necessary in a case of lucid interval, considered relatively to the proof of the insanity to which it forms an exception. Two great masters in jurisprudence have expressed opposite opinions on this question. Lord Thurlow seems in both cases to have deemed it necessary to have a proof as demonstrative of the lucid interval as of the insanity, and of a restored strength of mind not inferior to the original state of intellect of the person in question. But Lord Eldon has well limited the doctrine, since neither the same demonstration can be expected in acts of rational calmness, as in the striking symptoms of insanity, nor does the law require, in order to validate many acts, the same perfect tone of intellect as while untouched by disease, but is satisfied with a much less degree of capacity.⁵

SECTION III.—RESTITUTION AGAINST THE DEEDS OF PERSONS INTERDICTED.

Inequality alone, or lesion, affords no ground of challenge of the deeds of a person of full age whose capacity is unimpeached. There must be combined with it evidence of fraud

¹ [Important changes in regard to procedure are introduced by 31 and 32 Vict. c. 100, sec. 101, and A. of S. 3 Dec. 1868. The *briefe* is now to be in English, and directed to the Lord President of the Court of Session. The question put is whether the party is 'insane;' and he is to be deemed insane 'if he be furious, or fatuous, or labouring under such unsoundness of mind as to render him incapable of managing his affairs.' The inquiry is to be before a judge of the Supreme Court and a special jury, parties having the remedy of bills of exceptions and motions for new trials as in ordinary actions, and the Court having power to award expenses. See *Irving v Swan*, 7 Nov. 1868, 7 Macph. 86.]

² 'Furiosi autem si per id tempus fecerint testamentum quo furor eorum intermissus est, jure testati esse videntur.' Inst. ii. 12. 2.

³ Not merely 'actus sapienti conveniens, sed actus sapientis.'

⁴ Among the cases reported on this question, perhaps the most interesting and instructive is that of *Cartwright*, 1793, 1 Phillimore 90. See also *White v Driver*, 1809, *ib.* p. 84; *Towart v Sellars*, 1817, 5 Dow 231, 6 Pat. 301.

⁵ *Attorney-Gen. v Parnter*, 3 Brown's Chan. Ca. 443. *Ex parte Holyland*, 11 Ves. 11.

and circumvention. But there may be in one of perfect age a degree of weakness, facility, or prodigality, which, although not such as to justify a verdict of insanity, and place him under guardianship as insane, may yet demand some protection for him against unequal or gratuitous alienations: and this is attained by a proceeding which gives warning to all who may enter into contracts with him that he is under trust, and not free to exercise the power of alienation, directly or indirectly, without consent of his interdictors. It is this warning or notice which gives effect to the interdiction.

This remedy, called INTERDICTION, seems originally to have reached all the transactions of the person interdicted: it extends now only to the alienation of his heritable property, and to his other transactions only in so far as they are made the ground of proceedings against his heritage.¹

The effects of this protection, and the right of challenge arising from it, may materially interest creditors—either those to whom the interdicted person stands indebted, or those whose debtor has succeeded to the property of him who stands interdicted. The challenge is competent to creditors adjudging the estate which has been conveyed, or against which diligence is attempted on bonds liable to challenge on interdiction.²

JUDICIAL INTERDICTION.—Interdiction properly is a judicial proceeding grounded on an inquiry into the state of mind of the person whose property is to be protected, and denouncing, at the suit of those interested in him, the necessity and the fact of his being placed under the care of certain persons, without whose consent his deeds will be subject to challenge on a proof of lesion alone.³ The summons and decree of interdiction include, 1. A declarator of the facility of the person in question; 2. An interdiction or prohibition against selling his lands, wadsetting, etc., or contracting debt whereby his lands may be [140] affected; and, 3. A declarator, by anticipation, of the nullity of all acts and deeds contrary to the interdiction.

For attaining the great object of notice, it is requisite, 1. That the person to be interdicted shall be cited; 2. That the interdiction shall be published at the market-cross of the head burgh of the person's residence; and, 3. That it shall be duly registered in the General or Particular Register of Inhibitions⁴ within forty days, and till registration it has no effect whatever (1581, c. 119). If registered in the general register, the interdiction will reach all the interdicted person's lands in Scotland. If not so registered, and omitted also in the particular register of the county in which the lands lie, the interdiction will not affect those lands. Registration in the record of inhibitions is effectual for all heritable property, whether in shire or burgh, within the district.

The effect of interdiction is in two respects different from that of minority:—1. It inverts so far the common rule of law, as to make lesion by itself a competent ground of reduction of the deeds of the person interdicted, when granted without the consent of the interdictors; but such deeds are not null: they are only reducible on proof of lesion.⁵ 2. If the deed be granted with consent of the interdictors, no challenge will be competent, unless the deed be to the benefit of the interdictors themselves. Lesion alone, which in deeds of minors, even with consent of curators, is a good ground of reduction, is not sufficient where interdictors consent.⁶

There are two points in the reduction on interdiction: 1. That the interdiction has

¹ Stair i. 6. 41; Ersk. i. 7. 57.

² *L. Salton v Park*, 1666, M. 10420.

³ Sometimes, in the course of an action, interdiction proceeds *ex parte judicis* in the Court of Session.

⁴ See Ersk. i. 7. 56; Ersk. ii. 11. 4, 5. [There is now but one General Register of Inhibitions and Interdictions. 31 and 32 Vict. c. 64, sec. 16.]

⁵ The distinction between deeds of minors and of interdicted persons in this respect was first established in a case

reported by Gosford—*Anonymous*, 1672, 1 B. S. 655; afterwards it was confirmed in *Stewart v Hay*, 1676, M. 7132. See Elch. Annot. on Stair, p. 34.

⁶ [From a case noted in Baron Hume's Sess. Pa., referred to by Mr. Fraser, Par. and Ch. 565, it appears to have been held in 1807, that the consent of interdictors was not an absolute protection against gross lesion. But there was much division of opinion.]

been regularly obtained and duly published; 2. That there is lesion by the deed.¹ It has been laid down by Erskine, but on no sufficient authority, that an interdicted person can make no effectual settlement of his lands, however rational, without consent of his interdictors, nor even with it.² The case to which he refers as reported does not sustain his doctrine, being a settlement in favour of the interdictor himself.³ No other lawyer has delivered the same law, and the doctrine goes much beyond the legal effect of such imbecility as will authorize interdiction, especially if it can be held as meant to be applied to voluntary as well as judicial interdiction. If the proper effect of interdiction be to indicate such imbecility only as exposes the person to imposition and lesion, the consequence, in relation to a deed of succession, should be no other than to facilitate a reduction where the settlement is irrational, or where it has been induced by circumvention and undue influence.⁴

VOLUNTARY INTERDICTION.—But although interdiction is a judicial proceeding, and to its efficacy formerly it was necessary that inquiry should be made into the state of mind, and that, by declarator, an imbecility should be judicially declared analogous to that of minority;⁵ yet, considering this as a remedy which proceeds no further than to protect against lesion and gross inequality, it has not been rigidly required that there shall be a previous decree of declarator. The increasing delicacy of modern manners has gradually led to the introduction of voluntary interdiction as almost superseding the judicial, since the distinction [141] was fairly established between minority and interdiction. But the combination of voluntary interdiction with deeds of entail, and the use of it as a separate protection, were not unknown in practice towards the beginning of the seventeenth century.⁶ The great point is the notice of interdiction—the warning against relying on the acts of a man who has placed himself under trust. In voluntary no less than in judicial interdiction, registration is necessary.

SECTION IV.—RESTITUTION ON THE GROUND OF FACILITY, CIRCUMVENTION, AND LESION.

The deeds of persons of full age, not cognosced, nor interdicted, may yet be reduced on showing evidence of weakness of mind, combined with fraud (or circumvention, as it is called in this instance) and lesion. Fraud alone may indeed ground reduction where it is such as to give occasion to the contract. But facility alone, where the person has understanding enough to save himself from a sentence of idiocy,⁷ is not a sufficient ground of challenge; and still less is lesion by itself, or gross inequality. But where lesion and facility concur, or where facility and circumvention appear, or even where there is lesion so gross as to indicate the other two qualities, a deed of conveyance or contract will be reducible.

Such cases must, of course, depend on their own circumstances, and scarcely can be brought under any general rule of law.

¹ [Where a deed is rational and onerous, it is not reducible on the head of interdiction, even although it be in favour of an interdictor, at least if it be consented to by the other interdictors. *Kyle v Kyle*, 14 Dec. 1826, 5 S. 128, N. E. 117; *Fraser v Fraser*, 6 Feb. 1827, 5 S. 801, N. E. 279.]

² *Ersk. i. 7. 58.* In the Principles, he states the inability as applicable to the case of a settlement *without consent of interdictors*. *Ersk. Pr. i. 7. 34.*

³ *Tenant v Spruel*, 1725, M. 7127, 7165. [It seems to be

the law that interdiction does not apply to *mortis causa* deeds. *Mansfield v Stuart*, 26 June 1841, 3 D. 1103.]

⁴ See above, of Insanity, p. 133.

⁵ *Auchenbowie v his Interdictors*, 1607, M. 7157; *Anonymous*, 1618, M. 7158. Is this the case relied on by Erskine, i. 7. 53?

⁶ See *Seton v Acheson's Crs.*, 1622, M. 7162; *Row v Monro*, 1703, M. 7154.

⁷ *Ersk. iv. 1. 27.*

CHAPTER IX.

OF RIGHTS OF SUCCESSION IN MOVEABLES.

As, in relation to the heritable estate, creditors are entitled to adopt and make effectual their debtor's rights of succession, so in moveable succession, testate or intestate, the right of the debtor may be made available for the payment of the debt. But there is not much to be delivered on this subject that may not find a better place in a subsequent part of this work. Thus the necessary points in the law of succession and confirmation of moveables will be fully explained in commenting on the diligence for attaching moveable succession after death.¹ So the interest of creditors in the effect of marriage contracts and bonds of provision, as augmenting or diminishing the funds for their payment, will be taken into view in a full commentary afterwards to be given on marriage contracts and bonds of provision, in treating of the claims of wives and children.

But one or two observations may be worthy of attention here, in relation to the vesting of rights in moveable succession.

1. VESTING OF EXECUTRY WITHOUT CONFIRMATION.—Formerly it was of no avail to creditors that there should have opened to their debtor a lucrative succession in moveables, unless the right was vested by confirmation during their debtor's life. His death without confirmation carried the whole executry, of which he had not actually attained possession, away from his representatives and creditors, to the next of kin of the deceased. By [142] the recent Act² this is altered, and the succession is made to vest *ipso jure* without confirmation. The language of the statute is not, perhaps, very happily conceived for bringing out the principle which it was intended to sanction. But it will no doubt receive the most liberal construction, in order to give efficacy to this most just and expedient rule.

2. SPECIAL ASSIGNATIONS AND LEGACIES.—Debts or effects specially assigned or bequeathed effectually vest without confirmation,³ and may be attached by creditors as a fund for their payment; and so legacies vest *ipso jure* by mere survivance of the legatee.⁴

3. LEGITIM is the part which belongs to the children of the *communio bonorum* of their parents. On their father's death they have immediate right to it without confirmation, and this right their creditors may attach.

4. JUS RELICTÆ.—On the same principle, the widow's share of the goods in communion requires no form to vest it. She is *ipso jure* entitled to demand it, and her representatives or creditors, or those of a succeeding husband, are entitled to the benefit of the fund.

CONCLUSION OF PARTS I. AND II.

RATIFICATION OF EXCEPTIONABLE DEEDS—HOMOLOGATION—APPROBATE AND REPROBATE.

MANY of those rights which have already been the subject of consideration in this part of the work, may be renounced or departed from, either by express agreement and renuncia-

¹ See below, Book III.

² By 4 Geo. IV. c. 98, it is enacted, that from and after 19th July 1823, 'in all cases of intestate succession, where any person or persons, who at the period of the death of the intestate, being next of kin, shall die before confirmation be expedite, the right of such next of kin shall transmit to his or

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her representative, so that confirmation may and shall be granted to such representatives, in the same manner as confirmations might have been granted to such next of kin immediately upon the death of such intestate.'

³ 1690, c. 26.

⁴ Ersk. iii. 9. 30.

tion, or by implied assent and sanction. Under the former may be comprehended those deeds of ratification by which, in the case of a married woman, a minor, or an heir, an exceptionable conveyance or settlement may acquire the full effect of the most legitimate. Under implied consent may be included the two important doctrines of homologation, and approbate and reprobate. The principle which regulates the effect of such approbation is the same, whether it be express or implied, if the approbation be once clearly ascertained.

SECTION I.—EXPRESS RATIFICATION OF EXCEPTIONABLE CONTRACTS OR SETTLEMENTS.

Contracts, or deeds of conveyance or of settlement, may be saved from fatal objections by the express approval of those who would otherwise be entitled to challenge them; and this may operate as a bar not merely against the approver, but against his heirs and others coming into his place.

1. **RATIFICATION BY MARRIED WOMAN.**—Deeds by a wife, conveying to a stranger any heritable property to which she has right, either her own, or the subject of her liferent or other provisions, may be challenged by her, on the ground of having been granted through the just fear of her husband, or compelled by his violence.¹ But against a challenge on that [143] ground, a ratification made by the wife judicially, ‘outwith the presence of the husband,’ affords a complete defence, even if proof of force and fear be offered in impeachment of the deed.²

It has been said that the ratification, if truly, though secretly, made under the same compulsion with the deed itself, ought to be reducible, as the deed unratified would have been.³ This doctrine, however, is against a determination which, so early as 1481, was made on this question, and which is entered in the Rolls of Parliament, c. 84, as fixing the law at that time. And although there is a decision in the beginning of the seventeenth century to the contrary,⁴ the question has subsequently been determined conformably to the rule in the statute-book.⁵ There seems to be no doubt that this would now be held the rule of law, unless the party taking benefit by the deed should be proved to have been participant in the violence, or at least to have had notice of the compulsion under which the deed was granted and the ratification made.

2. **RATIFICATIONS BY MINORS**, made after majority, have the effect of discharging all claim of restitution on lesion.⁶ But where the ratification is made in minority, either at the time of the original contract or subsequently, it has no effect as a defence against the minor’s reduction.⁷ Even where made in majority, immediately after attaining the legal age, and without due opportunity of learning the state of his affairs, the Court will give great effect, in a reduction of the ratification, to any circumstances of deception under which it may have been executed; and in particular, to proof of a continuation of the influence or deception which may have operated during minority.⁸

3. **RATIFICATION BY AN HEIR** will be effectual to bar him from challenging the settle-

¹ See *Johnston v Napier*, 1708, M. 16511, for illustration of this ground of challenge.

² Ersk. i. 6. 32, 36. Without such ratification the deed is good, if not liable to a challenge *ex vi aut metu*. *Hay v Cuming*, 1706, M. 16506.

³ Ersk. i. 6. 34.

⁴ *Anonymous*, 1612, M. 16481.

⁵ *Grant*, 1642, M. 16483.

⁶ See above, p. 129. Ersk. i. 7. 39.

⁷ It was formerly held, that if such ratification was made by an oath, though in minority, ‘never to call the deed in question,’ it was effectual. But a statute was made in 1681, 19, for the purpose of preventing such oaths; declaring them

to be null and void, punishing the obtainers of them, and making a challenge competent to the relations of the minors. See also Ersk. i. 7. 39.

⁸ *Murray v Murray*, 1826, 4 S. 374, N. E. 377, 1 Fac. Coll. New Series 222.

Lochiel’s Trs. v Cameron, 1795, where a minor, having been secretly supplied with money on an engagement to sell two farms, and immediately on reaching majority, while ignorant of the state of his affairs, made a conveyance accordingly, without any advice or the aid of a man of business, the transaction was reduced on circumvention and lesion. Cited 1 Fac. Coll. p. 230.

ment of his ancestor, as made on deathbed; or as not duly authenticated; or as *contra fidem tabularum nuptialium*, etc.; provided the heir be of age, and in such circumstances that the ratification cannot be ascribed to his peculiar situation.¹ Such ratification is ineffectual, for example, where an heir is required by his dying ancestor to ratify a deed made on deathbed, and he complies, out of regard to the peace of the dying man.² But some care must be taken in discriminating the cases fit for the application of this principle. The expression of Mr. Erskine is not happy; and if extended to other cases than this of deathbed (to which alone the precedent quoted applies), it might sanction a very erroneous principle.³

It may be observed with regard to all these several cases, 1. That the ratifica- [144] tion is ineffectual wherever it is liable to the same exception with the deed ratified; as a wife's ratification in the presence of her husband; or a minor's, while yet in minority. And, 2. That it can operate as a renunciation only of those rights which are vested in the person ratifying, and which that person is in circumstances to alienate. So the ratification of an heir-presumptive, though binding on him and his heirs, will not affect the heir-apparent, should the ratifier not survive to succeed to the right; neither will a ratification, which is merely personal, be effectual in competition to divest creditors of a real right which requires a conveyance. See below, p. 141.

SECTION II.—IMPLIED ASSENT, OR CONFIRMATION, OF PREVIOUS DEEDS OR CONTRACTS.

By implied assent, as well as by express ratification, a right or ground of challenge may be effectually renounced; and the doctrines which are comprehended under this head present little difficulty, except that of applying the rules of evidence by which it is to be determined, whether the person entitled to the right or challenge in question can fairly be held to have abandoned or renounced it, to the effect of establishing the deed against which it might have been pleaded? On this principle of implied assent, the two doctrines of Homologation and Approbate and Reprobate depend.

I.—OF HOMOLOGATION.

Homologation is a word used with us in a sense somewhat different from that in which it is understood in other systems of jurisprudence. In the Continental law, homologation is an express act of judicial sanction or approbation, confirming and enforcing a private contract or transaction which would otherwise be exposed to objection.⁴ In this sense there are few examples of judicial homologation in Scottish law. Perhaps as such may be reckoned, 1. The act by which the Court of Session confirms a contract of composition among creditors in a sequestration, which without this sanction would not bind any but those who consented to it;⁵ 2. The judicial sanction of a trustee elected in sequestration, who in the same way might be objected to by the minority who voted against him; 3. The decree confirming the sale of a pupil's land, on the ground of necessity; 4. The decree which, on occasion of a judicial reference, is pronounced in terms of the award of the

¹ See *Murray v Murray*, *supra*. [A ratification or compromise after the ancestor's death must be complete and express. *Richardson v Richardson*, 8 March 1848, 10 D. 872. Acceptance of the office of trustee and of a small legacy was held to bar a claim of legitim. *Carmichael v Carmichael's Trs.*, 2 S. 198, N. E. 175. Comp. *Dunlop v Greenlees' Trs.*, 2 Nov. 1863, 2 Macph. 1; aff. 2 Jan. 1865, 3 Macph. H. L. 46, L. R. H. L. Sc. 109.]

² *Dallas v Paul*, 1704, M. 5677. See also *Ersk. iii. 8. 99*.

³ Mr. Erskine places it on the ground, that the ratification has proceeded merely 'from the fear of incurring the ancestor's displeasure;' and 'few heirs,' he adds, 'for fear of being

disinherited, would dare to refuse to sign such renunciations.' *Ersk. iii. 8. 99*. But it would rather seem, that if the ancestor *could* effectually disinherit, and is prevented from doing so only by the heir's consent, it would be an act which the heir would not afterwards be entitled to retract. This fear of disinheriting is not the species of fear which the law regards as sufficient to annul consent.

⁴ It proceeds upon an application to the proper judge, who, on due inquiry made, and the assent of all concerned, or the rejection of frivolous objections, ratifies and confirms the act.

⁵ See below, Book vi.

referee; 5. The judicial ratification by a married woman is also an example of this sort of homologation.

But homologation, as commonly used in the language of the law of Scotland, corresponds more with the doctrine of Implied Confirmation in other systems of law. It is that assent or approbation of a deed, conveyance, settlement, or contract, which is inferred from circumstances; supplying, in the case of the obliger or granter, the want of legal evidence of consent, and establishing as a recognised engagement a contract defectively entered into; [145] or giving sanction and effect to a conveyance or settlement against which exception might be taken.¹

Homologation is a generic term, comprehending all confirmations by implied assent; and so includes Approbate and Reprobate, which, however, as a separate doctrine, admits of some modification, to be afterwards explained.

Homologation may be either by the subsequent approbation of the granter or maker of the obligation, deed, or settlement; or by the acquiescence of one who, having an interest adverse to it, confirms what has been done. Homologation of the former kind bars *locus pœnitentiæ*; homologation of the latter bars all exception otherwise competent.²

When the original party homologates, he either ratifies a deed or obligation already executed, but imperfectly, or he adopts and gives effect to what would otherwise be null. When there is already an obligation existing, though imperfect or subject to exception, homologation may have the effect of confirming it as good from the first. Where the deed or obligation is null, homologation acts only as the adoption of what is reduced to an intelligible and precise shape, but is in no degree binding; and the binding effect has in this case no retrospect.³

When the homologation is by one not an original party to the deed, it is only where the deed is objectionable, but not absolutely null, that this implied assent is available. Homologation is here merely a bar to the exception.

In order to give the same effect to the approbatory act as to the full original consent, it is necessary, 1. That the assent be clear and indisputable, applying directly and unequivocally to the contract, conveyance, or settlement said to be homologated. 2. Such contract, conveyance, or settlement must be fully known to the person homologating, together with the state of matters as affected by that deed.⁴ And, 3. It must be an act that can be fairly ascribed to no other purpose than that of giving sanction to the deed or contract in question. The class of cases in which questions have most frequently arisen on these points, are those in which a person having an adverse interest has subscribed the deed as witness. The proper and only legitimate purpose of this act is to attest the authenticity of the subscription of the granter of the deed; and therefore it infers not, in the common case, homologation of the deed.⁵ But where, in addition to this, either the connection of parties and nature of the transaction is such as to afford real evidence of knowledge of the deed, or where there is evidence of its having been read to the person so subscribing,

¹ It has thus had the same effect with perfect consent or concurrence at the first formation of the contract, or granting of the conveyance, or making of the settlement.

² Erskine seems in his large Institute almost to narrow the doctrine to the former of these cases. Ersk. iii. 3. 47. But this inaccuracy of language is only in his posthumous work. In the Principles it is stated correctly. Prin. iii. 3. 15.

³ [The distinction between homologation of a reducible deed and adoption of a null deed was made in *Gall v Bird*, 3 July 1855, 17 D. 1027; a counter issue of homologation being allowed as to the former and refused as to the latter, on the ground that such a defence against reduction on the ground of insanity could only be established by declarator. See *Cumming v Munro*, 19 Nov. 1833, 12 S. 61. But forged

writings may be adopted by the person whose name is forged, so as to have effect *ab initio*. *Maiklem v Walker*, 16 Nov. 1833, 12 S. 53; *Findlay v Currie*, 7 Dec. 1850, 13 D. 278; *Frost v North of Scotland Banking Co.*, 20 June 1858, 20 D. 1135.]

⁴ See *Johnston v Paterson*, 1825, 4 S. 234, N. E. 237. [*Keith's Trs. v Keith, etc.*, 17 July 1857, 19 D. 1040; *Douglas v Douglas' Trs.*, 28 June 1859, 21 D. 1066; *Stewart v Baillie*, 27 Jan. 1841, 3 D. 463; *Hope v Dickson*, 17 Dec. 1833, 12 S. 222; *Urquhart v Urquhart*, 20 Feb. 1851, 13 D. 742, aff. 14 July 1853, 1 Macq. 658; *Selkirk v Law*, 2 March 1854, 16 D. 715; *Paterson v Moncrieff*, 15 May 1866, 4 Macph. 706.]

⁵ *Pourie v Johnston*, 1613, M. 5629; *Walwood v Taylor*, 1625, M. 5630; *Veitch v Pallat*, 1676, M. 5646; Ersk. iii. 3. 48.

the subscription as witness has been held as homologation.¹ The peculiarity, however, of an heir's condition, called on to witness the execution of a deathbed deed, has been held a sufficient ground for raising, in that particular case, an exception to this last rule.²

Homologation being an implied confirmation of a previous obligation, contract, or [146] deed, a protest against the inference which might otherwise collaterally arise from the act to be done will exclude homologation.³ But where the person so protesting is not entitled to do the act, or take the benefit which he contemplates, without undertaking as a condition of it the obligations imposed by the deed, the protest will have no effect in discharging such obligations. This, however, belongs to the doctrine of approve and reprobate, which will be considered immediately.

The effect of homologation, when clearly established as an implied assent to the deed or contract, is similar to that of express ratification. Therefore, 1. It sanctions the whole deed, if it be one which is indivisible;⁴ but if divisible into parts, the homologation of one of the separate parts will not confirm the whole.⁵ 2. Where the matter homologated is a deed or written instrument, and there is a verbal error in it, the homologation will be held to sanction the deed or instrument in its true meaning, but not the error.⁶ 3. Homologation will bar him who so confirms the deed, and his representatives, but not third parties entitled to rely on a real right; and so homologation of an heritable bond, in which one of the witnesses was not designed, and on which infestment followed, was held ineffectual to support it as a real right in competition, although good to support the bond as a personal debt.⁷

II.—OF THE DOCTRINE OF APPROBATE AND REPROBATE.

This is a part of the general doctrine of homologation.⁸ While acts of approbation from which no benefit arises to the approver are disposed of under the doctrine of homologation, those acts from which benefit arises, although strictly speaking also acts of homologation, are considered by lawyers under the head of Approbate and Reprobate. This doctrine is expressed in the maxim, '*Quod approbo non reprobo*;' and it has been stated from the highest judicial authority in the following manner: 'It is equally settled in the law of Scotland as of England, that no person can accept and reject the same instrument. If a testator give his estate to A, and give A's estate to B, courts of equity hold it to be against conscience that A should take the estate bequeathed to him, and at the same time refuse to give effect to the implied condition contained in the will of the testator. The Court will not permit him to take that which cannot be his but by virtue of the disposition of the will, and at the same time to keep what, by the same will, is given, or intended to be given, to another person. It is contrary to the established principles of equity, that he should enjoy the benefit while he rejects the condition of the gift.'⁹

¹ *Davidson v Davidson*, 1714, M. 5652; *Johnston v Berry*, 1725, M. 5657. See a distinction in *Bothwells v E. of Home*, 1748, M. 5662. [*Innes v D. of Gordon*, 5 July 1822, 1 Sh. App. 169; *Thorburn v Martin*, 8 July 1853, 15 D. 845. The party homologating must be of full age. *Irvine v Tait*, 1808, M. App. Deathbed 6; *Brodie v Brodie*, 6 July 1825, 5 S. 900; *Macgibbon v Macgibbon*, 5 March 1852, 24 Jur. 306.]

² See above, p. 139. See *Stewart v Stewart*, 1663, M. 5614; and *Halyburton v Halyburton*, 1666, M. 5675; as corrected by *Dallas v Paul*, 1704, M. 5677. [*Murray v Murray's Trs.*, 21 Jan. 1826, 4 S. 374, N. E. 377.]

³ [*Malcolm v Bardner*, 19 June 1823, 2 S. 410, N. E. 366. *Orichton v Orichton's Trs.*, 4 S. 553, N. E. 561; aff. 25 July 1828, 3 W. and S. 329.]

⁴ *Steel v Steels*, 1774, M. 5669, 5 B. S. 471. See also *Erskine v Erskine*, 1682, M. 5703.

⁵ *Primrose v Duie*, 1662, M. 5702. This case, however, is not a good illustration; for the acceptance which was pleaded as homologation did not necessarily confirm the decree arbitral.

⁶ *Wauchope v Hamilton*, 1711, M. 5712.

⁷ *Liddel v Dick's Crs.*, 1744, M. 5721; *Elchies*, Homologation, and notes, p. 185. Perhaps Lord Kilkerran's expression is a little too broad, 'that it was never found in any case that homologation was good in a competition.' [*Harkness v Graham*, 20 June 1833, 11 S. 760; *Mansfield v Walker's Trs.*, 28 June 1833, 11 S. 813.]

⁸ [Although it is so in principle, yet practically the doctrine arises in questions of succession more frequently than in questions as to obligations or contracts.]

⁹ *Kerr v Wauchope*, in H. L., 1 Blyth 21. [*Martin v Martin*, 1795, 3 Pat. 421.]

There is in such cases, strictly speaking, an alternative offered to the party; and a necessity raised for making an election either to accept and comply with the condition, or to forego the intended benefit. In this respect, the Scottish doctrine of Approbate and Reprobate approaches nearly to that of Election in English jurisprudence.¹ The great question to be determined is, in what cases the necessity of an election arises? or when a person can take benefit by a deed, without the necessity of complying with the indication of intention, as a condition under which that benefit is conferred, or intended to be conferred? In clearing this doctrine, not only do the same difficulties occur which have already been considered in treating of Homologation,—namely, whether the act in question truly is such as to infer a sanction to the imperfect deed, contract, or settlement, in its full extent and effect; but, superadded to these, there is another set of difficulties, relating to the power of the party who makes the deed to impose, as a condition of it, that alternative which requires a choice to be made,—the benefit to be accepted along with its burden, or the proffered advantage forfeited.

The alternative is raised, and the necessity of making choice between the benefit and the burden imposed, either by force of an express or of an implied condition, such as one person has the power to impose and the other is bound to submit to. The point may occur in one of two situations: either where no step has yet been taken to declare the choice, or after the benefit conditionally given has been already accepted, and a desire is manifested to avoid the fulfilment of the condition. The same principle will, of course, regulate both cases.

I. EXPRESS CONDITION.—Where the condition is express, and clearly stated as such, the doctrine is settled, that a person cannot accept and reject, approbate and reprobate, the same deed.² Where, for example, one having a land estate of small value, and a large personal estate, bequeaths by his will the personal estate to his heir, not otherwise entitled to it, under the condition that he shall give the land to another, the heir must either comply with the condition, or forego the benefit intended for him.³ A difficulty may in such cases, indeed, arise with regard to the power of imposing the conditions, or with regard to the validity of the mode in which that power has been exercised.⁴ And,

1. As to the power. Although the person imposing the condition may not have legitimate power substantively to make such a disposition (as a minor to make a settlement of his land), yet, if imposed expressly as a condition in the bequest of personal estate which

¹ [As to election, when there is an alternative under a contract, see Chitty on Contracts, by Russell, p. 628.]

² See above, p. 141.

³ On this principle the case of *Cunyngham v Gainer* was decided, 1758, M. 617. And the question had been viewed in the same light in England, where Lord Hardwicke, in Chancery, had some time before decided in the same way upon the same will. See 1 Bligh's Rep. in H. L. 27.

The doctrine was again applied in England, in *Brodie v Barry*, 1813, where one, by his will, devised and bequeathed to trustees all his estates, both in England and Scotland, on trusts for certain purposes, and among others to form a distributable fund to be divided among his nephews and nieces. On his death, his heir-at-law in Scotland was a niece included in the distribution; and against her a bill was filed by those interested in the distributable fund, in order to have her put to her election, either to forego the Scottish estate, which the will was ineffectual to carry, although intended to go with the other trust-estate, or to stand excluded from the benefit of the distribution. Sir William Grant, Master of the Rolls, decided 'that the heir must make election.' 2 Ves. and Beames 127.

Gibson v M'Bain, 1786, M. 620. Here, by will, two estates were settled; an estate in India on J. C. M'Bain, and an estate in Scotland on Janet Gibson, with an express exclusion of the person succeeding to the Indian estate from partaking of the Scottish. The question arose in relation to an heritable bond to which the testator had not made up titles, and which J. C. M'Bain claimed as not falling under the devise. The Court held, that as he had taken the estate in India, with the condition annexed, 'that he should stand excluded from any dividend of the effects or estate which was or might become the property of the testator in Scotland,' he was debarred from claiming any part of the sum in question.

See also *Lady E. and M. Kerr v Wauchope*, in H. L., 1 Bligh 1.

⁴ [The chief difficulties which have arisen in connection with this subject are those which involve international questions of English and Scotch law; e.g., where Scotch property is disposed of by English will, and *vice versa*. See *Loudon v Loudon*, 1811, Hume 23; *Wightman v De Lisle*, 1802, M. 4479, Hume 24; *Robertson v Robertson*, 16 Feb. 1815, F. C.; *Campbell v Munro*, 1836, 15 S. 310; *Trotter v Trotter*, 3 W. and S. 407; *Dundas v Dundas*, 1829, 4 W. and S. 460; *Alexander v Bennet*, 1829, 7 S. 817.]

the person can make, it has been held in England (though with much doubt) that it is operative. On the same principle, a question has been raised respecting deeds made on deathbed, in which conditions affecting heritage and the heir's right of succession have been introduced; but although the deed on deathbed, if it stood by itself, might be ineffec- [148] tual to carry land, yet, where such conveyance is made an express condition of a will of personal estate, the benefit of that will cannot be assumed without undertaking the condition.¹

Where the condition is such that the person on whom it is imposed is naturally, or by law or contract, disabled from fulfilling it, he will not be placed under the necessity of making his election. So, if an illegal condition be imposed, or one which is impossible, it will be held *pro non scripto*.² So also, although one may effectually impose it as a condition of his gift, that his donee shall purchase and entail certain lands, or shall entail his own lands, yet if he shall include under such express condition lands belonging to another, but which, being already entailed, cannot be purchased; or lands belonging to the donee, but already under an entailed destination which cannot be altered,—this is not a settlement which can legitimately raise the alternative requiring election to be made, but the disposition will be effectual although the condition should not be complied with.³ In such cases, however, a question arises whether compensation may not be demanded.⁴

2. As to the mode of imposing the conditions, there are certain forms settled by law as necessary, in point of solemnity and proof, to evince intention on particular occasions: as, in Scotland, a deed must be authenticated according to the Act 1681, c. 5, in order to convey land; in England, by the statute of frauds, a devise of freehold must be executed with certain ceremonies; and till lately (55 Geo. III. c. 192), wills of copyhold property, without surrender, were ineffectual.⁵ But although, as substantive acts, such imperfect wills and settlements are ineffectual, yet, where they are made expressly conditions of a will sufficient to convey the personal estate, the alternative to the benefit intended by that will to be conferred will be effectually raised, and the relinquishment or conveyance of the heritage will be required as the condition of the acceptance of the benefit.⁶

II. IMPLIED CONDITION.—Where the condition is only implied, the question presents greater difficulty.

1. Where there is no doubt of the power to declare or of the validity of the mode taken for declaring the purpose, the case will depend on the construction or evidence of an intention to make the bequest conditional. The principle which rules cases of this kind is, that the design must be manifest and unquestionable, and especially that no mere conjecture is admissible against the favour which the law entertains for the heir. His right is not to yield to a mere inference; nor is he to be held bound to convey on a supposition merely conjectural of what the testator would have intended, had he known or marked accurately the state of the property or parties. In applying this general principle, 1. A single deed of settlement, framed manifestly for the arrangement of the whole succession, and of which

¹ [M. of Breadalbane's Trs. v D. of Buckingham, 1840, 2 D. 731; Minto v Kirkpatrick, 1842, 4 D. 1224; Urquhart v Urquhart, 13 D. 742, 1 Macq. 658. See, as to the effect of a condition in a settlement of entailed property, obliging the donee to bring other lands under the entail, Carmichael v Carmichael, 15 Nov. 1810, F. C.; Smith v Murray, 9 Dec. 1814, F. C.]

² Ersk. iii. 3. 85.

³ In the case of Arbuthnot v Arbuthnot, 1792, M. 620, the Court distinguished between the case of approbate and reprobate, and 'the cutting down of part of a deed where that part was null from want of power in the granter.' As if a person were to entail his estate, and in the same deed to include an estate belonging to another, it was said that the entail would

be void, in so far as it related to the estate which did not belong to the granter; but there was no reason why that deed should not have effect in so far as it related to the estate over which the granter had the entire disposal. Bell's Ca. 195. Stuart v Leslie, 10 March 1810, F. C., is a strong case to the same purpose.

⁴ See below, p. 145.

⁵ English rule, Boughton v Boughton, 2 Ves. sen. 12; Sheddon v Goodrich, 8 Ves. jun. 481. Scottish rule, Ersk. iii. 9. 5.

⁶ This is fixed both in England and in Scotland.

1. See for English law, Brodie v Barry, 2 Ves. and Beames 127; and Welby v Welby, *ib.* 137,—both cases having been decided by Sir W. Grant.

2. For Scottish law, see Kerr v Wauchope, in H. L., 1 Bligh 1.

the parts are dependent on each other, and meant to stand or fall together, gives the proper case for the application of the maxim, *Approbo non reprobo*. And even where the settlement [149] is in separate deeds, but executed with the declared and manifest purpose of forming one consistent plan of settlement, the same rule is applied.¹ 2. But this general doctrine is so far qualified, that, in the *first* place, A mere narrative or assumption will not impose it as a condition on the heir or person favoured to realize that assumption as a condition of any bequest in his favour; and *secondly*, Where a settlement consists of a revocation of an old and the declaration of a new disposition, the favour which the law entertains for the heir leads to a separation of the parts of such a settlement, to the effect of admitting the heir to enjoy his legal right, as revived by the revocation, without being held bound by the new disposition as a condition, provided he takes nothing by the conveyance. This is a point which derives more than usual importance from the operation of the law of deathbed; the question being, whether the heir, strictly speaking, takes benefit by the *deed*, so as to give to the disposition contained in it the force of a condition. This point has been decided in the negative by great authorities.²

2. Although there may be no doubt in point of construction that a condition is intended, which, if *expressly* declared, would be imperative to raise the alternative, and compel an election, it may notwithstanding be ineffectual for want of power, or for defect of solemnity, where the condition is merely by *implication*. The exercise of the power is in that case taken as subject to the same exceptions to which as a substantive act it would be exposed. This distinction has been much questioned; but having once been established, it seems now to be settled as a rule not to be shaken.³

¹ *C. of Strathmore v M. of Clydesdale*, 1729, M. 6377. Here a tailzie and bonds of provision, made at the distance of two days from each other, were held as one settlement, so as to raise the alternative for election. *Turnbull v Turnbull*, 1776, 5 Br. Sup. 380. Here there were two deeds executed *unico contextu*, which were 'held to make one settlement of the defunct's whole estate.'

Gordon's case, not reported, but referred to in the Duke of Roxburghe's case, 1 Bligh 9, seems adverse. But *Wilson v Henderson*, 4 Pat. 316, also referred to in that case, 1 Bligh 4, seems to have been decided conformably to the above cases. [See also *Stewart v Stephen*, 1832, 11 S. 139; *Black v Watson*, 1841, 3 D. 522; *Harvey v Harvey's Trs.*, 22 D. 1310, 1 Macph. 345. The case of *Hill v Hunter*, 1818, Hume 27, is exceptional. In *Dow v Beith*, 1856, 18 D. 820, the heritable and moveable estates were settled by different deeds and upon separate trusts, and the principle of approbate and reprobate was held not to apply.]

² Lord Rosslyn, in the House of Lords, in Coutts' case, said: 'The respondent founded part of his argument upon what is termed in Scottish law the maxim of approbate and reprobate. Says Mr. Coutts: "If you approbate the revocation of the deed to Sir Hugh, contained in the posterior deed in my favour, then you cannot reprobate the other clause of that deed." But this is false reasoning. The Court cannot say to the heir-at-law, "Under what deed do you claim?" It is enough for him to say: "God and nature have made me heir-at-law; show me by what deed my right is cut off." 3 Bligh 664. Lord Chancellor Eldon, in a later stage of the proceedings, said, with regard to the argument of approbate and reprobate: 'I have made a good deal of inquiry into the grounds of the decision, to see whether it went upon that ground; and if so, how it could be maintained. I think that this is not a case where the doctrine of approbate and repro-

bate will apply. The heir says: "Your deed does not give you a title, unless you can show me a deed executed in liege poustie, existing at the death of the granter; and if there be no such deed executed, the deed executed on deathbed is gone." 3 Bligh 684.

See also *Cunningham v Whiteford*, 1748, Elchies, Deathbed, No. 19, 5 Br. Sup. 234. [*Battley v Small*, 2 Feb. 1815, F. C.]

³ 'I do not understand,' says Sir William Grant, in a case relative to a will comprehending both an English and a Scottish land estate, 'why a will, though not executed so as to pass real estate, should not be read for the purpose of discovering in it an *implied* condition concerning real estate, annexed to a gift of personal property, as it is admitted it must be read when such condition is *expressly* annexed to such gift. For if by a sound construction such condition is rightly inferred from the whole instrument, the effect seems to be the same as if it were expressed in words.' But he adds: 'Whatever may be the foundation of the distinction, it is established.' *Brodie v Barry*, 2 Ves. and Beames 130.

Lord Chancellor Eldon, in the Scottish case of *Kerr v Wauchope*, says: 'The distinctions upon this head of law appear to be rather unsubstantial. It has been held, that although a will containing dispositions of land be not duly executed according to the statute, yet if in the same will personalty is given, *upon condition* that the legatee convey the land, in such a case, inasmuch as the disposition of the personalty cannot be read without reading at the same time the condition upon which it is given, the gift and the condition are inseparable; and a case of election is raised because the testator in the disposition, not of land, but of personalty, expresses and directs what is to be done. These are undoubtedly thin distinctions, and a judge having to deal with them finds a difficulty in stating to his own mind satisfactory principles on which they may be grounded.' Then, after

In applying this rule, it would appear, 1. That where the testator has no power [150] to execute a settlement of the land (as a minor to make a settlement of heritage), the condition or alternative is not raised by implication: the will being void, it is not to be held as evidence of an intention to impose this as a condition.¹ 2. That where the deed is a testament, which, though made by a person having power to settle land, is unavailing in point of form and solemnity to carry land, or give evidence of an intention to dispose of it,² the alternative will not be raised.³ 3. That where the deed is done on deathbed, it is not void, and therefore the same reasoning does not apply. It is only reducible, not null. It is evidence of intention, though subject to challenge as influenced by importunity, and therefore a deathbed deed will raise the alternative, and require election.⁴

In closing this doctrine of Approbate and Reprobate, there remains one important question, which has been settled by a long series of determinations in England, but in relation to which there has been no decision in a Scottish case. Where an alternative is effectually raised, and the person sees it good to repudiate the proffered benefit rather than embrace the proposed condition, what shall be the effect of this to the person favoured by the condition? Shall he thus be entirely deprived of the benefit intended for him?

'In England (as Lord Chancellor Eldon said in the House of Lords), there has been engrafted upon the primary doctrine of election, the equity, as it may be termed, of compensation. Suppose a testator gives his estate to A, and directs that the estate of A, or any part of it, should be given to B; if the deviser will not comply with the provision of the will, the courts of equity hold that another condition is to be implied, as arising out of the will and the conduct of the devisee; that, inasmuch as the testator meant that his heir-at-law should not take the estate which he gives to A, in consideration of his giving his estate to B, if A refuses to comply with the will, B shall be compensated by taking the property, or the value of the property, which the testator meant for him, out of the estate devised, though he cannot have it out of the estate intended for him.'⁵

In the case which gave rise to these observations, this point had not been decided [151] in the Court of Session. It was therefore remitted for judgment by that Court, with certain

referring to Sir William Grant's having stated the same doubts, but concluded with adhering to the rule, he says: 'In such conclusion, and upon similar grounds, I acquiesce; for long professional experience has convinced me, that it is more beneficial to the community to adhere to imperfect or ineligible rules of law, which have been long established, than that each succeeding judge should be at liberty, upon his own notions of expediency, to improve and unsettle the law. The traditional experience of the Court does not furnish a wiser maxim than that which is contained in the short precept, *Stare decisis*.' 1 Bligh 23.

¹ This held in England on a principle equally applicable in Scottish jurisprudence. *Hearle v Greenbank*, 3 Atk. 695. See 13 Ves. 223. [See *Douglas' Trs. v Douglas*, 1862, 24 D. 1191.]

² *Montgomery v Foulis*, 1795, Bell's Fol. Ca. p. 203.

³ *Wilson v Henderson*, 1802; revd. in H. L., 4 Pat. 316, M. 15444.

⁴ *Paterson v Spreul*, 1745, M. 3334. It was contended that, by the law of deathbed, the defunct is presumed *non sanæ mentis*, so far as concerns the disposal of heritable subjects; and so the question was not, whether by the disposition, as comprehending both heritage and moveables, the heir was prejudiced, but whether the disposition, so far as it conveyed

a faculty to dispose of heritage, was not void as granted by a person who, *presumptione juris*, was incapable *quoad* that subject;—which the Lords had no regard to, as an improper conception of the law of deathbed; which, though it may proceed on the presumption of incapacity, only restrains deeds in prejudice of the heir, who therefore cannot take by a deed, and at the same time reprobate a part of the same deed.

See also *Kerrs v Wauchope*, in H. L., 1 Bligh 25.

⁵ *Kerrs v Wauchope*, H. L., 1 Bligh 25, 26. The Ladies Mary and Essex Kerr had, by the settlement of their brother the Duke of Roxburghe, the life interest of a trust-estate; the residue, after the death of the survivor, being devised to Sir John Scott and others. Those ladies were also their brother's next of kin. They reduced *ex capite lecti* the settlement so far as it conveyed land, and were in consequence held to have made their election to reprobate the deed, so that they could not under it claim the life interest. And thence a question arose, whether the residuary legatees, by way of compensation for what they lost by the reduction of the deed, could claim compensation out of the profits during the lives of the Ladies Kerr; or whether the Ladies Kerr were not, as next of kin, entitled to those profits as not disposed of by the will.

observations from the Lord Chancellor, which plainly indicated his opinion that the doctrine of compensation would apply to the case.¹ But it was not decided on the remit.

It will, however, require great consideration before this doctrine in its full extent be judicially admitted in Scotland. It will be found opposed by the necessity of holding the heir-at-law disinherited by mere implication, which the law of Scotland does not recognise. And practical difficulties of no mean importance must be encountered in the making up of titles, and in giving effect to the implied will.

PART III.

OF PROPERTY IN MOVEABLES CORPOREAL.

THE class of subjects which next demand attention as a fund of credit, or of payment of debt, comprehends the property of Moveables. And, *first*, Of property in ships, as a peculiar subject ruled by special statute; *next*, Of property in goods and merchandise.

CHAPTER I.

OF PROPERTY IN SHIPS.

PROPERTY in ships may be either of BRITISH or of FOREIGN vessels. The difference between them may be generally stated thus: 1. FOREIGN or ALIEN SHIPS are liable to alien duties when engaged in neutral trade, and to forfeitures and penalties when engaged in the trade of which, by statute, a monopoly is secured to British vessels; and, 2. BRITISH SHIPS enjoy commercial privileges and immunities which greatly augment the value of that sort of property.²

[152] It has been questioned whether a foreign-built ship, owned by British subjects, can legally be employed by them in the same trade in which it may be employed by an alien owner. Upon this point, Lord Eldon, while presiding in the Court of Common Pleas, had occasion to deliver this opinion, 'That a British owner of a foreign-built ship may

¹ 'The Court has not yet determined whether the respondents are or are not entitled to take their compensation until the death of the survivor of the appellants. The Court below having given no opinion, it is impossible that we should give any opinion upon that point. It is for their determination in the first instance. The cause must, in point of form, be remitted with a view to have that question decided. It appears to me very easy of solution. There are certain persons who, according to the expression and principles of our law, have a vested remainder in the capital. They have also, by way of compensation, a title to the life interest, preceding that remainder in the fund. Having, therefore, the whole interest, I do not understand upon what ground it can be argued that there ought to be an accumulation of the profits until the decease of the survivor of the appellants. If the appellants

have no right, and the respondents have all the right, in the subject of litigation, why is it not to be applied immediately by way of compensation, upon the ground that the condition of the gift being rejected, the life estate did not form a part of the disposition?' 1 Bligh 26. [The principle of equitable compensation has subsequently been established by a series of decisions embracing almost all the cases in which a person has the right of election between legal and conventional provisions. See *Fisher v Dixon*, 2 Bell 63, and cases cited; *Wills and Succession*, vol. i. pp. 480-483.]

² [For the privileges of British ownership and British character, other than the right to British protection, see *Customs Consolidation Act*, 16 and 17 Vict. c. 107, secs. 152, 163, 191, 324 to 331; and 18 and 19 Vict. c. 96, secs. 1, 14, 15.]

engage in neutral trade, and will be liable to the alien duties; but it is not the policy of the Legislature to prevent British subjects from employing foreign ships in neutral trade in as ample a manner as they can be employed by aliens.¹

The methods of acquiring property in foreign vessels must, of course, depend on the rules of the law of the state to which the ship belongs. But I shall confine myself to the consideration of property in British ships.

The great peculiarity of property in British ships, as distinguished from property in foreign ships or in other moveables, is, that it depends on written titles, which are recorded in a public register; and that on the state of the property as appearing from those titles in the register, creditors and purchasers may rely. In this respect, property in ships may be likened to property in land, which, in so far as creditors are concerned, is held by the law of Scotland to be correctly set forth, with all its burdens and encumbrances, in the records of sasine, of inhibitions, and of adjudications.

It appears that, at all times, the property of ships has been transferred with greater solemnity than that of ordinary moveables. In England, this species of property from very early times was evidenced by written documents;² and although, in Scotland, a written conveyance does not appear always to have been required for the transference of a ship,³ this has, by custom, been long since deemed essential. Besides the written instrument by which the property of ships is conveyed, there are other very important solemnities required by the Navigation Acts. Those Acts were not meant to regulate the transference of ships, but merely to give encouragement to shipping and navigation in this island. But, in the course of securing these objects of national policy, a system of regulations and a public record of this sort of property sprang up, which have proved of the most essential use in regulating the interests of shipowners and of their creditors. Courts of justice have not been blind to the uses which might be derived from the record that came thus to be established, and have thought it of importance to preserve and improve this record for the benefit of the public. Every rule of construction has been favoured which could lead to this beneficial end.

A short review of the history and policy of the Navigation Acts, with a commentary on the requisites enjoined by those Acts for establishing the character of a British ship entitled to the privileges, and for transferring and burdening this sort of property, will present a view of all the law on this subject.

SECTION I.—HISTORY AND POLICY OF THE NAVIGATION ACTS.⁴

Without recurring to the earlier codes of maritime law, in which a policy similar to that of the Navigation Acts may perhaps be traced, the first English statute on the subject was in Richard II.'s time, when it was ordained that no merchandise should be shipped out of the realm but in British ships, on pain of forfeiture.⁵ Amidst the civil distractions of England after that time, the maritime interest suffered neglect. An abortive attempt was made to introduce a navigation law in the time of Henry III., and it was not till the [153] sitting of the Long Parliament that the proposal was revived and adopted. To whatever motives we may trace this measure, whether to private animosity or to national hostility against Holland, the regulations are acknowledged to have been framed with as much wisdom as if dictated by the most enlightened views of maritime policy; and, indeed, at that moment, national animosity and the true interests of England coincided in a very remarkable manner.

It was in 1646 that the first Navigation Act was passed, for more effectually securing

¹ *Long v Duff*, 1800, 2 Bos. and Pull. 216.

² *Abbot, Treat. of the Law relative to Merchant Ships and Seamen*, 1.

³ *Cathcart v Holland*, 1681, M. 8471.

⁴ [See *Reeves' History of the Law of Shipping and Navigation*.]

⁵ 5 Rich. II. St. i. c. 3; 14 Rich. II. c. 6.

the trade of the British colonies in the West Indies to British shipping. In 1651, Cromwell's Act was passed; and, with improvements, it was, after the Restoration, re-enacted in England in 1660, and in Scotland in 1661.¹ By these laws, certain duties and forfeitures were imposed on foreign ships, while the trade of England and Scotland was confined to ships truly belonging to natives. A species of register was appointed by both those Acts: it being enacted that an oath should be taken to the ownership, and a certificate granted; and that of all those certificates a register should be kept. Further improvements were introduced in the reign of Charles II., of William III., and of George II. During the administration of Mr. Pitt, the whole of those laws were revised and consolidated into a system, under the care and by the exertions of the late Lord Liverpool, than whom no man was better skilled in the naval policy of Great Britain.² The system thus established, after having been amended by particular statutes,³ was again consolidated in an Act of His present Majesty, the 4 Geo. IV. c. 41. This statute, however, was repealed by the Act of last session, 6 Geo. IV. c. 105, entitled 'An Act to repeal several Acts relating to the Customs,' on occasion of the general reformation made on the laws of Custom and Excise. And by the Acts of the same session, c. 109 and 110, the system of registry was re-enacted, with only the changes necessary from the new arrangement of the establishment of the Customs. These two statutes, which came into operation on 5th January 1826, contain a digest of the whole of this department of the law.⁴

This is not the place in which to discuss the policy and expediency of these Acts, or their effects on foreign trade or domestic industry.⁵ Their aim was national defence,—an object of vital importance in a country like this, and with regard to which it seems the part of wisdom not entirely to trust to the indirect effects of an augmenting commerce, but to add the force of legislative enactment in the creation of naval power.

The great objects proposed to be attained by the Navigation Acts are—

1. The creation of a body of skilful and hardy seamen.
2. The augmentation of the shipping actually in the possession of the natives of this country. And,
3. The encouragement of the skill and industry of our own ship-carpenters, by confining the privileges to ships British-built.

It would be a false inference from the comparative tardiness in restricting the privilege to British-built ships, that the encouragement of this branch of our national manufacture has been regarded as of little importance by the Legislature. It must be recollected that the number of vessels British-built was not, till of late years, by any means adequate to the occasions of our trade; and that it was not till 1786 that the Legislature could, with any [154] regard to true policy, restrict the monopoly to British-built ships. They were forced to rest satisfied with ships that were British-owned.⁶

The monopoly of trade secured to British ships is: 1. Of the trade from Britain to the British settlements and plantations. 2. Of the coasting trade. 3. Of the importation of many bulky or valuable articles into Great Britain; with a share of this importation trade to ships of the country of the produce or manufacture, or from which the goods are imported

¹ The English statute is 12 Car. II. c. 18, and the Scottish 1661, c. 45.

² 26 Geo. III. c. 60.

³ 27 Geo. III. c. 19; 34 Geo. III. c. 42 and 68; 35 Geo. III. c. 58; 37 Geo. III. c. 63; 48 Geo. III. c. 70. The Registry Acts are in force in Ireland. See Irish statutes, 27 Geo. III. c. 23; British Acts, 42 Geo. III. c. 61.

⁴ 6 Geo. IV. c. 109, Act for the encouragement of British shipping and navigation; and c. 110, Act for the registering of British vessels.

⁵ [The doubt here indicated by the author as to the policy

of the Navigation Laws has been verified by their total repeal, in so far as they gave protection to the British shipowner. See 12 and 13 Vict. c. 29, and 17 and 18 Vict. c. 5. An abstract of the provisions of the subsisting statute, as to Registration, Sale, and Mortgage, is given, *infra*, p. 159 sqq.]

⁶ By the accounts taken in 1801 of British ships registered in the different ports of the empire, the number of vessels manned and navigated by British subjects amounted at that time to 17,295; their tonnage to 1,666,481 tons; and the number of seamen employed, on an average of one man to 17 tons, to 129,546.

(with certain exceptions). 4. Of the fisheries for importation into Great Britain. These privileges are guarded and made valuable by forfeitures and alien duties against foreign ships;¹ and they are confined to ships duly registered as British ships, and navigated by a British master, and three-fourths of the crew British seamen.

But it is proper to give more precisely the description of such vessels as are required to be registered, and which, being registered, are, while the register is in force, entitled to the privilege of British ships.

SECTION II.—OF A SHIP'S NATIONAL CHARACTER.

The privileges of trade being shared between British and foreign ships, the Legislature has been careful to distinguish the description of either character.

I.—DESCRIPTION OF BRITISH PRIVILEGED SHIPS.

By the recent statutes, no ship shall be entitled to the privileges of a British ship, unless, 1. It shall be duly registered and navigated as such; or, 2. It shall be under fifteen tons burden, and confined to inland or coast trade, and wholly owned and navigated by British subjects.

1. REGISTERED SHIP.—The leading description, according to the late Act, of a ship entitled to be registered, or which, having been registered, is to be deemed duly registered, comprehends, (1.) 'Such ships as are wholly of the built of the United Kingdom, or of the Isle of Man, or of the islands of Guernsey or Jersey, or of some of the colonies, etc. in Asia, Africa, or America, or of Malta, Gibraltar, or Heligoland, which belong to the king at the time of the building of such ship.' And, (2.) 'Such ships as shall have been condemned in any court of admiralty as prize of war, or in any competent court as forfeited for breach of the law for prevention of the slave-trade, and which shall wholly belong, and continue wholly to belong, to His Majesty's subjects, duly entitled to be owners of ships or vessels registered by virtue of this Act.' 6 Geo. iv. c. 110, sec. 5.

Two exceptions to this description are made: 1. That where a ship has been repaired in a foreign country, if such repairs shall exceed the sum of twenty shillings for every ton of the burden of the ship (unless made necessary by extraordinary damage sustained during absence, to enable her to perform the voyage in which she was engaged, and to return to the king's dominions), she shall not continue to enjoy the privilege of a British ship (sec. 6).² 2. The other exception is, where such ship has been captured and become prize to an [155] enemy, or been sold to foreigners; and the character as a British registrable ship shall in that case be redeemable only under the provisions of the 5th section, by condemnation as prize of war, or for breach of the laws for prevention of the slave-trade.

It is a part of the national character as a British ship, that the owners shall be British. And, 1. No person who has taken the oath of allegiance to any foreign state (except under the terms of some capitulation), unless afterwards he become a denizen or naturalized subject of the United Kingdom, shall, in whole or in part, or directly or indirectly, be owner of any ship required or authorized to be registered. 2. Neither shall any one be such owner if he usually resides in a country not under the king's dominion, unless a member of a British

¹ 6 Geo. iv. c. 109, secs. 2–11. By sec. 4, to exercise the privilege unregistered exposes the ship to forfeiture; and by sec. 23, 'If any goods be imported, exported, or carried coastwise, contrary to the law of navigation hereinbefore contained, all such goods shall be forfeited, and the master of such ship shall forfeit the sum of one hundred pounds.'

² It is provided that a ship undergoing such repairs in a foreign country shall, by the master, etc., on arrival, be re-

ported to the collector and comptroller of the customs at the port, under the penalty of twenty shillings per ton; and if satisfied on the points in the Act, they are directed to certify, on the back of the register, that the privileges of the ship have not been forfeited (sec. 6). It is further provided against combinations of workmen in British ports, that the Privy Council may permit a ship to repair to a foreign port for necessary refitting (sec. 7).

factory, or agent or partner in a house or copartnership actually carrying on trade in Great Britain or Ireland (sec. 13).

With these requisites, a ship, in order to enjoy the privilege of a British registered ship, must have the sanction of a certificate of registry, guarded by the surveys, oaths, and other precautions enjoined in the Act. See below, p. 151 et seq.

2. SHIPS NOT REGISTERED.—Ships British-built under 15 tons, though not registered, if owned and navigated by British subjects, are British ships, in all navigation in the rivers and on the coasts of the United Kingdom, or of the British possessions abroad, not proceeding over sea; or such vessels not exceeding 30 tons, and not having a whole deck, employed in fishing on Newfoundland banks and shores, etc., are also admitted as British (6 Geo. iv. c. 109, sec. 13).

Honduras ships also, owned and navigated as British ships, are entitled to the privilege of British ships in all direct trade between the United Kingdom and that settlement, on producing certificates of the built and ownership from the superintendent of the colony (sec. 14).

3. NAVIGATED AS BRITISH.—It is requisite in all cases, that ships professing to be British shall be navigated by a certain proportion of British subjects. Every registered ship, while she claims the privilege, shall be navigated during the whole of every voyage, with cargo or in ballast, by a master who is a British subject, and a crew whereof three-fourths at least are British seamen; and in the coasting trade, or among the British islands, or in fishing there, the whole crew shall be British (secs. 12, 13).

Two provisions are added for clearing difficulties: 1. The character of British master or seamen includes natural-born subjects; or subjects by naturalization or denization; or by conquest or cession taking the oaths; or serving in time of war for three years in a ship of the king (sec. 16). And, 2. As to the proportion, if there be one British seaman for every 20 tons burden, the ship shall be deemed duly navigated, although the number of other seamen should exceed one-fourth of the crew.¹

II.—DESCRIPTION OF FOREIGN PRIVILEGED SHIPS.

In order that a ship should be admitted to be a ship of any particular country, to share the privilege of trade with British ships, it is requisite—

1. That she be of the built of such country; or, 2. Prize of war to such country, and condemned as prize; or, 3. Forfeited to such country under laws for the prevention of the slave-trade, and condemned as forfeiture; or, 4. British-built, not being a prize of war from British subjects.

[156] Under this law a question sometimes arises, whether a ship repairing in a foreign port be of the built of that particular country; as when a Russian cargo was imported in a ship originally built in Holstein, but which having been wrecked on the coast of Russia, was there repaired at the expense of two-thirds of her value, which by the Russian law entitled her to navigate as a Russian ship. It was held by Lord Ellenborough that she was not Russian-built; that *repair* is not *built*; that the ship must be of the built of the place of her original construction; and that the Russian law cannot control the Navigation Act of Great Britain.²

2. It is necessary that such vessel should be navigated by a crew of which three-fourths are subjects of that country, and owned by subjects of such country (6 Geo. iv. c. 109, sec. 15). And the rule of proportion of one seaman for every 20 tons is applied as in the case of British navigators (sec. 16).

¹ On these points occasional exceptions are admitted, or power given by royal proclamation to make relaxations; for which see the Act, secs. 17–20.

² *Redhead v Cater*, 4 Camp. 188. This question arose under the old laws.

SECTION III.—OF THE REGISTERING OF BRITISH SHIPS.¹

While a ship continues in the hands of the builder, the property of it is, like that of any other moveable, unaffected by any of the regulations of the Navigation Acts. If it is to be attached by creditors, they must use the ordinary diligence for affecting moveables. If it is to be transferred, a bill of sale, with delivery, is a sufficient conveyance.²

But as soon as the vessel is ready for sea, and before she departs from port, she must be registered in terms of the Acts; or after a ship captured from the enemy comes into a British port, and is condemned as lawful prize, if she is to be fitted out for sea under British ownership.

By the recent Act (6 Geo. iv. c. 110, sec. 2), no ship or vessel is to be entitled to any of the privileges or advantages of a British-registered ship, until the person or persons claiming property therein shall have caused the same to be registered, and shall have obtained a certificate of such registry. And by sec. 4, ships not duly registered, and not having obtained the proper certificate, and exercising any of the privileges of a British ship, shall be subject to forfeiture, and with the guns, ammunition, etc., may be seized by any officer of the customs. But this is declared not to affect any vessel registered under former Acts, until such time as, by the subsisting Act, they shall be required to be registered *de novo*. The occasions on which registers *de novo* are required are these: 1. Where the owner or owners shall have transferred all his or their share or shares, the ship shall be registered *de novo*, before sailing or departing from the port to which she belongs, or from any port in the same part of the kingdom, or with a provision for a certificate on the back of the existing certificate, if time presses, enabling him to sail upon that voyage (sec. 13). 2. When a certificate of the registry of a ship is lost, on proof thereof made, the commissioners of the customs may permit a register *de novo*, and a certificate to be granted on bond to deliver up the lost certificate when found, to be cancelled (sec. 26). 3. When the certificate of a ship is unduly detained by the master, etc., after certain precautions the ship may be registered *de novo* (sec. 27). 4. When a ship, after being registered, shall be so altered as not to correspond with all the particulars mentioned in her certificate, she shall be registered *de novo*, as soon as she returns to her port, or any port in the same part of the kingdom (sec. 28). And, 5. No certificate, except under the subsisting Act, or under the Act of 4 Geo. iv. c. 41, for the registering of vessels and specifying the shares of the vessel [157] held by each owner, shall be in force after the 5th January 1826, or the ship's arrival at her port after that date, unless where time has been granted for ascertaining the number of shares (sec. 35).

The following points are fixed as to the registry and certificate:—

I. PERSONS AUTHORIZED TO MAKE REGISTRY AND GRANT CERTIFICATE.—The collector and comptroller of His Majesty's customs in any port in the United Kingdom, and in the Isle of Man; the principal officer of the customs in Guernsey or Jersey, together with the governor or commander-in-chief of these islands, etc., are authorized and required to make registry and grant certificates (sec. 3).

II. WHERE TO BE REGISTERED.—Registry shall not be made, nor certificate granted, in any other port or place than that to which the vessel shall properly belong, otherwise to be void and null, unless specially authorized by an order in writing under the hands of the commissioners of customs (sec. 11). And the port of the vessel shall be that at or near to which some or one of the owners who shall take the requisite oath shall reside (sec. 12).

III. PROOFS OF THE BUILT OR CONDEMNATION.—Before the owner can obtain a certificate, certain proofs must be given of the place in which the ship has been built, or of her condemnation as a lawful prize, and of the ownership.

¹ Under existing laws, *infra*, p. 160 sqq.

² *Oxenheim v Gibbs*, 1807; *Abbot on Shipping*, chap. i.

BUILT.—The evidence of the 'built' is a full and true account, under the hand of the builder, of the denomination of the ship, time and place of building, tonnage, and name of the first purchaser. Such account the builder is, by the statute, required to give on the same being demanded; and this is confirmed by the oath of the owner, that the ship to be registered is the same with that described by the builder.¹

CERTIFICATE OF CONDEMNATION.—If the ship to be registered is a prize captured from the enemy, or forfeited for breach of the slavery laws, a certificate must be produced of the condemnation, under the hand and seal of the judge of the court in which the ship was condemned; and also an exact account or survey under the order of the condemning court; and an oath to the identity of the ship.²

IV. SURVEY OF THE SHIP.—In order to enable the collector and comptroller of customs to grant a certificate, truly and accurately describing the ship, and to enable other officers of the customs, on due examination, to discover the identity of the ship, one or more persons, approved by the commissioners of the customs, go on board and examine, and take the measurement of the ship.³

V. OWNERSHIP.—The proofs of ownership are intended to prevent foreigners from being proprietors of British ships. They partly arise out of the documents produced to prove the **BUILT**, and partly out of the oath of the owners. Before obtaining a registry, an oath is prescribed to be taken before the persons who grant the certificate, by the owner, if only one; or if two, and both resident within twenty miles of the port, by both; if both or either resident at a greater distance, by one. If the number of owners exceed two, then by the greater part (not exceeding three), if resident within twenty miles of the port; and if all are resident beyond twenty miles, one shall suffice. This oath expresses the name and description of the vessel, the name of the master, the name of every proprietor or owner, with every particular relating to their character as British subjects; and it contains also a positive averment that no foreigner, directly or indirectly, has any share or interest in the ship.⁴

[158] **VI. REGISTER AND CERTIFICATE.**—The particulars relating to the description of the ships thus collected are inserted in a register. Of this a certificate is granted, which bears, That in pursuance of the Act, the owners having taken and subscribed the oath required, and sworn that (in the proportions specified on the back) they are the sole owners of the ship, by her name and port, that she is of such a burden, and that such a one is master, and that the ship was built at such a port, etc.: And that the surveying officer, by name, having certified that the ship is of such and such dimensions, and rigged in the manner particularly specified, and that the owners having consented and agreed to the description, and having caused sufficient security to be given, as required, the said ship by name has been registered at such a port. On the back of the certificate of registry there shall be an account of the parts or shares held by the several owners; the several shares being distributed among owners not exceeding in number thirty-two.

At every port of registry a book is to be kept by the collector and comptroller of the customs, in which the entry shall be duly made, each being numbered in progression; and within one month at furthest, a true and exact copy shall be transmitted to the commissioners of the customs. They again are bound, in Scotland and Ireland, to transmit at the end of every month, true and exact copies to the commissioners of customs in England.⁵ This record has collaterally, as already observed, come to serve as a useful representation of the actual state of the shipping interest of this country.

¹ 6 Geo. IV. c. 110, sec. 25.

² *Ib.* sec. 29. Prize vessels are not to be registered at Jersey or Guernsey, or Isle of Man (sec. 36).

³ 6 Geo. IV. c. 110, sec. 16; and the rules of admeasurement are laid down in secs. 17, 18, 19, and 20.

⁴ 6 Geo. IV. c. 110, sec. 14. If a corporate body, the oath must bear the name of the company or corporation.

⁵ Secs. 11 and 47.

The certificate is written on parchment, and delivered to the captain, signed by the collector or comptroller of the customs, to be a voucher and safeguard to the vessel of her character and privileges as a British ship.

VII. PRECAUTIONS AGAINST THE ABUSE OF THE CERTIFICATE.—It is only by the certificate that an officer can determine whether a ship is entitled to the privileges of a British ship, and it is of great importance on this point to prevent abuse. For this purpose, in the *first* place, security by bond is granted by the master and owners in a large penalty, that the certificate shall not be lent, sold, or disposed of, but shall be faithfully kept for the use of the ship, and returned on the several events which render it no longer useful.¹ And, *secondly*, the certificate is entrusted to the custody of the master, who is bound to deliver up the certificate to the proper officer of the customs, for the use of the ship, as occasion shall require, under high penalties; and it is not essential that this detention should be malicious: it is sufficient if it be wilful.²

VIII. LOST CERTIFICATE.—When a certificate shall be lost or mislaid, and proof thereof to the satisfaction of the commissioners shall be made, they are authorized to register the vessel *de novo*, and grant a new certificate; or when the ship is far from her port, to grant a licence, under which she may sail in safety to the extent permitted. The additional precaution, however, is taken of an oath or bond as to the lost certificate, that it shall, if found, be delivered up to the proper officer.³

IX. EFFECT OF CERTIFICATE AS PROOF OF PROPERTY.—The use of the certificate is to prove the identity of the ship as privileged. But the privilege is so combined with the property as sworn to in the owners specified, that it serves also as a badge of the property or ownership in British ships; and while no one whose name does not appear in the certificate, or by indorsation on it, is deemed a proprietor, those who appear still as owners on the register are held as such, and their creditors may seize the ship as their untransferred [159] property. But the proof by the register is not absolute to the effect of vesting the property in one who has not given authority for the transfer.⁴

Where the precautions enjoined by the Act have been neglected in cases intended as trusts for benefit of others, the registry is held the sole criterion of property, and the right of those for whose benefit the sale was intended will be defeated.⁵

X. OF SHIPS HELD IN SHARES.—Under former statutes there was much confusion and vagueness relative to shares in ships. By the Act of 4 Geo. IV. c. 41, and the renewed Act of 6 Geo. IV. c. 110, secs. 32–35, it is provided,—

¹ 6 Geo. IV. c. 110, secs. 21, 22, 23.

² The Court of Admiralty will, in a suit for possession of ships, order delivery of the certificate where necessary. *Barbara*, Chegwyn, 4 Rob. A. R. 1.

³ 6 Geo. IV. c. 110, sec. 26.

⁴ *Tinkler v Walpole*, 14 East 226; *Trehella v Rowe*, 11 East 435. [Abbot on Shipping, 11th ed. 68.]

⁵ Thus, under the former Acts, a ship intended to be for a partnership, but one of the parties alone being sole registered owner, his separate creditors were preferred to the creditors of the partnership. *Curtis v Perry*, 6 Ves. jun. 739.

Again, in a similar case, a ship was bought by a company and paid from its funds, and everything relative to the purchase marked it as a purchase by the company, but the registry was in the name of one of the parties alone; and in a question between the joint and separate creditors the latter were preferred, the Lord Chancellor Eldon holding the registry to be the evidence of the property, and that it must be taken so to be even among creditors. *Yallop ex parte*, 15 Ves. jun. 60.

The same decision was given where 10-16ths of a ship were

bought by a company, and 5-16ths registered in the name of one partner, and the other 5-16ths in the name of another, in a question between the joint creditors and the creditors of one of the partners as to one of those 5-16ths. *Houghton ex parte*, and *Gibble ex parte*, 17 Vesey 254.

A ship purchased by a company of four persons was registered in the name of two of them alone. An action on a policy of insurance on freight was not maintainable by the company, freight arising only from ownership; and there being no right, either legal or equitable, in the company as owners of this vessel. *Camden v Anderson*, 5 Term. Rep. 709.

See *Stringer v Murray*, 2 Barn. and Ald. 248, where one contracting to have a ship built for him in the East Indies agreed to sell a share, and received the price. Held that the ship, having been registered in the name of the former alone, the latter had no legal interest.

Brewster v Clarke, 2 Merivale 75.

See *ex parte Burns*, 1 Jac. and Walker 378. Ships registered in the name of one partner, but in the order and disposition of both, belong to the partnership. [Abbot on Shipping, 11th ed. 52–54.]

1. That the property in every ship or vessel, of which there are more than one owner, shall be considered as divided into sixty-four shares; and the proportion held by each owner shall be described in the registry as being a certain number of sixty-fourth parts, no person being entered as owner in respect of any share which shall not be an integral sixty-fourth part of the same (sec. 32).

2. That, upon the first registry of any ship, the owner or owners who shall take the oath before registry, shall swear to the number of such parts thus held by each, and the registry shall be accordingly; it being provided, that the owners of fractional parts, wherever in a division the property of a ship comes to be separated into any number of parts, may transfer to each other, or join in transferring to a stranger, the fractional parts, by memorandum on their respective bills of sale, or by fresh bills of sale without stamp (sec. 32). And by secs. 34, 35, provision is made for clearing in the registry the titles to all shares of ships registered before 31st December 1823.

3. That it shall be lawful for any number of owners named and described in the registry, being partners in any house or copartnership actually carrying on trade within the king's dominions, to hold any ship, or share of a ship, in the name of such house or partnership, as joint-owners, without distinguishing the proportionate interest of each owner; and that the ship, or shares so held in copartnership, shall be held to be partnership property to all intents and purposes, and shall be governed by the same rules as relate to and govern all other partnership property in other goods (sec. 32).

4. That not more than thirty-two persons shall be legal owners at one and the same time, under the exception, *first*, of the equitable title of minors, heirs, legatees, creditors, or others duly represented by, or holding from, any persons within the number registered as legal owners; *secondly*, of joint-stock companies for the purpose of owning ships or vessels [160] as their joint property, who shall have elected any number, not less than three, of those members to be trustees for them: in which case it is declared lawful for such trustees, or any three of them, with permission of the commissioners, to take the oath required before registry; except that, instead of stating therein the names and descriptions of the other owners, they shall state the names and description of the company to which such ship shall in such manner belong (sec. 33). This provision was introduced into the Act of 6 Geo. iv. for the first time, to provide for a case which had raised many doubts under former Acts. There are partnerships whose partners are so numerous, that it is very desirable to avoid the necessity of having a title from each in case of a sale. Shipping companies, and companies for herring fishery, etc., sometimes consist of perhaps a hundred persons. And in practice, under former Acts, the registry of ships belonging to such companies was in general made in the name of certain persons, as trustees for themselves and all the other partners by name, as persons carrying on trade under such a firm; and when a ship of the company was sold, the transfer was made on the back of the certificate by the trustees, as authorized either by general powers or by a special minute of the company. This method, however, had never been judicially sanctioned, and might have been exposed to much doubt, which is now removed.

CONCLUSION.—In order to bring the whole shipping property of Great Britain under the operation of the system established by this last Act, it is provided, that from the 5th January 1826, or from the first arrival or entry of any ship after that day at the port to which she belongs, or any port in the same part of the kingdom, or in the same colony, etc., no certificate of registry shall be in force, except such as are granted under one or other of the Acts 4 Geo. iv. c. 41, or 6 Geo. iv. c. 110, and in which the share or shares held by each owner shall be set forth;¹ and to facilitate this, no stamp duty is required on the bond for the first registry under this Act (sec. 36).

¹ Sec. 35. Indulgence is given where the collector and comptroller certify that time has been granted for ascertaining the shares.

SECTION IV.—OF THE SALE AND TRANSFERENCE OF SHIPS.¹

Under the older statutes, the whole doctrine of the sale and transference of ships was difficult and embarrassing, unsuitable to a species of property so much the subject of daily transfer. The matter is now reduced to great simplicity by the statutes of 4 Geo. iv. c. 41 and 6 Geo. iv. c. 110, the latter being very nearly a transcript of the former.

I.—SALE OF A SHIP.

To the sale of a ship three things are necessary: A bill of sale or instrument in writing; an entry on the register at the ship's port; and either an indorsement on the certificate, or a new registry.

(1.) BILL OF SALE.—The written deed of vendition, which had in Scotland become by usage in some degree necessary in transferring the property of ships, has, under the Ship Registry Acts, been required as indispensable. Under the old statutes it was required, that every transfer or mortgage of a ship, in whole or in part, and every contract for such transfer,² should be by a bill of sale, or agreement, or instrument in writing, in which [161] 'the certificate of the registry of such ship or vessel should be truly and accurately recited in words at length;' otherwise such bill of sale, transfer, or contract, or agreement for transfer, should be utterly void and null, and should not be valid or effectual to any purpose whatsoever.³ This rule was adhered to with the greatest strictness; insomuch, that although a mere clerical mistake was held not sufficient to void a bill of sale,⁴ yet very trivial errors were held fatal.⁵

But this inconvenient and truly unnecessary strictness was removed by the Act

¹ [See the provisions of the Merchant Shipping Act, *infra*, p. 164 sqq.]

² As a *transfer* such agreements were void; but it was doubted whether a personal obligation to transfer and complete the sale according to law, though undoubtedly not of force to change the property, might not be sufficient to ground an action for implement. The words, 'every contract for such transfer,' it was said, *may* mean contracts intended as a transfer. But Lord Thurlow seems to have had a correct view of the point, when, in a private opinion delivered to the counsel in the case of *Hibbert v Rolleston*, he held it to have been the policy of these Acts (distinguishing the question from all the analogies at common law), that no such thing as an equitable title to a ship could effectually subsist. See 11 Ves. jun. 625.

In England, a bill of sale, by way of mortgage, was found void under this Act, *so far as regarded the conveyance of the property in the ship*, but held sufficient to support action for the money lent. *Kerrison v Cole*, 8 East 231.

In Scotland the following case was decided:—Letters were exchanged, offering and accepting the purchase of a ship, but without any recital of the certificate. The master was directed to obey the buyer's orders, and did so. The seller then tendered a regular vendition, which having been refused, an action was raised for payment of the price; and the Court held the vendee effectually bound to pay, as the statute was supposed to apply only to venditions themselves, and contracts having the effect of transfers, not to the preliminary agreements intended to be followed by the regular conveyance. *M'Nair v Millar*, First Division, 2 Dec. 1808, F. C.

Of this decision it was doubted whether it were according to the sound policy and plain intendment of the statutes.

³ 26 Geo. III. c. 60, sec. 17; 34 Geo. III. c. 68, sec. 14.

1. A bill of sale intended as a mortgage for a promissory note held void for want of the recital; and though the grand bill of sale and actual possession of the ship were delivered, yet, as against the creditors of the granter, the vendee had not even a lien. *Rolleston v Hibbert*, 3 Term. Rep. 406, and 3 Brown's Ch. Ca. 571, same case.

2. In a proceeding in Admiralty for the purpose of disposing a shipmaster and part owner, the defence was, that by an agreement to sell certain shares, for which he had accordingly paid, the master held the majority of shares. 'Independent of any other objection,' said Sir William Scott, 'I do not think that, under the Act of Parliament, it would be possible for the Court to recognise such a transaction as this; for the words of the Act are as strong as they can be.' *The New Draper*, Walker master, 4 Rob. 287.

⁴ *Rolleston v Smith*, 4 Term. Rep. 161. This was a prize-ship transferred while the ship and certificate were at sea. The date of the sentence of condemnation was in the recital said to be 28th May 1783, and of the certificate of freedom 23d Jan. 1783. The true date of the condemnation was 28th May 1782, and the mistake was palpable on comparing the dates. The error in the recital was not held to be fatal to the transfer.

⁵ *Westerdell v Dale*, 7 Term. Rep. 306. Here in the recital the word *oath* was used instead of *affirmation*; the non-residence of any other part owner within twenty miles was omitted; and a different name was given to the master. Everything else was truly stated. The Court held a person who had sold by this incorrect transfer liable for repairs, though the ship had passed in the meanwhile through several hands.

It has been held that, to one effect, a conveyance is good,

of 4 Geo. IV. c. 41, sec. 29, re-enacted by the 6 Geo. IV. c. 110, sec. 31, whereby, after requiring that the transfer, in all cases where the property in any ship shall, after registry thereof, be sold to any other of His Majesty's subjects, shall be 'by bill of sale or other instrument in writing, containing a recital of the certificate of registry of such ship or vessel, or the principal contents thereof, otherwise such transfer shall not be valid or effectual for any purpose whatever, either in law or equity,' it is enacted, 'That no bill of sale shall be deemed void by reason of any error in such recital, or by the recital of any former certificate of registry instead of the existing certificate, provided the identity of the ship or vessel therein intended be effectually proved thereby.' This places the recital on the true footing on which it ought to stand; and although, perhaps, the expression 'the principal contents thereof' may be held ambiguous, it cannot be doubted that a fair recital of all that truly [162] relates to the several points which are in the Act considered as essential to the identification of the ship would be a sufficient recital.

(2.) ENTRY IN BOOK OF REGISTRY.—No bill of sale or other instrument in writing is under the new statute valid or effectual to pass the property in any ship, until produced to the collector and comptroller of the customs of the port at which the ship is registered, or of the port at which she is about to be registered *de novo*; and until such collector or comptroller shall have entered in the books of registry or of intended registry of such ship, the name, residence, or description of the vendor, or of each if more than one; the number of shares transferred, with the name, residence, and description of the purchaser, or of each if more than one; and the date of the bill of sale and of the production of it (sec. 37). Besides indorsing these particulars on the certificate as hereafter to be mentioned, the collector and comptroller are required, if called upon so to do, to certify by indorsation on the bill of sale, that the particulars as above have been entered in the book of registry, and indorsed on the certificate.

When the entry is so made, the bill of sale is valid and effectual to pass the property as against all, and to every intent and purpose, except against subsequent purchasers or mortgagees, who shall first procure indorsement to be made on the certificate of registry (sec. 38). See below.

As the indorsement on the certificate or registry *de novo* is thus the criterion of preference among competitors for the property, or rival mortgagees, provision is made for allowing sufficient time to the vendee to have his vendition so indorsed on the certificate. By sec. 39, after an entry of particulars in the book of registry, there shall be no entry of any other bill of sale, etc., from the same vendor to any other vendee till thirty days shall have elapsed from the day when the other entry was made; or in case of the ship's absence from her port where the former entry was made, till thirty days from the day of her arrival in her port.

(3.) INDORSEMENT ON THE CERTIFICATE, OR NEW REGISTRY.—The sale is not completed, to the effect of passing the property effectually, until either the certificate of registry is produced, and an indorsement made on it of the particulars mentioned in the entry in the book of registry,¹ or a new registry is made and certificate granted to the vendee.

1. Under the first statutes no indorsement was required. It was first made necessary by 34 Geo. III. c. 68, sec. 15, and then it was a more complex operation than it is now, insomuch that difficulties almost insuperable were experienced in practice. This appears in

though the requisites of the Registry Acts have not been observed, viz. to the effect of supporting an action for the money lent. See above, *Kerrison v Cole*, 8 East 231; and in *Mestaer v Gillespie*, 11 Ves. jun. 621, the Lord Chancellor and Sir William Grant gave their opinions in favour of the efficacy of such a conveyance in carrying freight.

¹ That indorsement is made by the collector and comptroller thus:—

'CUSTOM HOUSE, LEITH, 27th May 1826.

'A B, of Leith, merchant, has transferred, by bill of sale dated 25th May 1826, the ship *Atlas* to C D, of Edinburgh, merchant.

'E F, Collector.

G H, Comptroller.'

the decided cases, which may now be regarded only as matter of history. One most essential improvement in the recent Acts is, that the penal effects of not having the entry made in the book of registry indorsed on the certificates are taken away, the only effect of such neglect now being, that priority of right is with the first indorsement.

As already noticed, thirty days are allowed after entry of the transfer in the book of registry, before another transfer from the same person to another vendee can be entered; and the collector and comptroller are required, 1. To indorse on the certificate of registry the particulars of the bill of sale of such person as shall produce the certificate of registry for that purpose, within the thirty days after the entry of his bill in the book of registry; or within thirty days after the return of the ship to port, in case of her absence at the time of entry. 2. Where no one so produces the certificate within thirty days of the entry of his bill, etc., the officers are to indorse on the certificate the particulars of the bill of sale, [163] etc., to such person as shall first, after the expiration of the thirty days, produce the certificate of registry for that purpose (sec. 39). 3. If the certificate be lost or mislaid, or improperly detained, so that indorsement cannot be made in due time, and proof thereof shall be made to the satisfaction of the commissioners of the customs, it shall be lawful for them to grant such further time as may be necessary for recovery of the certificate, of which a memorandum shall be entered by the collector and comptroller in the book of registry, and during such further time no sale shall be entered (*ib.*). 4. To prevent the necessity of the vessel resorting to the port of her registry for the mere purpose of completing a transfer by indorsement, it is provided that such indorsement may, under certain precautions, be made in another port. And, *First*, The bill of sale, etc., must be entered at the port of registry. *Secondly*, The bill of sale must contain a notification of such record, signed by the collector and comptroller of the port of registry. *Thirdly*, The collector and comptroller of the port where the ship lies, shall give notice to those of the port of registry of the requisition to make indorsement; and they, again, shall thereupon send information whether any and what other bills of sale have been recorded in the registry book. *Fourthly*, The collector and comptroller of the port where the ship is, shall then indorse on the certificate the transfer. *Finally*, They shall give notice thereof to the collector and comptroller of the port of registry, who shall record the same, inserting the name of the port at which the indorsement was made.

2. Instead of an indorsement on the old registry, a new registry may be obtained on every transfer of property. By sec. 42 it is provided, that if, upon any change of property, the owners shall desire a new registry, although not required by the Act, it shall be lawful to make registry *de novo*, all the requisites being observed. And such new registry, whether required by the Act or made in compliance with the desire of the party, as fully completes the transfer as if the indorsement had been made on the certificate.

3. By sec. 39 it is declared to be the true intent and meaning of this Act, that the several purchasers and mortgagees, where more than one appear to claim the same property, shall have priority one over another, not according to the respective times when the particulars of the bill of sale, etc., were entered in the book of registry, but according to the time when the indorsement is made upon the certificate of registry.

II.—SALE OF SHARES IN A SHIP.

It has already been seen, that ships owned by more than one are held to be divided into sixty-four shares, and that each owner must hold a certain number of sixty-fourth parts; no person being entitled to be entered as owner in respect of any share not being an integral sixty-fourth part. All the requisites of bill of sale—entry in the book of registry—and indorsement on the certificate—already enumerated as applicable to the sale of ships, are to be observed also in the transference of shares or ships.

III.—SALES IN ABSENCE OF OWNERS.

Provision is made by the Act for two cases which sometimes occur: 1. Where a ship or any shares of it belonging to one who is absent from the kingdom are sold by his known agent or correspondent, under directions express or implied, the commissioners of the customs are authorized, on application made, and a proof to their satisfaction of the fair dealings of the parties, to permit such transfer to be registered, if registry *de novo* be necessary, or recorded and indorsed as if legal power were produced; good and sufficient security being given to produce a legal power or bill of sale within a reasonable time, or to abide the future claims of the absent owner and his heirs. And, 2. A similar provision is [164] made for the case where, from death, or absence, or distance of time, a bill of sale cannot be produced or proved to have been executed, and registry *de novo* shall have become necessary (sec. 44).

IV.—TRANSFERENCE TO HEIRS, CREDITORS, ETC.

The passing of property in ships to heirs or to creditors is not within the words of the statute, which requires either an instrument in writing, or an entry in the book of registry, or an indorsement on the certificate. The 31st section of the Act, relative to transfers by bill of sale, speaks only of the property 'in any ship, etc., belonging to any of His Majesty's subjects, *being sold* to any other of His Majesty's subjects.' The 37th section, relative to the entry in the book of registry, mentions only *vendors or mortgagors*. The 45th and 46th sections refer only to mortgages or assignments to trustees, for the purpose of selling for the payment of debt. But the transmission by confirmation to the executor, or the right acquired and assigned by commissioners of bankruptcy in England, or by the adjudication which in sequestration passes the property of a bankrupt in Scotland to the trustee, is not comprehended within the words, nor is within the spirit, of the provisions relative to sales and mortgages. There is, in such cases, no sale from one subject of the king to another: there is a mere transmission of right as to personal representatives of the owner. Under former Registry Acts it was held in England, that the requisites of those Acts did not apply to transfers, deriving their effects by peculiar provision or operation of law; as assignments by commissioners of bankruptcy to the assignees.¹ And although this decision in some degree proceeded on the peculiarity of the conveyance from the commissioners, as not being from a former owner in the strict terms of the Acts in question, the general principle seems to have been admitted, that the conveyance to the assignees is a conveyance of powers to be exercised in making a transference, rather than itself a transference. I have no doubt that this precedent would be followed both in England and in Scotland. If a question were to arise in bankruptcy with a purchaser or mortgagee, not having got an indorsement till after the right of the English assignees, or of the Scottish trustee, were completed, by assignment in the one case and adjudication in the other, it would seem that the sale or mortgage would be defeated. Bankruptcy alone would not indeed prevent the completion of the mortgage or purchase, by indorsement on the certificate.² But the assignment or adjudication being complete without indorsement, the subsequent indorsement of the bill of sale or mortgage would not seem to avail against the creditors; at least it would not if the term of thirty days from the bill of sale, or from the ship's arrival, had been allowed to elapse without an indorsement.³

¹ Abbot 74; *Bloxham and Assignees of Ward v Hubbard*, 5 East 407; *Yallop ex parte*, 15 Ves. 60; *Hay v Fairbairn*, 2 Barn. and Ald. 196.

² *Dixon v Ewart*, 3 Merivale 322, where, under the former

Acts, the indorsement being an act to be performed by the vendor or his attorney, was not held barred by bankruptcy.

³ In a case on this part of the Act, however (May 1826), I found, in consultation, my opinion opposed by that of two

V.—MORTGAGE OF SHIPS AND DEEDS IN SECURITY.¹

There are two methods of using property in ships as a fund of credit—by mortgage, and by assignment to a trustee, for the purpose of being sold for payment of debt. Both these forms of security are regulated by the 45th and 46th sections of the Act, by [165] which many of the doubts and practical difficulties are removed which attended the doctrine of mortgages under the former Acts.²

It is enacted, that where any transfer of a ship, or share thereof, shall be made as a security for debt by way of mortgage, or any assignment to a trustee for selling the same for payment of debt, the collector and comptroller of customs of the port of registry shall make an entry in the book of registry, and also an indorsement on the certificate of registry, as in the case of a sale; and in such entry and indorsement shall state and express that such transfer was made only as security for the payment of a debt by way of mortgage. The mortgagee is not, by reason of his mortgage, to be deemed the owner of such ship or share; nor shall the person or persons making such transfer be deemed, by reason thereof, to have ceased to be owner or owners, except so far as may be necessary for the purpose of rendering the ship or share available, by sale or otherwise, for payment of the debt for securing which the transfer was made.

Where any transfer of a ship or share shall have been made for security of debt, either by way of mortgage or of assignment, and such transfer shall have been duly registered according to the provisions of this Act, *i.e.* entered in the book of registry, and indorsed on the registry, the right or interest of the mortgagee or assignee shall not be affected by any act of bankruptcy of the mortgagor or assignor after the time when such mortgage or assignment shall have been so registered, although such mortgagor or assignor, at the time he shall become bankrupt, shall have in his possession, order, and disposition, and be the reputed owner of the ship or shares; and the mortgage or assignment shall be preferred to any right, claim, or interest which may belong to the assignee of such bankrupt (sec. 47).

VI.—EVIDENCE IN MATTERS OF OWNERSHIP IN VESSELS OR SHARES.

It was under the former Acts found very inconvenient, on occasion of trials relating to the ownership of vessels, to require the registering officer to attend and bring up the records; to remedy which it has been enacted, 1. That there shall be exhibited, upon request for inspection and examination, the oaths and affidavits, registers and entries; 2. That copies may be taken, or an extract, which, on being proved a true copy, shall be allowed and received as evidence upon any trial at law, without the production of the originals, and without the testimony or attendance of the collector or comptroller, or any one acting for them (sec. 43).

[PRESENT STATE OF THE LAW OF PROPERTY IN SHIPS.

Ships are personal property, and as such are at common law subject to the same general principles of attachment, of transference, and of succession, as other moveables. They are subject to the legal diligence of arrestment and poinding. They pass on the death of the owner to his personal representatives, and not to his heir-at-law. On the marriage of a female owner, the property in them falls under the *jus mariti* of the husband. These

eminent English counsel, who were both of opinion that a trustee in sequestration, or an assignee under an English commission of bankruptcy, must be held, on the strict words of the statute, bound to enter the transference to him in the registry, and indorse it on the certificate, otherwise the right

will be bad. [See the statute 17 and 18 Vict. c. 104, secs. 59, 74, 75; Abbot, 11th ed. p. 59.]

¹ [See the provisions of the Merchant Shipping Act, *infra*, p. 169 sqq.]

² See Trollop's Treatise on Mortgage of Ships.

[and all the other common law principles applicable to moveable property in general apply to ships, except where they are the subject of special statutory provisions. But in this, as in every maritime country, there is a very comprehensive collection of statutory enactments and customary law relating to shipping. Most of these are now consolidated into a few statutes: the Merchant Shipping Act, 1854 (17 and 18 Vict. c. 104); the Merchant Shipping Repeal Act, 1854 (17 and 18 Vict. c. 120); the Merchant Shipping Amendment Act, 1855 (18 and 19 Vict. c. 91); the Passengers Act, 1855 (18 and 19 Vict. c. 119); the Merchant Shipping Amendment Act, 1862 (25 and 26 Vict. c. 63). The extent of prior statutory regulation regarding the mercantile marine of England may be seen from the schedule appended to the Repeal Act of 1854, which contains a list of the statutes repealed to make room for the Consolidation Act of 1854. The repeal of the Navigation Laws, and the introduction of the policy of free trade into shipping, has essentially altered the objects and purposes which a great part of the older statutes was meant to accomplish. The general object of much of the former legislation was to draw a distinction between British and foreign vessels; to secure for British vessels a monopoly in this country of commercial privileges and immunities which greatly augmented the value of British ship property; to render foreign ships liable to alien duties when engaged in neutral trade, and to forfeitures and penalties when engaged in trades of which it was desired to secure a monopoly to British vessels. The fundamental purpose was national defence—the creation of a body of skilful and hardy seamen in the mercantile marine, the seminary from which the supply of our sailors for the navy was drawn; the augmentation of the shipping actually in the possession of the natives of this country; and the encouragement of the skill and industry of our own ship-carpenters, by confining the privileges to ships British-built. When the policy which dictated this legislation was abandoned, the purpose of much of the legislation had ceased to exist; but advantage was taken of the existing machinery to apply it to purposes different from the original, but quite in accordance with the necessities and requirements of a great maritime country. By the Acts above specified, particularly the Merchant Shipping Act of 1854, the tenure, transmission, and burdening of property in British ships has been subjected to regulations which bear a close analogy in principle to the system of registers of land rights. The recent legislation has continued the distinction between British and foreign ships; and it is to the former alone that this system of registration applies. Property in British shipping is allowed to be held by subjects of the British empire only; and all ship property so held is, with a few inconsiderable exceptions, within the compulsory scope of the registry enactments.]

ACQUISITION OF SHIP PROPERTY.—Property in a ship, or share therein, may be acquired by building, by purchase of the ship when built, or by capture. As a general rule, it may be said that, under the provisions of the Merchant Shipping Act, a written title of property in British ships is imperative. Every vessel which is to be navigated as a British ship must be registered before she can get a clearance as a British ship from any British port; yet, as regards the mere property, there is no law obliging the builder of a vessel, as a condition of holding the property of what he has so built, to register it. If he chooses to keep it unemployed, registration or written title is not essential to his right of property. When a man orders a ship to be built for him, it is often a nice question, *when* the property vests in him so as to be effectual against the creditors of the shipbuilder on the shipbuilder's bankruptcy. In the case of *Simson v The Creditors of Duncanson*, the Court of Session held, that where a ship was to be built and paid for by instalments, and where the builder became bankrupt after receiving payment of the first instalment, the work being unfinished on his hands, the property was not in the creditors, but in the person for whom the ship was being built, and that he might have her on paying the balance of the price.¹ This case, however, is contrary

¹ *Simson v Duncanson's Crs.*, 1786, M. 14204; *Sim v Grant*, 1862, 24 D. 1033.

[to the principle of the Scotch law of sale, by which delivery alone passes the property of goods. Under the Mercantile Law Amendment Act, sec. 1, the creditors of the shipbuilder would be bound to deliver upon tender of the price; but until delivery, the vessel is the property of the bankrupt or his trustee. And it may be doubted how far an unfinished ship is within the clause, which only prohibits creditors from attaching goods sold but not delivered where they so remain with the seller *custodiæ causâ*.

Supposing, however, that the vessel is built and already on the register, she may be acquired from the registered owner by purchase and sale. But a transference of a registered ship can only be made in the form and under the conditions prescribed by the Merchant Shipping Act. It is therefore necessary to explain the system of registration of ships as now established by Act of Parliament.

REGISTRATION OF SHIP PROPERTY.—Property in British ships can only be possessed by subjects of the British Crown, and no ship shall be deemed to be a British ship unless she belong wholly to owners of the descriptions specified in the Act, *i.e.* (1.) Natural-born British subjects; (2.) Foreigners made denizens, or naturalized, and either resident within Her Majesty's dominions, or partners in a business carried on there, and who have taken the oath of allegiance; (3.) Bodies corporate established under, subject to the laws of, and having their places of business in, the British dominions. A British subject by birth, who has afterwards taken the oath of allegiance to any foreign state, is treated, in regard to the right of holding property in British ships, as a foreigner. He must, to re-entitle him to hold such property, take the oath of allegiance to Her Majesty of new, and, like a naturalized foreigner, either reside in her dominions or be a partner in some house carrying on business within her dominions, during the whole period of his ownership. The condition requiring residence or interest in a business carried on in Her Majesty's dominions is meant to prevent persons from enjoying the rights and privileges of Englishmen while in reality subjects of another country. It was decided by the English courts prior to this Act, that a corporation carrying on business in the United Kingdom, some of whose members were foreigners residing abroad, might register its ships; and the principle of this decision is now incorporated in the Act.¹ In no legal sense are the individuals owners. The ownership is in the corporation. Although bodies corporate can hold British ship property, yet private firms cannot, though the individual partners should be all natural-born British subjects, or naturalized foreigners capable of holding such property individually. This latter exception is caused, as we shall see, by the necessities of the scheme of registration, which is cognate to our system of registration of land rights. It may be pointed out, that in the particulars just mentioned there is already a similarity between ship and land property in two respects: (1.) A foreigner not naturalized cannot hold landed property in Great Britain; (2.) A private firm cannot hold landed property; but (3.) A body corporate can. These peculiarities of landed property flow from the theory of superior and vassal, which is the foundation of our law of real property; the same peculiarities in the case of British ship property are the result of positive enactment.

With certain inconsiderable exceptions, every British ship must be registered in certain registers kept by the persons mentioned in the 30th section of the Act, and at the places there mentioned. The registration of ships by their owners is not compulsory, but no ship unless registered in the manner specified is a British ship. Yet, by sec. 100, a non-registered ship, though not entitled to any of the benefits belonging to British character, is nevertheless declared subject to payment of dues, and to all penalties and punishment of offences committed on board of her as if she were a British ship. In the United Kingdom the registers are kept at any ports or places approved of by the commissioners of customs, by the principal officer of customs there. In order to identify the vessel, when

¹ *Reg. v Arnaud*, 9 Q. B. 806; and *Reg. v Powell*, 11 Jur. 279.

[she is first put on the register, the owner or owners, or his or their agent duly authorized in writing to make the application for registry, is required to produce to the registrar a certificate by a surveyor duly appointed under the Act, and in the form given in the schedule to the Act. This certificate specifies the tonnage, build, and other particulars descriptive of the identity of the ship. In order, again, to prevent any person or body corporate, other than those qualified to own such ship, from registering her as British, the owners, or their agent applying for registry, must produce a declaration in the form provided in the schedule of the Act, referring to the ship as described in the surveyor's certificate, stating in what way he or they are entitled to hold British property, when and where the vessel was built, etc., the name of her master, the number of shares he holds in her, and a denial that any unqualified person or body of persons is entitled as owner to any legal or beneficial interest in such ship. In addition to these two documents, the applicant for registry must produce a certificate by the builder, if the ship is British-built, as to her tonnage, time and place of building, etc.; and in the case of a foreign-built ship, he must either produce a similar certificate from the builder, or declare his ignorance of these matters, and the impossibility of getting a builder's certificate. Where, again, the ship is one taken from the enemy by our vessels, and condemned and sold, the purchaser, on applying for registry, instead of producing the builder's certificate, will produce an official copy of the decree of the prize court condemning her to be sold as lawful prize of war. These documents being produced, the registrar is bound to register the vessel. He records in the registry book the particulars required by the Act, *i.e.* her name, the port to which she belongs, the details as to tonnage, build, description, etc., and the several particulars as to her origin, given in the documents produced to him, and which serve to identify her; and lastly, the names and descriptions of her owner or owners, and the proportions in which they are interested in her. On the completion of the registry, the registrar grants to the owners a certificate of her registry in the prescribed form, which comprises a statement of the same particulars that are entered in the register book, with the addition of the master's name. By these means the title to ship property is so clear and plain, as to be matter of eyesight on record. But the record being local, and accessible only in the place where it is kept, the advantage of the certificate issued to the owner is, that it in effect submits a duplicate of the authentic register, under the authority of the registrar, to the eyes of people at a distance. It is, however, no part of the title to the ship. It is used by the master, and its functions are confined to the practical purpose of the navigation of the ship, for which purpose it is the authentic evidence, to such of Her Majesty's officers as are entitled to interfere, of the ship's national character. The certificate also provides the means of information in any quarter of the globe, as to some at least of the persons who are responsible for penalties or damage incurred in connection with the ship. These being its purposes, the certificate cannot be detained by the owner or any other person from the master or person entitled to it, for the time, for the purposes of the lawful navigation of the ship. Every change of owners or master must be endorsed on it; and the use, for such purposes, of a certificate not granted in respect to the ship for whose navigation it is used, involves forfeiture of the ship to Her Majesty.

The property of every ship is divided, for the purposes of the register, into sixty-four shares, and these shares cannot be held in severalty by more than thirty-two persons. Nobody can hold less than one sixty-fourth of a ship; nobody can be registered as the owner of a fraction of a share. One or more shares, however, may be held by five,—or fewer, but not more than five persons,—jointly, *i.e.* as undivided property. Joint-owners are considered as constituting one person only as regards the rule making thirty-two persons the maximum number that can be registered as owners. And one of such joint-owners cannot dispose in severalty of the fractional *pro indiviso* part to which his interest in the undivided share or shares extends. The five joint-owners of a share thus form but one person for the purposes of holding or of conveying the share or shares they hold jointly or *pro indiviso*. Individual joint-owners are

[expressly forbidden from exercising any act of disposal over the joint property without the concurrence of the rest. By these restrictions the complexity of fractional details is avoided, and simplicity of title is preserved. With the same view to simplicity, the title of every owner appearing on the register is assumed to be absolute and unqualified. By sec. 43, no notice of any trust—express, implied, or constructive—shall be entered on the register book, or be receivable by the registrar. The registered owner of any ship or share therein shall, it is provided, have power absolutely to dispose of such ship or share, and to give effectual receipts for any money paid or advanced by way of consideration for such disposition of the ship or share. By force of this section, therefore, if any one holds ship property as trustee for another, the trust is not recognised by the register. Although the frame of the statute, by prohibiting private firms to be registered as owners of ships, actually obliges such firms to hold ship property through the intervention of trustees, yet for all purposes of the register—for all questions as to who are the persons in whom the title is vested, and by whom it can effectually be transferred—trusts have no existence. Whoever appears as owner on the record, is absolute owner to all third parties; and any person is entitled to deal with him as such on the faith of the record, and to pay the price for and take a transference of the ship or share from him. Such being the relation in which a registered owner, whether holding for himself or for another, stands to third parties, what remedies have the parties for whom he is engaged as trustee against him? This matter is regulated by a subsequent statute—the Merchant Shipping Amendment Act, 1862, sec. 3. That section provides that no prejudice is to be created thereby to the provisions of the principal Act for preventing notice of trusts from being entered in the register book, or received by the registrar: it provides also that no prejudice is to be done to the powers of sale and disposition, and of granting effectual receipts conferred by the principal Act on registered owners: it also provides that no prejudice is to be done to the provisions which exclude unqualified persons from the ownership, avowed or latent, of British ships. Subject to these declarations, it provides that equities may be enforced against owners of ships (*i.e.* against the persons appearing as such on the register), in respect of their interest therein, in the same manner as equities may be enforced against them in respect of any other personal property. The equities here referred to are obviously the equitable and beneficial interest as opposed to the legal title of property. Thus, if a shipowner dies and leaves his estate to trustees who register as owners, and directs that his ship, in certain events which afterwards happen, be made over to a legatee, so soon as the specified event happens, and the legatee is entitled to have the ship made over to him, the equitable or beneficial interest vests in the legatee. If the trustee has the legal estate, *i.e.* if he is in the position of registered owner, the legatee may bring an action to compel him to execute a transfer in his favour. If the property has been sold, an action will lie against the trustee for breach of trust, in availing himself of his legal powers to sell, in violation of the trust purposes. Thus, in all questions purely between the trustee as legal owner and the legatee as vested with the equitable right, and which do not affect third parties, such equities may be enforced. It appears, further, that if a purchaser from a trustee, at the time of the purchase and transference, had notice of the trust or other qualification of the vendor's title, he will be deemed a partaker of the fraud of the trustee in selling, and the equity vested in the legatee may be enforced against him on the ground of his being conscious of the fraud, just as it might be enforced against the trustee himself.¹ Yet, as the power to pass an absolute title lay with the trustee as registered owner, his transference appearing on the register even to a fraudulent acquirer will hold the latter out to the world as absolute registered owner; and a third person who has no notice of the obligations of the trustee, and no knowledge of the transfer of these liabilities to the fraudulent purchaser, will be entitled to deal with either on the faith of the register.

¹ *La Neve v La Neve*, 2 White and Tudor's L. C. 3d ed. 39, notes.

[But no such equity in respect of the *ownership* of a British ship, can be acquired by any one who is not legally qualified to hold property in British ships. The third section of the Amendment Act, providing for the enforcement of equities against the registered owner, expressly guards against any prejudice to the provisions in the principal Act relating to the exclusion of unqualified persons from the ownership of British ships. And the principal Act itself makes it imperative on every owner applying for registration to emit a declaration that no unqualified person or body of persons is entitled to any legal or beneficial interest in the ship, or any share therein. Beneficial interest is declared by the third section of the Amendment Act of 1862 to include all equitable interests: therefore no equitable interest in a British ship, or a share of such ship, can be held by any unqualified person; and British law will not enforce any such interest against the registered owner at the instance of a person not qualified to hold property in British ships.]

Such being the nature of the legal title in the person who stands on the register as owner of a ship, he may transfer that title, or he may mortgage it, but he can only do so in the forms provided by the Act. The only two deeds affecting the legal title of the registered owner which can appear on the register, are a deed of transference or transmission of the ownership from him to another, or a deed of mortgage, which creates a burden on his right of ownership, in the nature of a security for a loan or other valuable consideration.

SALE OF SHIP PROPERTY.—The 55th section provides that a registered ship or any share therein, when disposed of to persons qualified to be owners of British ships, shall be transferred by bill of sale in the form of the schedule, or as near thereto as circumstances permit. A bill of sale in any other form, or containing any particulars other than those in the schedule, cannot be recorded, unless by the special direction of the commissioners of customs. As the bill of sale must enter the register in order to make the purchaser's title good against all the world, the statute has made the form of it comprehend all those particulars necessary to make the identity of the ship unmistakeable, and to secure the continuity of the series of the titles and securities relating to it. The form for these purposes contains the description of the vessel given in the surveyor's certificate produced to the registrar when she was first put on the register book, or such other description as may be sufficient to identify her to the satisfaction of the registrar. It then goes on to set forth, that 'I, A B, being owner of shares in the ship above particularly described, in consideration of £ paid to me by C D, hereby transfer to the said C D the said shares.' And then there is a clause in which A B covenants with C D that he has 'power to transfer the shares, and that they are free from incumbrances, save as appears by the registry of the said ship. In witness whereof,' etc. This is the form in the schedule; but the commissioners of customs, under sanction of the Board of Trade, have issued an amended form, which appears preferable in this respect, that it includes a transfer not only of the ship, which is all that the statutory form allows to be included, but also 'of her boats, guns, ammunition, small arms, and appurtenances.' This seems necessary, because questions have frequently arisen as to sales under the general word 'ship,' whether this or that passed to the purchaser by the contract. Thus the writers on maritime law hold that the boats are not conveyed by the word ship. In one case¹ common ballast on board at the time of sale did not pass under the word *furniture* of ship, for the place and purpose of it might be supplied by merchandise; and in another case² ballast known as *kentledge* (pig-iron ballast laid on each side of the keelson) did not pass by a sale of the ship with all her stores, tackle, apparel, etc. The purchaser ought, therefore, if he has any doubt about any special things being capable of conveyance under the words in the form, to make a separate contract as to these. If these are really parts of the ship, the form will carry them; if not, they do not require to enter the register, as not being parts of the ship, and they may pass by any form competent

¹ Kinter, Leon. 46.

² *Lano v Neale*, 2 Starkie 105.

[to convey other moveable property. The statutory bill of sale is to be executed in the presence of, and be attested by, one or more witnesses. It requires no stamp (17 and 18 Vict. c. 104, sec. 9). The transfer is made simply 'by A B to C D.' No statement is permitted of any character in which C D is to hold the property. So, if the transfer is to C D, E F, and G H, the owner can only transfer to them 'jointly:' he cannot say, 'to C D, E F, and G H, as copartners.' The statutory form also permits of no warranty or representation being inserted in the bill of sale, although it may have been part of the bargain. The only permissible conditions are the warranty of title to transfer, and against incumbrances other than those on record. Now, it is an established principle of the common law, that verbal representations or warranties made with respect to a contract afterwards reduced to writing, are held to be discharged or passed from if they are not introduced into the written contract. By the statutory form all such prior communings are excluded from the bill of sale, and therefore it would appear that if the purchaser buys on the faith of them, his only remedy or protection is to see that they are true before he takes the bill of sale and pays the price. If he relies on them, and finds after taking the bill of sale that the representations are false or the warranties not complied with, he has no ground of action; for they do not appear in the final written shape to which the parties reduce their bargain.

The bill of sale, when duly executed, must be produced to the registrar at the ship's port for registry. Until the bill of sale is recorded, the absolute disposing power remains in the seller, whose name stands on the record as vested with the property (sec. 43). When the registered owner, then, executes two bills of sale in favour of different purchasers, he who first records his bill of sale is the owner.

Before a purchaser or transferee holding a bill of sale can have it recorded, something more is necessary than mere production to the registrar. The transferee must make a declaration in the form provided in the schedule. The object of this declaration is to prevent any unqualified person in whose favour a bill of sale may be granted from appearing on the register as owner of property in British ships. The declaration, therefore, states the applicant's qualification to hold such property, and contains a denial that any unqualified person or body of persons is entitled as owner to any legal or beneficial interest in the ship, or any share therein. Any person making a false declaration of qualification (whether his own or another's) to hold British ships, is declared guilty of a misdemeanour, and the ship or shares in respect of which such false declaration is made shall, to the extent of the declarant's interest, be forfeited to Her Majesty; and if he make the declaration on behalf of others, and it be not proved that he had no authority from them to make it, their interests are also forfeited (sec. 103). On this declaration and bill of sale being produced to the registrar, he records it, and endorses on the bill of sale the fact of registration, with the day and hour thereof. The statute provides (sec. 57) that all bills of sale shall be entered in the register book in the order of their production to the registrar. Suppose that an owner has sold and granted bills of sale to two parties, and one has got his bill of sale recorded, then the question may arise whether the registrar is entitled to record the other when produced to him, whether he is entitled to refuse it, or whether he is bound to record it *valeat quantum*? In *Orr v Dickinson*¹ (a case under this Act), it was held that if any bill of sale is a nullity, or the registration itself is invalid or fraudulent, the register may be vacated by order of a court of equity because of the nullity of the transaction. Suppose, then, that one of the two bills is a nullity, say the one first recorded, unless the nullity appears on the face of it, how is the registrar in a position qualifying him to judge whether the second bill, if recorded, would or would not carry the property? Mr. Maclachlan says it is his duty, if one bill is recorded, to refuse the other, because the last registered person is owner; and the bill second produced not being granted by that person, but by the person registered previously to him,

¹ *Orr v Dickinson*, 1 Johnson 1.

[it is plain that the second bill is bad. But this opinion cannot be reconciled with *Orr v Dickinson*. The first bill may be a nullity, and incapable, though recorded, of carrying the ownership to the person in whose favour it is granted. If that be so, as for aught the registrar knows it may be, why should not the second transferee have his bill recorded *valeat quantum*? Mr. Maclachlan says that the registrar is not entitled to record any bill unless it be in proper form duly executed, and *correspondent with the state of the register book at the time*. The 57th section, to which he refers, undoubtedly supports the opinion that it is only bill of sale 'duly executed' which the registrar is bound to record; but the words 'duly executed' mean no more than executed in the form of the statutory schedule, and duly witnessed as required by the Act. There is no warrant for Mr. Maclachlan's other condition, that the bill of sale must be correspondent with the state of the register at the time; nor is there any right on the part of the registrar to say that the second bill is bad, as being granted by a person having no title to grant it. He obviously cannot say so, because although there is another bill already on record, granted by the same owner as the one produced for registration, he cannot be certain that the first bill is not a nullity. The refusal on the part of the registrar to record an instrument presented for registration may be the subject of an appeal to the commissioners of customs. Any omission on the part of the registrar would not, it seems, invalidate the transfer.¹

Such, then, is the method by which a purchaser's title is completed to a British ship, if he is qualified to hold property in British ships. But a British ship may be sold to a foreigner, a person not qualified to hold British ship property. In that case a bill of sale cannot be recorded in his favour. The statute (sec. 53), however, provides that whensoever a registered ship, by reason of a transfer to persons not qualified to be owners of British ships, ceases to be a British ship, every person who at the time of the transfer owns such ship or share therein, shall immediately give notice to the registrar, who shall make an entry thereof in his register; and the master must at once, if in port, or if not, within ten days after his arrival in port, deliver up the certificate of registry which he uses in navigating the ship as evidence of her British nationality. A British ship must be wholly owned by British qualified owners: a valid transfer may be made of the whole vessel, or of any share in her, to a disqualified person; but in either case the vessel ceases to be British, and must be taken off the register, and must cease to use the British flag, or to assume the British national character, under the penalty of forfeiture of the whole ship to Her Majesty (sec. 103). The only assumption of British character which is not visited by forfeiture is, when it is assumed to avoid capture by an enemy. It is therefore of the first importance to a purchaser of a share in a British ship, to see that no unqualified person owns any share in her; and it is of the same importance to co-owners of the seller of a share, to see that he transfers no interest to any disqualified person, for this involves her loss of national character, and, it may be, the forfeiture of the vessel.

Here it may be asked, What are the privileges of British ownership and British national character? British ships are entitled to the protection of the British Government, and to the protection of British consuls and forces in all quarters of the world, and against all aggression on British rights. Without registration the vessel is not entitled to use the British flag, nor can any vessel clear out of any British port with the character of a British vessel unless the master holds a certificate of her registration as a British vessel. Again, there are some trades in which no foreign vessel is permitted to engage. No goods or passengers can be carried from one part of any British possession in Asia, Africa, or America, to another part of the same possession, unless in British ships (sec. 163 of Customs Consolidation Act, 1853; 16 and 17 Vict. c. 107). Under the Navigation Laws, duties were imposed on all foreign shipping entering our ports, and foreign vessels were excluded from our coasting

¹ *Ratchford v Meadows*, 2 Esp. 69; *Heath v Hubbard*, 4 East 110; *Underwood v Miller*, 1 Taunt. 387; *Thompson v Smith*, 1 Madd. 395.

[trade, that is, from carrying between one part of the United Kingdom and another. By the Act of 1855, 18 and 19 Vict. c. 96, sec. 1, foreign vessels were admitted to our coasting trade under the same laws, rules, and regulations as our own; and by sec. 14, no foreign ship or goods carried therein are to be liable to any higher or other dues or restrictions than British ships so employed, or than goods carried therein. But by sec. 15 Her Majesty has the power, by an order in council, of imposing similar prohibitions and restrictions on foreign ships employed in our coasting trade, and duties of tonnage on all foreign ships or on all goods or any specified classes of goods imported or exported in those ships, as provided in sec. 324 of the Customs Consolidation Act with regard to foreign trade. By sec. 324 of the Customs Consolidation Act, Her Majesty, by order in council, may impose these prohibitions and restrictions and duties on foreign ships of any country, and goods therein imported or exported into or from any part of the United Kingdom or any British possession in any part of the world, so as to place these foreign ships on as nearly as possible the same footing in British ports as that on which British ships are placed in the ports of the foreign countries to which the vessels in question belong, and so as to countervail any disadvantages to which British trade or navigation is subjected by the regulations of such foreign countries. These are the chief matters regarding freedom of trade in which British vessels have or may have an advantage over foreign vessels. Under the Merchant Shipping Act, 1854, sec. 516, the statutory provisions limiting the responsibilities of shipowners in certain cases were applicable only to the owners of British vessels; but this privilege was done away with by the 64th section of the Merchant Shipping Amendment Act of 1862, which extended the existing limitations of liability to the owners of all vessels, whether British or foreign.

TRANSFER OTHERWISE THAN BY SALE.—We have seen how a purchaser, qualified or disqualified, may complete his title to a ship. But ship property, like all other property, requires to be transmitted in consequence of the death of owners, of the bankruptcy of owners, or in consequence of the marriage of a registered female owner. On the death of the owner without any settlement, the succession passes to his executors or heirs *in mobilibus*; if he leave a settlement, to his appointees; on his bankruptcy, to his trustee for behoof of his creditors; on the marriage of a female owner, the property in the ship falls under the *jus mariti* of her husband, and becomes his. In order, however, to maintain the completeness of the register, it is necessary that all these transmissions of the property enter the record, and the statute has not overlooked them.

In case of such transmissions of the right to a registered ship, the registration of the title acquired by the person to whom such right is transmitted is a condition precedent to his disposing power in regard to the ship. Before registration, the applicant for registry must authenticate the transmission of the right by a declaration made in the form in the schedule, containing the description of the ship, the statement of the applicant's right or qualification to hold British ship property; and, in addition to these, a statement describing the manner in which, and the party to whom, the property has been transmitted. Thus, in the case of a declaration by a legatee to whom the ship has been left by will, the declaration sets forth the death of the testator, and the fact of his having left a will whereby he bequeathed the ship to the applicant; so, in the case of a trustee in bankruptcy, it will set forth the sequestration and the act and warrant in his favour, transferring and confirming the right to the ship to and in the trustee. In the case of a marriage, the husband will set forth the marriage, and the fact that thereby the property became by law vested in him, and that he is entitled to be registered as owner. An executor to an intestate will set forth his confirmation as executor, and so forth. The 58th section makes the same provision, not only for cases of transmission by death, bankruptcy, and marriage, but also '*by any lawful means other than by transfer,*' or bill of sale from the owner. This will comprehend all cases of legal diligence; as, where a ship is pointed by a creditor, the creditor will make a similar declaration narrating the particular steps of legal diligence which transferred the property

[to himself. And in all cases the declaration will contain the denial that any unqualified person or bodies of persons have any ownership, legal or beneficial, in the ship. Along with this declaration, the statute requires that there be produced to the registrar, in the case of bankruptcy, such evidence as may be receivable in courts of justice of the title of the parties claiming as trustees or otherwise; in the case of marriage of females, a copy of the register of marriage, or other legal evidence of the marriage, and of the identity of the female owner; in the case of a transmission by testamentary instrument, or by intestacy, the will, or a copy thereof which would be evidence by the law of Scotland, or the extract testament dative, or other legal evidence capable of proving the title of the claimant upon an intestacy. In the case of insolvency, which would include probably all transmissions by legal diligence, the registrar will require legal evidence of the transmission of the property to the creditor, which will be the extract decrees, charges, etc., necessary to operate the transference. On production of the declaration with the requisite evidence, the registrar is bound to register the persons entitled under this transmission as the owner or owners of the ship; and such persons, if more than one, shall, however numerous, be considered only as one person as regards the maximum number of owners entitled to be put on the register (sec. 60).

But death, or marriage, or legal diligence may transfer the right to one not qualified to hold British ship property. In this case, sec. 62 provides that, if the ship is registered in Scotland, the Court of Session may, on the application of such unqualified person, order a sale of the property so transmitted, and direct the proceeds to be paid to the applicant or otherwise as the Court may direct. Every order for sale made by the Court in such cases is appointed to contain a declaration vesting the right to transfer the ship or shares to be sold in a nominee of the Court, who shall thereupon be entitled to transfer as if he were registered owner, and every registrar is to obey the requisition of such nominee as he would do that of the registered owner (sec. 63). Such application must be made within four weeks after the death or marriage, transmitting the property to the unqualified owner, or within such further time as the Court may allow; and if no application be made, the ship or share so transmitted shall be forfeited. The Court may, however, in its discretion, refuse to grant any order of sale, as it probably would do in the case of an alien enemy making the application, and in case of refusal the property is forfeited to the Crown (sec. 64).

If, after the execution by a registered owner of a bill of sale, but before its registration, it should happen that the registered owner died, or became bankrupt, or was married, and a transmission of the property took place, and the transferee by operation of law got his acquired title recorded first, that title being in no way inconsistent with or adverse to the claim of the transferee by bill of sale, it seems to be the result of the English cases that a court of equity in England, and no doubt also, on the same principles, the Court of Session in Scotland, would have no difficulty in ordaining the executor, trustee, or husband whose name is on record, to grant a new bill of sale, or to do all things necessary to perfect the title intended to be conveyed by the bill of sale granted by the prior registered owner. And by sec. 65 the courts have the power, on summary application, to issue an order prohibiting for a time to be named therein any dealing with any ship or share; and, on intimation of such order, no registrar will record any deed affecting such ship or share granted by the party prohibited. In the event of any transferees by law placing their title on record before the transferee by bill of sale from the testator, the latter may, while he brings his action to have them decerned to complete his title, prevent them from exercising their power of transferring the property to a third party, from whom, if he had no notice of the claimant's rights, the claimant would not be able to recover the ship. If it should be found that the registrar is not entitled to register two bills of sale by one party, the second applicant may, on showing *prima facie* grounds that the first recorded bill of sale is a nullity, or that the registration is a nullity, be entitled to a remedy by interdict against his disposing of the property in virtue of his standing on the register as owner until the reasons on which

[his title is challenged shall be determined. The Court has power to annex conditions of caution or otherwise to the granting of any such order.

Again, suppose a bankrupt, within sixty days of his bankruptcy, or in violation of the Acts 1696 or 1621 for preventing fraudulent alienations by insolvents, and fraudulent preferences, should transfer his ship property, the trustee or creditors may no doubt effectually reduce and set aside the deed of transference, and by decree of Court vacate the registry of the transferee's title, should the title still appear on the register in the person of the immediate transferee of the bankrupt.¹ The transferee may also be interdicted from putting away the property, until the action of reduction, or other legal proceedings to set aside his title, can be brought and decided.

MORTGAGE OF SHIP PROPERTY.—We have thus examined the ordinary mode by which property in British ships is transferred—whether by sale or voluntary conveyance by the registered owner, or by operation of law, as in the cases of death, bankruptcy, marriage, and legal diligence. Before explaining another method, intended to facilitate transactions regarding ship property, to be carried out in foreign lands, we proceed to consider the ordinary mode of burdening British ship property by mortgage or deed of security for a loan or other valuable consideration.

The registered owner of a British vessel may grant such a security in the form of a mortgage over the vessel. The instrument must be in the form given in the schedule to the Act, or as near thereto as circumstances permit, and mortgages of ships can be made in no other manner.² The Act itself (18 and 19 Vict. c. 91, sec. 11) provides that, if the mortgage be made in any form, or contain any particulars other than the prescribed form, no registrar can be required to record the same, without the express direction of the commissioners of customs. The form given in the Act embodies, for the purpose of identification, the surveyor's certificate of the vessel; acknowledges receipt of the loan; binds the owner to repay it with interest; and in security of repayment, 'mortgages' to the lender the shares of which the borrower is owner in the ship therein described. It contains a covenant against incumbrances, save what appear on the register. It requires, though the Act is silent on the subject, the usual witnesses; and by 17 and 18 Vict. c. 104, sec. 9, it requires no stamp. As between the grantor and grantee, registration does not appear to be compulsory, although it undoubtedly is so in all questions with third parties. On production of a mortgage to the registrar of the ship, he is bound to record it in the register book. All mortgages are to be recorded in the order in which they are produced to the registrar; and he notifies the fact of registration thereon in a certificate, stating the day and hour of registration. If more than one mortgage of the same ship or share are registered, the mortgagees are entitled to priority one over the other, according to the date of recording, whatever be the dates of the respective instruments, and whatever notice—express, implied, or constructive—the first registered mortgagee may have had of the prior existence of any mortgage recorded after his own (sec. 69). A mortgagee does not require to make any declaration such as is required from a person claiming registration as an owner. There is no restriction in the Act against a person who is disqualified from being the owner of British ship property, holding a mortgage over it. A mortgagee is not, by reason of his mortgage, to be deemed the owner of the ship or share mortgaged; nor is the mortgagor deemed to have ceased to be owner, except in so far as may be necessary for making such ship or share available as a security for the mortgage debt (sec. 70). This enactment puts an end to the questions which arose under the earlier statutes as to the liabilities attaching to the legal interest in the ship, which under those statutes were vested in the mortgagee without any qualification or reserve. But in order to make his security available, the mortgagee has power, in virtue of the Act, absolutely to dispose of the ship or share in respect of which

¹ *Anderson v Western Bank*, 14 Jan. 1859, 21 D. 250.
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² *Liverpool Borough Bank v Turner*, 6 Jur. N. S. 935.
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[he is registered; and to give to any person purchasing from him, receipts for the price, which shall be effectual to defend the purchaser against any action at the instance of the owner or others, and to exempt him from the necessity of seeing to the application of the price. If a surplus should arise on such a sale over what is required to pay the debt and consequents, the mortgagee will hold such surplus as trustee for the owner and subsequent mortgagees according to their rights.¹ But if there be more mortgagees than one, it is only the first who is entitled to sell. No subsequent mortgagee can exercise this power, unless with the concurrence of all the prior mortgagees, or under an order of Court. A mortgagee, however, is so far the owner, that he is entitled to the accruing freights and other benefits,² but his responsibility for work and service done to the ship depends on a different principle; and although he is declared by the present Act only to be an owner in a qualified sense, yet he may make himself liable as owner, if he has acted in such a way with reference to ship's furnishings as shows that the credit was given to him. A mortgagee may also, it seems, enter into the possession and use of the ship:³ at least such was Lord Hatherley's opinion, although there is nothing directly authorizing this in the statute. But a mortgagee who takes possession for the purpose of sale is bound to use the care and diligence of a prudent man, in order to sell to the best advantage; and if he employ the ship meanwhile in a speculative adventure with loss, the loss will fall on himself.⁴

A registered mortgage may be transferred by the creditor to another, just as a bond over land may be transferred. As the original mortgage itself may be held by a person disqualified to hold the ownership of British ship property, so it may be transferred to a disqualified person. The instrument by which the transfer is made must be in the statutory form, which requires to be registered in the same way as the original mortgage, in order to vest in the assignee a right valid and indefeasible, as against either the assignor or third parties. So, also, when the interest of the original mortgage, or of any registered owner of a mortgage, becomes transmitted in consequence of death, bankruptcy, marriage, or any lawful title other than transfer, the legal title to the mortgage is to be transmitted in the same way as the title to ownership is transmitted in similar cases, the person in whom the interest vests making a declaration as to the means by which, and the person to whom, the interest has passed, in the same form as is required in the case of a change of ownership, except that no declaration of qualification to hold British ship property is required. Evidence must be produced to authenticate the transmission of the interest; and on production of the declaration and evidence, the registrar will enter the name of the person or persons entitled under such transmission as the mortgagee or mortgagees. Although nothing is directly said on the point in the Act, there is no doubt that where two transfers of a mortgage are granted, it is the first recorded which carries the legal title; but whether express, implied, or constructive notice of a prior dated assignment would apply to the holder of the first recorded transference of a mortgage in the same way as prior notice does between two competing transferees of ownership, or whether, on the contrary, the exclusion of such notice would apply to the transference as it does to the constitution of mortgages, the Act does not explicitly determine. When a mortgage is satisfied, the registrar, on production of the mortgage deed, with a receipt for the mortgage money endorsed thereon duly signed and attested, is required to make an entry in the register book of the fact that the mortgage has been discharged; and '*upon such entry*,' says the statute, 'the estate which passed to the mortgagee shall vest in the same person or persons in whom, having regard to intervening acts and circumstances, the same would have vested if no such mortgage had ever been made' (sec. 68). If a man stand as mortgagee of a ship on the face of the record, but has been paid his debt, he cannot, it would seem, transfer that mortgage to an assignee, so as to convey to him an effectual interest in the ship. A creditor infert in a bond and disposi-

¹ *Tanner v Heard*, 3 Jur. N. S. 427, Rolls.

² *Cato v Irving*, 21 L. J. Ch. 675.

³ *De Mattos v Gibson*, 7 Jur. N. S. 282.

⁴ *Marriott v The Anchor Reversionary Co.*, 30 L. J. (Ch.) 122.

[tion in security, of which the debt has been paid, cannot, although the record contains no registered discharge, give a valid title to an assignee, who, nevertheless, may have been relying on the absence of any registered discharge extinguishing the security, and presuming therefore that it subsisted. That is a matter against which it is held the register affords assignees of land securities no protection. It is the same with an assignee to a mortgage over a ship. The payment extinguishes the security along with the debt itself, and reinvests the proprietor with the full right and unburdened property of the vessel. On principle, this effect certainly follows; yet it has been observed that the 68th section seems to say (it does not unequivocally say, but it may in one view be taken to say) that it is only on entry of the discharge of the mortgage in the register that the estate held by the mortgagee re-vests in the owner of the ship. The better opinion is, however, that nothing but unequivocal words in the statute to that effect could continue the mortgagee's right in the ship after the debt itself was paid off; and therefore, that although it will be every owner's interest to see a discharge duly noted in the register, that is not necessary to disburden the ship of the security.

SALE AND MORTGAGE PROCEEDING ON CERTIFICATE.—The ordinary method of conveying or burdening the property of registered ships, which has now been examined, is obviously intended for those who are resident in this country, and have access to the register book kept at the ship's port of registry. The declarations required are, for instance, all to be made by the person who receives the property in presence of the registrar, if the declarant reside within five miles of the port of registry, and if beyond that distance, by any registrar or justice of the peace. Many persons, however, not resident in the country of the port of registry, will require to deal in British ship property either as purchasers or lenders on mortgage. These persons have no convenient access to the registry to examine the state of the title; and even if they depute agents in this country to examine the record, and these agents send them out written reports, such a report may, before it reaches the intending purchaser or lender in a foreign country, be rendered valueless by the owner in the meantime granting, and the purchaser recording, a transference or mortgage prior in date to that of the foreign purchaser or lender.

In order to facilitate the commerce in ships, and the obtaining advances on the security of ships in distant countries, a certain machinery has been devised consisting of what are called certificates of mortgage and certificates of sale. These are not to be confounded with the ship's certificate of registry as a British ship, which the captain is to use while navigating the ship as a proof of her British nationality, and her title to British protection.

The certificate of mortgage is a device or expedient for placing the register with all its contents authentically before the eyes of an intending mortgagee in a distant country—too distant conveniently to communicate with the port of registry; and for enabling that mortgagee to deal with the owner on the footing that, whatever deeds may be granted by the owner at home after the date of that certificate, they cannot affect his mortgage, which, on the contrary, will rank in the order of priority precisely as if it were recorded at the date of the certificate. The registration of the certificate at the same time is a notice to people inspecting the register, of the chance that their rights may be cut down by deeds executed abroad, but not yet brought home for registration. The owner records in the ship's register notice that he has executed a deed giving power to certain specified persons to mortgage the ship for a specified amount, and of the time within which, and the places at which, the same may be exercised. The registrar gives a certificate of the state of the ship's register down to the date of recording this notice, and to this certificate is appended the deed of powers. Any mortgage granted by the person named within the time and not exceeding the sum specified is, in terms of the statute, to have priority over mortgages granted by the owner subsequent to the date of the notice that such powers had been granted to be exercised abroad. By this machinery the person abroad sees how the register stands down

[to the moment at which the power of mortgaging in his favour is granted : he knows that his own mortgage will rank next, and all other deeds subsequent to his own; and the public at home, on searching the record, and finding the notice of the grant of powers to be executed abroad standing in the register, though they do not know that the power has actually been exercised, nevertheless see and learn enough to make them act with caution, since they know that a mortgage made abroad in virtue of that power will rank preferably to any deed the owner may grant them in the meantime. In like manner, an owner may grant a power of sale instead of a power to mortgage; and deeds of sale and transfer executed in pursuance of such a power, will rank as of the date when the notice of the granting of the power is put upon the record. No certificate of mortgage or sale can be granted so as to authorize any mortgage or sale to be made in pursuance thereof at any place within the United Kingdom, if the vessel's port is there; or to be exercised within the same British possession in which her port of registry is situated. In either case, the power given, whether to sell or to mortgage, must be exercised in strict conformity with the deed conferring it; it must be exercised by the person named in the deed as intended to exercise it; it must, in the case of a power to mortgage, be for a sum not larger than the maximum sum authorized by the deed of power to be borrowed on the security of the vessel; and in the case of a sale, it must not be for less than the minimum price authorized to be taken for her. It is further provided that no mortgage or sale *bona fide* made shall be impeached by reason of the person by whom the power was given dying before the making of such mortgage or sale. *Bona fides*, it is presumed, means ignorance of the mandant's death. So also, in the case of the owner's bankruptcy, if the sale or mortgage is tainted with *mala fides* on the part of the receiver, or if he had notice of the bankruptcy, the transaction will be liable to be set aside at the instance of the creditors, on the ground that the power was brought to an end by the bankruptcy, and the receiver cannot plead *bona fides* and ignorance to exempt the case from the operation of the general principle that the deed must be null as granted after a recall of the power to grant it. Even *bona fides* and want of notice of the bankruptcy is not always enough under this Act to support a deed granted after the bankruptcy. The statute only provides that such a deed shall not be impeached if made and received in *bona fide* without notice, and when the power of granting is limited to a certain specified place or places, and to a certain specified time not exceeding twelve months from the registration of the certificate of powers, and when (of course) the power is exercised in conformity therewith, at the place and within the twelve months specified. The statute does not make any provision for or against a case of *bona fides* and want of notice when the power is granted to be exercised (as it may competently be) anywhere out of the United Kingdom, or possession where the ship's port is, and without any limit as to time. This case is left to the operation of the ordinary rules of law, unless we are to *infer* from the express provision made for supporting *bona fide* onerous deeds taken without notice of the bankruptcy at a place specified in the certificate of power, and within twelve months of the date thereof, that no other deeds are to be supported against challenge on the ground of recall of power by the bankruptcy. There is another case to which the statute makes no reference: it is the supervening insanity of the granter of the powers before the execution of them. Notice of insanity will apparently nullify any deed taken after its receipt, but such notice would require to be proved by the challenger; for the fact has no element of notoriety about it such as may be predicated of death or bankruptcy.

Supposing the mortgage or sale to be validly constituted as *jus ad rem* by the agent or mandatory abroad, what requires to be done in order to make the one or the other effectual as a right of property? The requisites are different according as it is a mortgage or a sale that is in question. When a mortgage is granted in virtue of a certificate of mortgage, a record of the mortgage requires to be endorsed thereon by a registrar or British consular officer abroad; and on receipt of the endorsed certificate, the registrar at the home port is

[bound to record in the register book any undischarged mortgage appearing thereon, in such manner as to preserve its priority over mortgages or other deeds granted after the powers were issued. Having thus entered the mortgage, he is to cancel the deed or certificate of powers itself, and enter the fact of its cancellation in the register book, which voids the powers for ever *quoad* all future exercise of them. Every mortgage which is so registered on the certificate shall have priority over all mortgages of the same ship or share which are created subsequently to the date of the entry of the granting of the powers made in the ship's registry at home; but it would seem that, if not so endorsed on the certificate, the subsequent mortgagees or vendees are not affected by it, just as an unrecorded bond would not affect the property. If powers have been issued to mortgage, say to the extent of £1000, it is competent for the mandatory to grant one or more mortgages amounting in whole to the sum specified. If two or more mortgages are granted, they all, when recorded on the back of the certificate of powers in virtue of which they are created, take precedence of others granted subsequent to the notice on the ship register of the issue of these powers; but in any question of priority *inter se*, they rank one before the other in the order in which they are endorsed on the certificate, just as, if granted at home, they would rank in the order in which they are entered in the register; and no notice, express, constructive, or implied, to the holder of the last dated but first endorsed mortgage, that the competing mortgage has been granted, although not endorsed on the certificate, is to be of any effect in determining questions of priority. Unless the first dated mortgage is on the certificate of powers, to show to all who are asked to lend on the faith of it how far these powers have already been exhausted, the lender is not bound to take any heed of the prior mortgage, though he knows of its existence. And if, after lending on the faith of the unexhausted certificate, the second lender parts with it before getting his mortgage endorsed thereon, and so allows the first lender to have his mortgage first registered after all, the second lender will lose his chance of priority in consequence of his negligence. Subject to these rules, the mortgagees under a certificate of powers who have got their mortgages registered on the back of the certificate, have the same rights and powers, and are subject to the same liabilities, as if their mortgages had been registered in the home register, instead of upon the back of the certificate. If a mortgage is discharged before the certificate of powers is returned to the home registrar, and the mortgages endorsed thereon are recorded in the home register, the discharge may be endorsed thereon by any registrar to whom the certificate is produced; but afterwards it must, of course, be recorded in the ship's home register. The statute contains no provision requiring the certificate of powers on which mortgages are registered to be produced to the home registrar, and cancelled within any given time, or at all; nor is it essential to the validity against the world, of a mortgage granted under such certificate of powers, that it should ever be transferred from the certificate into the ship's home register,—the reason being, that people dealing on the faith of the home register, see that the powers were issued of a certain specified date, and must act on inquiry, or on the assumption that the powers have been exercised. Suppose a ship is worth £10,000, and powers of mortgaging abroad for £2000 have been issued, and noted on the ship's register, of course the owner's hands are not tied up from granting mortgages at home; and there being a margin of £8000 free, even if the powers should be exercised abroad, people may be found willing to lend on mortgages which will be postponed to those granted abroad, or the owner, after granting the powers, may sell the ship at home. Each subsequent mortgage or bill of sale will, of course, be in the form of the Act, but there is a little difficulty as to the form of the clause of warrandice against prior incumbrances. The use of the statutory form is essential, and the clause must contain nothing beyond what the Act allows; but that form is only, 'I covenant that I have power to mortgage as aforesaid, or to sell, and that the ship or shares are free from incumbrances, save as appears by the registry of the said ship.' But what if the foreign mortgage is not on the registry of the ship, but only on the back of the certifi-

[cate? In that case the warranty would not literally except these foreign mortgages; but would the home mortgagee or purchaser be entitled to insist on the warranty against the grantor, and maintain that he is bound under it to clear off the foreign mortgage, because the warranty only excepts the incumbrances that appear on the home register? In all probability, the courts would construe the issue of powers to mortgage appearing on the register as an incumbrance on the title, and would hold the prospective or actual exercise of it as excepted in the warranty.

Where, again, the certificate issued is a certificate of power to sell, it has this peculiarity, that it must be for a sale of the entire ship: it cannot be issued for the purpose of selling only a part or certain shares of a ship. The ship, when sold under such powers, is required, if the sale abroad be made to a person qualified to hold property in British ships, to be registered anew; and for the purpose of getting her registered anew, the bill of sale, the certificate of powers to sell, and the ship's certificate of registry, are to be produced to the registrar of the port where she is to be registered anew (which may be any port the purchaser thinks proper, abroad or at home, but it will always be done at the nearest port abroad); and on production of these documents to him, the new registrar is to endorse on the certificates of sale and the ship's certificate an entry of the fact of a sale having taken place, and he is to forward them to the home registrar, who thereupon makes a memorandum of the facts in his register, and so closes the old registry of the ship. If, prior to the sale, a mortgage were entered on the old, or if there be any existing certificates of power to mortgage standing thereon, the old register, though closed for all other transactions, remains open as to them. On such registry anew, the new registrar is to transfer from the certificate of power to sell the notice of all mortgages endorsed thereon by the registrar by whom it was issued. By these provisions, entry of the issue of a certificate of power to sell abroad made on the home register will practically close the register from that date, as no one will deal with the owner in regard to the ship until the certificate issued is returned unexercised, and is cancelled by the home registrar, and a note thereof made on the registry. The certificate, when issued, contains all the mortgages granted up to the date thereof, and thus enables the foreign registrar, when registering the ship anew, to transfer to his book in which the ship is registered *de novo* the whole existing incumbrances on the vessel. These mortgages will therefore appear in both registers, and until they are discharged the new purchaser will hold his property under burden of them. But although the home register is, on the issue of powers of sale, practically closed against all further dealings with the owner, because nobody will deal with him, any prior mortgagee may exercise *his* powers of sale, either before or after the vessel is sold abroad, under the certificate of sale. Such a sale by the mortgagee would be recorded in the home registry, if the vessel was not registered anew, and might be recorded in either if she were. The purchaser abroad might thus find his title defeated by a sale made by the mortgagee either *before* he bought abroad or *after* he had bought; and this will suggest the necessity of no one purchasing on such a title abroad, if there are mortgages endorsed on the certificate of powers of sale, until the mortgages are produced and the discharges recorded. If the foreign purchaser, however, buy without that precaution, and the mortgagee do not sell till *after* the title is vested in him, the mortgagee will hold the balance of the price, after paying off his own debt, for behoof of the foreign purchaser. If, however, the sale has been made by the mortgagee before the foreign purchase was completed, it will be a question whether in that case any trust would be created in the person of the mortgagee, for behoof of the purchaser who had no interest or property in the ship at the time when the mortgagee sold and received the price; whether the mortgagee has any concern with him, or can be called to account by him; whether, in short, the question of accounting for the surplus is not a question solely between the mortgagee selling and the then owner, leaving any claim the foreign purchaser has for repetition of the price paid for a ship already sold to be settled between him and the owner. The new registry contains

[the description of the vessel as in the original survey, and before registration the purchaser makes the same declaration as to qualification, etc., as any other transferee. The vesting of the title of a purchaser under a certificate of sale, is not the recording of the sale on the back of the certificate, but the new registry of the vessel. So far as concerns mortgages granted under a certificate of powers of mortgage, the certificate with the endorsed notice of mortgages granted thereunder may, for the time being, be regarded as a sort of floating registry of the ship; and if endorsed on the certificate they are valid, as we have seen, whether recorded afterwards in the ship's register or not. But it is not so with a sale abroad, made in virtue of a certificate of sale. The endorsement on the certificate of powers of sale of the fact of a sale having been made, is only for the purpose of transmitting to the home register authentic information to enable him to close the old register, and it is the registry of the sale abroad that vests the title in the purchaser.

Provision is made in sec. 83, enabling an owner who grants a power of mortgage or sale, or any person who succeeds to the ownership, to recal the powers before they are exercised or exhausted. This can only be done, however, when the powers are to be exercised at a place or places specified in the certificate; because the revocation is to be made by notice to the registrar at those places abroad, so as to prevent the public from acting on the faith of the deed of powers. The revocation is made by a form given in the schedule: it is certified by the home registrar, and sent to the registrar abroad, where the deed of powers was to be exercised; there notice of recal is recorded in the register, and the registrar is required to exhibit the same to all persons who may apply to him for the purpose of effecting or obtaining a mortgage under the deed of powers. But what if the money is given on loan, or the sale completed, and price paid on the faith of the deed of powers, without application to the registrar who has received notice of revocation and recorded it? The party must blame himself for not inquiring before he contracted; but the effect is clear, for the statute says expressly, that *after such notice has been recorded*, the certificate, *quoad* any further exercise of the powers, is deemed to be revoked and of no effect.

The statutory powers of sale or mortgage do not interfere with the power that an owner has in the ordinary course of business to depute any person to act for him in granting deeds of mortgage or sale under the usual power of attorney. There is this great distinction, however, which explains the necessity for providing the statutory machinery, that any sale or mortgage effected under an ordinary power of attorney will have no validity until recorded at the port of registry: it will not take precedence of subsequent deeds first recorded there, and it will not rank as of the date of issuing the power of attorney.

We have seen that no certificate of sale can issue except for the sale of a whole ship. But occasionally it may happen that several owners of a vessel reside in different countries, and wish to unite in effecting a sale out of the country or possession of the ship's port of registry. This may be done, 1. By ordinary power of attorney; but the purchaser's title will not be complete till the bill of sale and declaration of ownership are sent home to the port of registry, and the sale recorded there. If the purchaser desires to change the registry afterwards, he can do so under the 89th section, which provides that the registry may be transferred from one port to another whenever the owners desire. Or, 2. All the owners desirous of selling the whole ship abroad may grant a transfer of their interests to one resident at the port or in the possession of the port of registry, who would then execute the deed of transfer to the purchaser, or the certificate of sale to the agent abroad to sell her there. Or, 3. The absent owners, along with the others, may apply to have the registry changed to the foreign port where the vessel is to be sold; and on the new registry being completed, then the bill of sale to the purchaser may be completed there.]

CHAPTER II.

OF PROPERTY IN GOODS AND MERCHANDISE.

THE great mass of property which forms the subject of mercantile dealings, and which we see undergoing incessant changes in commercial cities, consists of moveables corporeal—goods, wares, merchandise, in a rude or in a manufactured state. And the infinite variety of situations in which this species of property is found, from the first moment that the crude material is begun to be prepared for the market to the final exhibition of the completed manufacture in the warehouse of the merchant, in the manufactory of the artisan, in the [166] shop of the retailer, or in the hand of the purchaser, or of the carrier who undertakes to transport it to the purchaser's residence, occasion questions of difficult solution.

Where a merchant fails with his goods lying consigned in the hands of factors, or in the course of being worked up by the manufacturer; or the agent of a foreign house, with his warehouse full of goods, partly his own, partly belonging to his correspondent abroad; or the seller of goods, after receiving payment or good bills for the price, becomes insolvent, while yet the commodity lies in his repositories waiting a message from the purchaser for delivery; or the buyer of wares fails without paying the price, and the goods are still with the vendor, or, having just left his warehouse, are on the road, or at least in their passage, to the buyer to be delivered,—in all such situations matter of doubtful right arises, in regard to which the rules of the ancient jurisprudence are hard to be reconciled with the facilities required in modern trade, or the usages which manufacturers and merchants have found to be necessary or convenient in conducting their intercourse.

The contest in such discussions resolves into matter of disputed right between an individual claimant and the general body of creditors: the former asserting his claim of property, to the effect of diminishing the general fund for division; the latter maintaining their right, as in the room of their debtor, to sell and distribute the goods in satisfaction of their debts. This inquiry corresponds with that which the Continental lawyers have so amply discussed in questions concerning '*creditores domini*.' And it seems necessary to consider,

1. The rules, in their simplest form, respecting the completing of transferences, where, the price being paid or secured, there is no disturbance of the right on account of insolvency.
2. The equitable right, on the insolvency of the buyer, to retain or stop *in transitu* goods which have not been paid for.
3. The remedy afforded against fraud, even after the commodity has been delivered. And,
4. Certain circumstances in which the true ownership yields to the right of those who, by collusion, have been enabled to acquire false credit on the apparent ownership of goods.

SECTION I.

OF THE TRANSFERENCE OF GOODS AND COMMODITIES BY SALE AND DELIVERY.

There exists in name, though not in reality, a remarkable difference between the law of Scotland and that of England relative to the effect produced on the right of property by the contract of sale. In England, the completion of the mere contract is said to pass the property. But it is not the absolute property which so passes: it is only a qualified and imperfect right which subjects the buyer to the risk of the commodity, but confers on him no title to demand possession of it, or to exercise any dominion over it; and it therefore

cannot be said that the property passes, otherwise than nominally, until the contract is followed by delivery and possession.¹ In Scotland, property is not transferred, either nominally or effectually, without delivery of the commodity; and yet the risk of the [167] thing is with the buyer, as completely as by the law of England, from the moment the contract is completed.

Essentially, therefore, the law of the two countries in this matter is the same; and yet it is very necessary to keep the nominal distinction in recollection in comparing the writings of lawyers, or perusing the language of judicial decisions, in either country. It is not perhaps of any importance to contend for the greater purity of principle or of language by which the law of Scotland in this matter is distinguished; and yet I cannot help observing, 1. That it is inconvenient, and apt to introduce confusion of ideas, to use the word PROPERTY in different senses. Correctly speaking, property imports '*dominium*'—the entire and exclusive dominion over the thing spoken of—the proprietor being the *dominus*, and having the sole disposal of it. The departure from this simplicity of language has required, in English juridical expression, the qualifying terms (not understood in common speech) of Absolute and Special property; whereas in Scotland the term is used in one uniform and unvaried sense, importing the right of exclusive possession and uncontrolled disposal. 2. It does not, to a Scottish lawyer, appear correct in reasoning to ascribe to property alone that risk attending commodities sold, which is inconsistent with the other features of a right admitted to be imperfect, and at the same time is sufficiently accounted for (consistently with the imperfect transference) by referring it to the principle of the law of contract, the obligation undertaken by the seller being discharged by the perishing of the commodity without his fault.²

According to the Roman jurisprudence, which in this matter is followed in Scotland, there are, in the transference of property by sale, two distinct parts: 1. The contract or agreement to transfer, regulated by the law of obligations; and, 2. Tradition, by which the transference is completed, which constitutes the right of property, and in its effects is ruled by the law of property. In the language of the Roman law, the contract is distinguished as the *titulus*, the tradition as the *modus transferendi dominii*.

The completion of the contract, or *titulus transferendi dominii*, confers no real right. Without tradition it passes no property or *dominium*. It only establishes against the person who means to transfer, the obligation to deliver the thing sold; and bestows on the person who means to acquire, a *jus ad rem*.

¹ See *Bloxam v Sanders*, 1825, for a statement of this imperfect right in English jurisprudence. The propositions laid down by Mr. Justice Bayley in delivering the judgment of the Court are: 1. Where goods are sold, and nothing said as to time of delivery or of payment, and everything the seller has to do is complete, the property vests in the buyer, so as to subject him to the risk of accidents, and entitle him to demand possession or payment of the price; but he has no right of possession till the price be paid. 2. The seller's right in respect of the price is not a mere lien which he will forfeit if he parts with the possession, but grows out of his original ownership and dominion; and payment or tender of the price is a condition precedent on the buyer's part, till when he has no right to possession. 3. If the goods are sold on credit, and nothing said of time, the buyer has right to possession as well as property; but his right of possession is not absolute, but liable to be defeated if he become insolvent before he obtain possession. 4. If he fail to pay when the credit expires, and is insolvent, it is as if no bargain for credit had been made; the seller has a right to stop *in transitu* in virtue of his original ownership, the right of the buyer being defeated. Much more has the seller a right to retain the goods. 5. The

buyer can maintain no action which requires both a right of property and a right of possession, but on payment of the price. Add to this the effect of the Act of 1 James I. c. 19, below, next note.

[Correct these observations on the English law of sale by Blackburn on Sale, pp. 147–200, particularly pp. 187–9; Benjamin on Sale, pp. 213–301; or Brodie's Stair, App. p. 906, note.]

² The chief distinction in practical effect between the English law in passing the property, and the Scottish in leaving the goods untransferred, is visible on occasion of a sale where the price has been paid. In England, this entitles the buyer to possession, and in all cases *at common law* makes a perfect transference, so that the creditors of the seller cannot take it. In Scotland the property is not passed, and the creditors of the seller will be entitled to it as part of the fund of division. By the English statute 21 James I. c. 19, the same practical effect is produced in England with that which results from the operation of the common law in Scotland; goods remaining in the seller's possession, although paid for, going to his creditors as if untransferred. [Repealed by 6 Geo. IV. c. 16, and subsequent Acts.]

It is by the completion of the *modus transferendi* accompanying a legitimate contract that the property passes, and the *jus in re* is established, by which the right of the vendee is distinguished from that of the general creditors of the vendor.¹

[168] Sale as a contract will be considered hereafter. At present it is to be assumed that a contract of sale has been concluded, unexceptionable, and established by the legitimate evidence; the present inquiry being directed to the doctrine of tradition or delivery—the *modus transferendi* by which the real property is passed in conformity with such contract.

The property of moveables is, according to the received maxims of the law, presumed from possession; and this possession, the badge of such property, is conferred by tradition, implying the consent and act of the vendor to confer on the vendee at once possession and the *jus domini*.

DELIVERY OR TRADITION, originally, was a clear and unequivocal act of real possession, accomplished by placing the subject to be transferred in the hands of the buyer, or of his avowed agent, or in their respective warehouses, vessels, carts, etc. This sort of delivery was well entitled to be held as the true and proper badge of transferred property, as importing full evidence of consent to transfer; preventing the appearance of possession in the transferrer from continuing the credit of property unduly; and avoiding uncertainty and risk in the title of the acquirer.

But an adherence to this plain and simple rule is utterly impossible amidst the complicated transactions of modern trade. It often happens that the purchaser of a commodity cannot take instantaneous delivery. Its bulk; the distance from his house; the frequency of bargains concluded by correspondence between distant countries; the peculiar situation of the goods, deposited perhaps in public custody for the duties, or in the hands of a manufacturer for the purpose of having some operation of his art performed upon them, to fit them for the market; and many other obstructions,—make it often impracticable to give or to receive actual delivery. The fair occasions of trade have been thought to require that in such cases the original rule should not be adhered to rigidly; that something short of actual delivery should be admitted to transfer the property. Thus, when the seller in a distant country puts the goods on board a ship to be transported to the buyer, and delivered to him; or when, the distance between them being by land, a carrier receives the goods from the seller to carry to the buyer; or when, the goods being in the hands of a manufacturer or packer, or in a public warehouse, an order is given to the buyer to receive delivery,—these acts come constructively to be regarded as fair badges of transference, entitling the buyer, who has paid the price, to take the wares as his own. By the admission of these, and such acts as these, to have the effect of delivery, commerce is facilitated, and the rapid circulation of commodities, and busy employment of stock in speculation and mercantile enterprise, fostered and encouraged.

But when the buyer suddenly fails before the price is paid, and the goods are still in a state of transit to the buyer, the situation of the seller is thought hard, and an extension of the right of the seller to retain his undelivered goods is naturally attempted. His goods are still distinguishable, and have not yet reached the buyer; they have not gone into his

¹ Traditionibus dominia rerum non nudis pactis transferuntur. Cod. de Pact. l. 2, tit. 3, l. 20.

In the following passage, Pothier has delivered with great clearness the distinction between real and personal rights, according to the doctrine of the civil law: 'Les conventions seules et par elles-mêmes ne produisent que des obligations: c'est leur nature; c'est pour cela qu'elles sont établies. Ces obligations ne donnent à celui envers qui elles ont été contractées, qu'un droit contre la personne qui les a contractées. Ce droit est bien un droit *par rapport* à la chose qu'on s'est obligé de nous donner; mais ce ne peut être un droit *dans* la

chose; c'est encore moins le domaine de la chose.' He afterwards adds: 'De ce principe que le domaine d'une chose ne peut ordinairement passer que par la tradition de la chose, il suit, que quelque convention que j'aie avec une personne qui s'est obligée de me donner une certaine chose, tant qu'elle ne m'en a pas fait la tradition réelle ou feinte, elle en demeure toujours la propriétaire. C'est pourquoi ses créanciers peuvent la saisir valablement sur elle, sans que je puisse être reçu à demander la récréance de cette chose n'en étant pas encore devenu le propriétaire.' Traité du Droit de Propriété, tom. iv. p. 436, No. 245, 247.

stock ; they have not contributed to mislead others by raising a credit on the property ; and in this way, and from the indulgence of equitable considerations, and notions of hardship, [169] a privilege arises to sellers of following and stopping their goods before they come into the buyer's hands.

This may be regarded as a general view of the principles and considerations on which the law with respect to the transference of goods, merchandise, etc., has in this country been arranged, and which in the prosecution of this inquiry is now to be more particularly detailed : the doctrine of delivery in this section ; the provisions against injustice in the next.¹

SUBSECTION I.—OF RISK AS A CRITERION OF THE TRANSFERENCE OF GOODS.

In attempting to reconcile the jarring principles, and resolve the difficulties, of the doctrine of delivery, it has been thought that the simplest and least objectionable criterion

¹ [An important qualification of the doctrine of delivery (and bearing likewise on the law of reputed ownership) has been introduced by the statute 19 and 20 Vict. c. 60, which must, in perusing the text, be carefully kept in view. It is enacted by sec. 1, that 'from and after the passing of this Act, where goods have been sold, but the same have not been delivered to the purchaser, and have been allowed to remain in the custody of the seller, it shall not be competent for any creditor of such seller after the date of such sale to attach such goods as belonging to the seller by any diligence or process of law, including sequestration, to the effect of preventing the purchaser or others in his right from enforcing delivery of the same; and the right of the purchaser to demand delivery of such goods shall from and after the date of such sale be attachable by or transferable to the creditors of the purchaser.' From this rule the landlord's hypothec is excepted. This is so far an adaptation of the law of England to Scotland ; but it seems to have escaped observation, that in England sales of goods exceeding the value of £10 must be in writing, which is not the case in Scotland : and even with this precaution great evils have existed. These evils are thus stated in the preamble to 17 and 18 Vict. c. 36, 'for preventing frauds upon creditors by secret bills of sales of personal chattels :—' Whereas frauds are frequently committed upon creditors by secret bills of sale of personal chattels, whereby persons are enabled to keep up the appearance of being in good circumstances and possessed of property, and the granters or holders of such bills of sale have the power of taking possession of the property of such person to the exclusion of the rest of their creditors,' therefore certain enactments are made for the recording and publication of such bills of sale under the sanction of nullity. (See also, as to Ireland, c. 55.) The enactment in the English Act, 19 and 20 Vict. c. 97, sec. 1, intended to correspond with that in the Scotch Act, is in these terms : 'No writ of *feri facias* or other writ of execution, and no writ of attachment against the goods of a debtor, shall prejudice the title to such goods acquired by any person *bona fide*, and for a valuable consideration, before the actual seizure or attachment thereof by virtue of such writ ; provided that such person had not, at the time when he acquired such title, notice that such writ, or any other writ by virtue of which the goods of such owner might be seized or attached, had been delivered to and remained unexecuted in the hands of the sheriff, under-sheriff, or coroner.' It does not appear that

the statutes requiring the sale to be in writing, and to be registered, are repealed. There is thus still disconformity between the laws of the two countries. On the construction of the first section of the Mercantile Law Amendment Act, it is decided that the purchaser cannot claim the benefit of the enactment, where he agrees that the seller shall retain not only the custody, but the use of the subject, the principle of reputed ownership being applied. *Sim v Grant*, 1862, 24 D. 1033. The Act does not interfere with the seller's right of retention for the price, *Linn v Shields*, 1863, 2 Macph. 88 ; nor even (in the opinions of a majority of the consulted judges) with his right of retention for a general balance. *Wyper v Harvey*, 1861, 23 D. 606. By 19 and 20 Vict. c. 60, s. 2, it is enacted, that 'where a purchaser of goods who has not obtained delivery thereof shall, after the passing of this Act, sell the same, the purchaser from him or any other subsequent purchaser shall be entitled to demand that delivery of the said goods shall be made to him, and not to the original purchaser ; and the seller, on intimation being made to him of such subsequent sale, shall be bound to make such delivery on payment of the price of such goods, or performance of the obligations or conditions of the contract of sale, and shall not be entitled, in any question with a subsequent purchaser, or others in his right, to retain the said goods for any separate debt or obligation alleged to be due to such seller by the original purchaser. Provided always, that nothing in this Act contained shall prejudice or affect the right of retention of the seller for payment of the purchase price of the goods sold, or such portion thereof as may remain unpaid, or for performance of the obligations or conditions of the contract of sale, or any right of retention competent to the seller, except as between him and such subsequent purchaser, or any such right of retention arising from express contract with the original purchaser.' And by sec. 3, 'Any seller of goods may attach the same while in his own hands or possession, by arrestment or poinding, at any time prior to the date when the sale of such goods to a subsequent purchaser shall have been intimated to such seller ; and such arrestment or poinding shall have the same operation and effect in a competition or otherwise as an arrestment or poinding by a third party. See *Melrose & Co. v Hastie*, 1 Macq. 698, as to the seller's right of retention for a general balance due by the purchaser, in a question with a sub-vendee, which seems to be settled by the above-mentioned enactment.]

of transference is to be found in the *RISK*; and that if in any case it be doubtful whether the property be altered, the most correct decision is to assign the right to him who must bear the burden of the loss should the subject perish. If the legal effects of risk were not to be accounted for on any other theory than as the accompaniments of ownership, the conclusion would be unavoidable. But without admitting ownership as in any degree influenced by the completion of the contract, all the effects of the maxim, '*Periculum rei venditæ nondum traditæ est emptoris*,' may be justified as legitimate consequences of the personal obligations under that contract. And in the law of Scotland it is settled that risk is no test of property; and that the question of risk forms a point in the law of Obligation, not in the law of Transference,—the decision of it depending upon principles quite distinct from those concerned in the question of property.

If a person have sold a particular cask of wine, and received the price, he has by the contract of sale conferred on the vendee the *jus ad rem*; and he is, by the obligation contained in that contract, bound to deliver the wine when demanded. But as tradition alone passes the property, or *jus in re*, he continues still the undivested proprietor. The buyer may by action compel delivery; and if this have become impossible by the fault of the seller, he will be entitled to damages. But if by unavoidable accident the wine perish, the obligation to deliver cannot be enforced; and as no damages can be due where there has been no fault, the wares are said to have perished to the buyer. It is only a concise way of expressing this doctrine to say, that the risk lies with the buyer.¹

The best proof of this doctrine is, that if the subject of the obligation be not specific, but indefinite (a certain number of quarters of corn, for example, or of pipes of wine), then, as the obligation may be fulfilled although all the wine in the vendor's cellars have perished, so the loss is not to the buyer; the seller has no good defence against the claim for delivery. Thus, in the contract of sale, the buyer is creditor, and the seller debtor for *delivery*; the seller is creditor, and the buyer debtor for the *price*. The buyer is entitled to enforce the obligation to deliver, under which the seller lies; the seller, on his part, to enforce payment [170] from the buyer.² The seller's obligation, being for a specific subject, is extinguished wholly, or to a certain extent, by the annihilation or partial destruction of the subject without his fault; the buyer's, being for a sum of money, can admit of no such defence.

It is thus that the subject comes to perish to the buyer, and to be at his risk; not because the transference to him is complete, but merely because the property is the subject of an engagement by the seller, which is extinguished by its destruction. In no sense, either actually or constructively, is the real right of property altered. Possession, the true badge of property and foundation of credit, remains with the seller; and even the very maxims of the law which lay the risk upon the buyer, distinguish the property as still untransferred. While, by one maxim, '*Traditionibus dominia rerum non nudis pactis transferuntur*'; by another, '*Periculum rei venditæ nondum traditæ est emptoris*.'³ After a bargain of sale, therefore, the goods which still remain in the seller's warehouse perish to the buyer;⁴

¹ Stair i. 14. 7; Ersk. iii. 3. 7. See also Pothier, Tr. des Obligations, part 3, c. 6. Tr. du Cont. de Vente, vol. i. p. 481, sec. 56. [On the principle of the rule, that risk passes by the contract and not by the delivery, and its history, see Brodie's Stair, Appendix, pp. 854–8.]

The legislators employed in constructing the new civil and commercial code of France departed from these views, and assumed the principle that the property of goods sold is acquired to the buyer from the moment of completing the contract. '*La vente est parfaite entre les parties, et la propriété est acquise de droit à l'acheteur à l'égard du vendeur, dès qu'on est convenu de la chose et du prix; quoique la chose n'ait pas été encore livrée ni le prix payé.*' Code Civile, § 1583.

In the passage of Lord Stair, cited above, there is an idea

extremely similar to this: 'The intention and tendency of the property being to the buyer, if the seller be not *in mora*, the case is as if the delivery were made, and the property changed, as to the intention and meaning of the parties, which regulates contracts.'

² The buyer is entitled, besides, to have his commodity, according to agreement, with all its intermediate advantages; and he must take it with all its accidental damage.

³ Contrast the 8th law of the Pandects (lib. 18, tit. 6, De peric. et com. rei vend.), where the doctrine is laid down concerning the effect of completing the contract, with the 20th law of the Code, lib. 2, tit. 3, De Pactis.

⁴ See Pothier, Con. de Vente, vol. i. p. 579; Stair i. 14. 7; Ersk. iii. 3. 7. In *M'Donald v Hutchison*, 1744, M. 10070, the

but if the buyer become a bankrupt without paying the price, the goods are still the seller's; nay, though the price has been paid, the creditors of the seller, finding the goods in his warehouse, are entitled to take them as a part of his estate, leaving the buyer to claim a dividend for the price.

In England, the doctrine of risk, considered in its practical effects, is almost precisely the same with that which has now been explained; but the principle seems different. In that law, it appears that the risk may correctly be stated as the criterion of property. For the determinations touching the question seem to proceed on the ground that the property passes with the completed contract, and is suspended while the contract is incomplete, and that the risk attaches to the thing, and so to the owner of it.¹ But practically the decision is not different in this class of cases in the two countries. In England, the property passes when the contract is complete, not sooner; in Scotland, the obligation to deliver does not attach till the same point of completion. But taking the principle of the law of Scotland, the doctrine of risk (whatever it may be in England) is quite unconnected with the question of transference: it affords no true criterion by which the question of property can be decided; and some other method must be taken of reconciling the apparent inconsistencies of the doctrine of delivery, considered as a badge of transference.²

SUBSECTION II.—OF COMPLETION OF THE TRANSFERENCE BY DELIVERY.

The general doctrine of delivery is laid down in very clear terms by one of the [171] best of our lawyers: 'Transmissions of every subject, of whatever kind (says Kilkerran), must be completed by some public act that may come to the knowledge of third parties, and without which the transmission will be incomplete, be it ever so fairly and honestly intended. The transmission of the property of moveables is completed by delivery; of lands, by infeftment; of tacks (leases), and other rights which require no infeftment, by possession.'

Keeping in recollection that, in this first part of the inquiry, the rules are to be considered in their most simple form as unaffected by any failure in the payment, or satisfaction given for the price, it is to be observed, that although delivery of the commodity is necessary to the passing of property, it still is not indispensably required that it should be of that actual and unequivocal kind which places the thing sold within the grasp and in the personal apprehension of the buyer, or of his servants, clerks, and others, whom the law identifies with him and considers as his hands;³ but that acts of possession less immediate

Lords determined the general point, 'that *periculum rei venditæ nondum traditæ* lies on the buyer.' The case was: 'A parcel of spirits in the king's warehouse was sold, and a bill given for the price, but the spirits not delivered; and next day the warehouse was broken, and the spirits taken away, yet the buyer found liable for the price.' Elchies, *voce* Sale, No. 5. [So in the case of *Hansen v Craig & Rose*, 1859, 21 D. 432, where a cargo of oil weighed and ready for delivery was destroyed by fire after the exchange of bought and sold notes, but before delivery,—it was found that the subject perished to the purchaser, although the buyer had not checked the weight and quality of the oil, which by usage he was entitled to do.]

¹ The principles of English law on this subject seem to me to be justly stated by Mr. Brown, in his treatise on the Law of Sale, p. 355 et seq., and I fear that I am accountable for the fault of having overlooked this distinction, and misread the case of *Rugg v Minnet*, 1809. In this case, turpentine was sold by auction, and certain casks bought by Rugg. They were to be filled up by the sellers during a certain time, while they remained in their warehouse till the last payment was

made. Some of the casks were filled up, and nothing remained for the sellers to do; others were not so filled up, and in this state of matters a fire happened which consumed them. The Court held the former to be at the risk of the buyer, the latter at the risk of the seller. 11 East 210.

In the case of *Zagury v Furnell*, 2 Camp. 240, relative to goat-skins, which by usage are counted over before the contract is complete, the same principle was followed; the whole having been burnt before counting off. So in *Hinde v Whitehouse*, 7 East 558. [Addison on Contracts, 6th ed. 177-9.]

² For the obligations to deliver, and their effects, see below, Of Sale.

³ Ersk. ii. 1. 19. 'Non est corpore et actu necesse comprehendere possessionem, sed etiam oculis et affectu, et argumento esse eas res quæ propter magnitudinem ponderis moveri non possunt, ut columnas: nam pro traditis eas haberi si in re præsentî consenserint.' Dig. lib. 41, tit. 2. De possess. l. 1, sec. 21. See also Pothier, Tr. du Droit de Propriété, vol. iv. 419, where, speaking of the sale of a log of wood by a timber merchant, who points it out as the vendee's, and other similar

and direct are by construction of law held sufficient, when actual tradition into the buyer's hands cannot be given.

It appears that at first the rule of law which required actual delivery in order to complete a transfer of property was rigidly observed, unless where actual delivery was in the circumstances of the case impracticable. And the confusion which has been introduced into the doctrines of the law by the relaxation of the rule, even to this extent, gives warning of the danger with which any further indulgence may be attended. It is by no means uncommon, however, to find every fancied conveniency or facility to the dealings of traders represented as a case of that sort of necessity which the law has in contemplation in admitting constructive delivery; not reflecting that this doctrine, in its true nature, is not meant as an indulgence to imprudent carelessness, nor the ancient rule of tradition intended to be broken in upon for the attainment of mere conveniences. There is no end to the multiplication of small distinctions, and traders will be found infinitely ingenious in discovering cases in which mere conveniency and facility in the management of their dealings may be made to assume the appearance of necessity, till all the fixed principles of the law shall be unsettled, and a miserable pretence of mercantile usage, varying in every port, and with each new set of dealers, be permitted to usurp the place of those great rules to which it is so easy to conform. If a merchant buy and pay for a pipe of wine, which is marked and set apart for him in the vendor's cellar, it may be a great conveniency to him that it should remain there; and in one sense he may be said to suffer a hardship, should that wine be taken by the seller's creditors on bankruptcy as a part of the divisible fund. But that is a hardship to which the buyer voluntarily exposes himself for the sake of this very conveniency, and against which he may provide by taking immediate delivery, or by having the wine locked up, and the key delivered to him. But if he order this wine from a distance, and pay for it, and it is put into the hands of a carrier or shipmaster, to be transported to the buyer, all is done that [172] can be done: all the delivery is taken that the circumstances of the case allow. It is only a necessity of that absolute kind that can in strict principle authorize constructive delivery. Where the goods are at sea; or require to be sent from a distance by a carrier; or are in a public warehouse; or in the hands of a manufacturer, to have some operation of art performed,—these are truly cases of necessity; and without some relaxation of the rule of actual delivery in such cases, it has been supposed impossible to carry on trade.

In England, it appears from some recent decisions that this doctrine is in danger of being unsettled, not merely by the admission of conveniency, to supply the place of the impossibility of making actual delivery, which formerly was held essential to constructive delivery; but even by admitting this imperfect delivery to have the effect of divesting the seller of his right to stop *in transitu*.

To make the explanation of this doctrine as plain as possible for practical uses, the cases may be considered in the following order:—

1. Where goods are in the seller's own custody at the time of delivery; and the delivery is made directly to the buyer, or into his warehouse, ship, or cart.
2. Where the goods are in the custody of a third person.
3. Where the seller and buyer are at a distance, and the goods are to be sent by sea or land-carriers.
4. Where the buyer is represented by another person.

cases, he says: 'Dans tous ces cas, les yeux, de celui à qui on fait la montrée de la chose dont on entend lui faire la tradition, lui font acquérir la possession d'une chose mobilière de

même que s'il l'eut reçue entre ses mains.' See Ulpian's doctrine, Dig. l. 18, tit. 6, l. 1, sec. 2. De Peric. et Comm.; and that of Paulus, *ib.* l. 14, sec. 1.

ART. I.—TRANFERENCE OF GOODS IN THE SELLER'S OWN POSSESSION, DIRECTLY TO THE BUYER.¹

1. The simplest case of all is, where a person goes into a shop, and buys and brings off with him an article there exposed for sale: as, if I go into a bookseller's, and purchase and bring away with me a book; I have received actual delivery, and the transfer is to all intents and purposes complete.

'The clearest possession,' says Lord Stair, 'is of moveables, and it is the first possession that was amongst men: for so did the fruits of things common become proper; and thereafter, ornaments, clothes, instruments, and cattle, became proper; the possession whereof is simple and plain; holding and detaining them for our proper use, and debarring others from them, either by detaining them in our hands, or upon our bodies, or keeping them under our view or power, and making use of them, as having them in fast places to which others have no access. This possession of moveables was so begun and continued, and by contrary acts interrupted and lost, when others exercised the same acts either without the possessor's consent, or by their tolerance, or tradition and delivery, or by forsaking and relinquishing them; so that in the matter of possession of moveables there can be little controversy.'²

2. Where the commodity is not a single article, but, like a cargo of grain, requires repeated acts, and a long protracted course of delivery, circumstances may fall out so critically as to make it of importance to draw the line between what is actually delivered and what is not yet delivered. If, for example, a merchant in Leith have in his warehouse 100 bushels of corn, which he sells to another merchant, and 50 bushels of the grain have been delivered over to the buyer; is it to be held that delivery has taken place only of that part of the cargo which has in truth been given out of the warehouse, and received by the buyer, while the other is still in point of fact undelivered? Or is the whole to be held as delivered? In such a case, even where the price has been paid, the delivery cannot on strict principle be held complete, so as to prevent the creditors of the seller from [173] taking the undelivered part, leaving the buyer to claim a dividend on the price.³

¹ [The author, in delivering the doctrine of the transference of property in corporeal moveables by tradition, has unfortunately introduced into his exposition much obscurity and confusion by his division of delivery into actual and constructive, with a view to marking the boundary between cases in which stoppage *in transitu* is, and those in which it is not, competent. He makes the cases in which stoppage is not competent, cases of actual; those in which it is competent, cases of constructive, delivery. The competency or incompetency of stoppage ought not to have been treated as part of the question of delivery, or the right dealt with as if it had been a consequence of imperfect delivery. The division into actual and constructive delivery is barren of any practical results, even if theoretically defensible. There is no such thing as constructive delivery, though there may be actual and constructive possession. There is either delivery or no delivery, considered as the criterion of the transference of the *dominium* of moveables. The division is useless also in regard to the doctrine of stoppage *in transitu*. In all real cases of stoppage *in transitu*, there can be no question that the goods have been delivered, that the property has passed to the vendee, and that all the other consequences of complete tradition have taken place. The right of stoppage ought to have been kept apart from the question of delivery as the criterion of the transference of property, and to have been dealt with as an equitable privilege of an exceptional nature accorded to the unpaid seller, in certain circumstances, against goods which have by completed delivery already become the property of the

insolvent vendee. The true question in a case of stoppage is not whether the goods have been delivered, or whether the property has passed, but whether the goods are still *in transitu*?—whether, notwithstanding, or rather assuming, that the delivery is complete and the property passed, the goods are not still within the limits or in the circumstances in which the equitable and exceptional remedy of stoppage is exercisable? The reason why goods are liable to be stopped is not that delivery to a carrier is an imperfect tradition, but because it is a delivery *for the purpose of transport*, or in the course of the conveyance of the goods from an unpaid vendor to an insolvent vendee. The confusion throughout this whole section of the work arises from making cases which deal merely with the question as to the termination or prolongation of the *transitus*, authorities on the question of delivery or no delivery. The confusion which has arisen, both in regard to tradition and to stoppage *in transitu*, from the author's method of treatment, has been pointed out successfully by Mr. Brown in his *Treatise on Sale*, Nos. 655–665, and Nos. 719 to 728.]

² Stair ii. 1. 11. [Observe, however, that where goods are rejected on the ground of disconformity to order, the property does not pass; that is, where the seller acquiesces in the rejection of the goods, or where the buyer is justified in rejecting them. *Jowitt v Stead*, 1860, 22 D. 1400.]

³ *Collins v Marquis' Crs.*, Nov. 1804, M. 14223. Here a cargo of timber was commissioned by Marquis from Collins, and sent by a ship, which on arrival was partly unloaded. Part of the timber was taken into Marquis' timber yard, part

3. Where the seller sends his carts, waggons, etc., to the premises of the buyer, the goods continue undelivered while they are still on the carts unpacked.¹

4. Where the buyer sends his cart to receive delivery, and the ware is delivered over and placed on his cart, this is actual delivery, transferring the property.

5. Where the commodity is delivered to any one entitled to represent the buyer, and give it a new destination, in which the seller is not participant; or to one who, as his clerk, servant, custodier, etc., is to hold the goods till, by a separate and uncontrolled act of the buyer, a new destination is impressed on them, the delivery is effectual to all purposes. Where it is made even to a third person, and for the sole purpose of the goods being carried farther, the delivery is good to pass the property in all cases, except where the seller stops for the price.²

6. The delivery of commodities into the warehouse of the buyer, whether he be present or not, is as complete delivery as in the example already given of a book put into the hand of the buyer. So, where one has a granary or a warehouse under the care of a servant or clerk, delivery into that granary or warehouse passes the property. Nay, it has been decided in England, that 'if a trader be in the habit of holding the warehouse of a wharfinger or of a packer as his own, and making it the repository of his goods, delivery into such warehouse is actual and real delivery.'³

7. Under the bonding acts, the bond warehouse is to be held as the merchant's own

was still on the shore, part remained on board, when the process of delivery was stopped by the shipmaster, doubtful of the security for his freight. Collins then applied to the sheriff to have the cargo inventoried and sold for his behoof. But in the meanwhile, Marquis' creditors, to gain an advantage, paid the freight, and got possession of the whole timber from the shipmaster. The question was brought to trial by an action on the part of Collins for restitution of the whole cargo. The Court held Collins entitled, 1. To that part of the cargo which remained on board; and, 2. To that which was on the shore undelivered; but, 3. They found the creditors of Marquis entitled to 'that part of the cargo which was, at the date of Collins' apprehension, within the woodyard or other premises belonging to Marquis.'

This decision may admit of some question, if it can be considered as falling under another class of cases, hereafter to be discussed. See below, Art. II. *in fin.*; and in that view, the English case of *Slubey v Hayward*, quoted ineffectually in Collins' case, was perhaps the true decision. In the simple case of delivery from the seller to the buyer, the decision seems to be law, and I should have been inclined to think it ought to have ruled, accordingly, the case of *Broughton v Aitchison*, 15 Nov. 1809, F. C.

[The text and note afford a striking example of the confusion already referred to, arising from mixing up tradition and stoppage *in transitu*. It is clear that the payment or non-payment of the price has nothing to do with tradition as the criterion of the transference of the property, though, of course, it is essential in a question as to stoppage. If the question in *Collins v Marquis* had been whether the property had passed to Marquis, there could have been no doubt that the whole cargo had become his property by being put on shipboard for him, and not merely that part of it which had been taken into his timber yard. It is inconceivable how, if the price had been paid, and stoppage incompetent, or if the price had not been paid, but no stoppage attempted, the creditors of the seller could have claimed any part of the cargo as undelivered, *i.e.* as property untransferred from the seller. The question whether the whole cargo, or only part

of it, was still *in transitu*, and liable to stoppage, is a totally different question; as to which, see, besides *Slubey v Hayward*, the following cases:—*Dixon v Yates*, 5 B. and Ad. 313; *Betts v Gibbins*, 2 A. and E. 57, 73; *Tanner v Scovell*, 14 M. and W. 28; *Hammond v Anderson*, 1 B. and P. N. R. 69; *Bunney v Poyntz*, 4 B. and Ad. 568; *Simmons v Swift*, 5 B. and C. 857; *Miles v Gorton*, 2 Cr. and M. 504; *Jones v Jones*, 8 M. and W. 431; *Wentworth v Outhwaite*, 10 M. and W. 436; *Crawshay v Eades*, 1 B. and C. 181. And see commentary on these cases in Benjamin on Sale, pp. 603–606. The author's doubts as to the soundness of the decision in *Collins v Marquis* as a point of the law of stoppage are confirmed by those of Mr. Brodie, Stair, App. pp. 882–3; and Ross, L. C. Comm. Law, vol. ii. 808.]

¹ *Blakey v Dimsdale*, 1774. Here a quantity of corn had been sold by sample to Blakey, deliverable in a month. It was sent by the seller in a cart, under the charge of his own servant, to Blakey's premises; and while the servant was in the act of uncarting the corn, part being already lodged in Blakey's repositories, and the rest still on the cart, a seizure was made of a certain proportion for the whole out of what remained on the cart as payment of a market-toll. The question was, whether Blakey was proprietor of the grain, so as to maintain his action of trespass. Lord Mansfield was of opinion that the delivery to the servant, for Blakey's behoof, was sufficient to vest the property in him as to third parties; and to this effect constructive delivery was sufficient. But the opinion on which I rely at present is this:—His Lordship proceeded to say, 'But what is still stronger in this case is, that the corn was absolutely brought to the plaintiff's house, and part of it unloaded before the trespass was committed. That is an actual, not a constructive possession.' Cowper's Rep. 664.

² [The more accurate statement would be, that even in this case the property passes by delivery to the carrier, although, if the vendee be insolvent, the seller may stop for the price.]

³ *Richardson v Goss*, 3 Pull. and Boss. 127; *Scott*, etc. v *Pettit*, *ib.* 469; and *Leeds v Wright*, *ib.* 320. [Smith, Merc. Law, 7th ed. 554.]

warehouse, where his goods lie at his disposal, and into which they may be delivered for his use. A delivery by the seller into the bond warehouse, for behoof of the buyer, of goods bonded in the buyer's name, is as effectual delivery as if made into the buyer's own cellar.¹ So it is with delivery into the warehouse of a public warehouseman in the buyer's name.

8. Where a buyer sends his own ship for the goods, or a ship chartered by him [174] for a definite period, and entirely at his own command, delivery into such ship is effectual to all intents and purposes. In the former case, it is his own repository in which the goods are placed; in the latter, the possession of the ship being with his hired servants, not for a mere voyage, but for such destination as he may choose to give, delivery into such vessel is delivery into the hands of the buyer.

9. But where a ship is on general freight only for a particular voyage, and in order to bring home to the freighter those particular goods from abroad, the freighter having no control over the ship, the delivery, though not held as made into the buyer's repository, is effectual to pass the property, the price being paid. And in such a case it makes no difference whether this affreightment is made by the buyer, the ship being sent from Britain, or by the seller, freight being got abroad; the engaging of the entire vessel not differing essentially from engaging a part of a general ship.²

The doctrine of these two paragraphs is illustrated in the cases quoted below.³

¹ *Strachan v Knox & Co.'s Tr.*, 21 Jan. 1817, 19 Fac. Coll. 253. Knox & Co. of Aberdeen ordered from Strachan of London wine in casks, to be sent from Oporto. Strachan's agent at Oporto accordingly shipped the wine for Aberdeen, where, on arrival, it was lodged in the king's cellars, bonded for the duties, in the name of a merchant acting for Knox & Co. While the wine lay thus in bond, and not paid for, Knox & Co. failed. Strachan applied to the sheriff for a warrant to have the wine delivered to him, as stopped *in transitu*, not yet having reached the hands of the vendee. The sheriff refused his application; and, on appealing to the Court of Session, they, recognising the distinction stated in the text, held the king's cellar to be the cellar of the person in whose name and for whose behoof the wines were bonded, and that in this case the delivery to Knox & Co. was complete.

² [The confusion in this paragraph is obvious. Delivery on board a general ship is effectual *to pass the property*, whether the price is paid or not. The non-payment of the price is only of consequence to the right of stoppage, which in that case is undoubtedly competent while the goods are on board a general ship, if the master be a middleman interposed merely for the purpose of conveyance to the buyer, but not if he has made himself the special agent of the buyer, as by granting bills of lading for the goods as shipped by the buyer, or if he holds the goods for conveyance away from the buyer to a foreign market. With reference to the right of stoppage in the cases distinguished in paragraphs 8 and 9 of the text, and the sub-distinctions just mentioned, see Blackburn on Sale, pp. 241-248; Benjamin on Sale, pp. 634-644, and cases there; Story on Sale of Personal Property, pp. 396-7, 400, and 402, and cases; *Morton v Abercromby*, 1858, 20 D. 362; *Noble v Adams*, 7 Taunt. 59; *Meletopulo v Ranking*, 6 Jur. 1095.]

³ In England, the following cases have been determined:—

Fowler, etc., Assignees of Hunter & Co., v M'Taggart and Kymer, tried by Mr. J. Grose at Bristol, Mich. Term, 1797. In that case, M'Taggart & Co. had shipped a quantity of tobacco by order of Hunter & Co., the bankrupts, on board of a vessel chartered to the bankrupts for three years, and in

which the goods in question were to be carried out to Naples and Alexandria. The goods were shipped 4th February, and the mate's receipt given for them, and an invoice made out by the sellers in name of the buyers. The vessel was by contrary winds detained at Portsmouth; and in March, the buyers becoming bankrupts, the sellers procured bills of lading from the captain to themselves, and in September 1794 got possession of the tobacco—got it relanded, and disposed of it. It was held that the shipping on board the vessel thus chartered by the buyers was an actual delivery, transferring the property of the goods, and divesting the sellers of the right to stop. 7 Term. Rep. 442; and *Cowasjee v Thomson*, 1 East 522, 3 East 396.

Inglis, etc., Assignees of Crane, v Usherwood, tried in King's Bench, 9 June 1801 (1 East Rep. 515). Lord Kenyon incidentally expressed an opinion apparently extending the doctrine of Fowler's case to a common affreightment. But this was corrected in the following case.

Bothlingk v Inglis. Crane chartered a vessel from London and sent her to Petersburg for a cargo. In consequence of Crane's order, Bothlingk & Co. shipped the cargo between the 19th and 29th October; but hearing of Crane's insolvency, they sent one of the bills of lading to London, and the goods were stopped. The question was, Whether this delivery into the vessel thus chartered was equivalent to actual delivery? and the Court held that it was not. An extract from the opinion of Lawrence, J., who delivered the judgment of the Court, will show the doctrine:—'For the benefit of trade, a rule has been introduced into the common law, enabling the consignor, in case of the insolvency of the consignee, to stop the goods consigned before they come into possession of the consignee; which possession Mr. Justice Buller, in *Ellis v Hunt*, says, means an *actual* possession. That the possession of a carrier is not such a possession has been repeatedly determined; and the question now is, Whether the possession of the master be anything more than the possession of a carrier, and not the actual possession of the bankrupt? As to this, it appears that Usherwood, the master, contracted with the bankrupt to proceed from hence to Petersburg, and to bring

[175] 10. Where goods are in a repository of the seller, from which the buyer does not wish them removed, but which he is willing to make the ultimate place of their destination for a time, the giving up of the key of that repository by the seller to the buyer is an act of real delivery.¹ It differs from symbolical delivery in this, that a symbol is properly nothing more than the sign of the thing transferred—the image by which it is represented to the senses; whereas the delivery of the key gives to the buyer access to the actual possession of the subject, and power over it, while the seller is excluded; in which particular it corresponds with what Lord Stair delivers in his definition of actual possession—‘having the goods in fast places, to which others have no easy access.’ It will not prevent this kind of delivery from having effect, that the seller has a double or master key by which he may open the door, or that he may get access by some indirect and unusual means, or that there is a door of communication with some other part of the premises which the seller may clandestinely open.² It does not, however, seem to be altogether settled (though the decision would probably be in the negative), whether the circumstance of the repository being

in his ship a cargo of goods, which Crane engaged should amount to the tonnage of the ship: which does not differ from a similar contract entered into by the consignor, by the direction of the consignee, at the loading port, for the conveyance of the goods from him to the vendee; in which case it would hardly be contended that a delivery by the consignor to the master of the ship, for the purpose of carriage, would be such a delivery to the vendee as to prevent the right of stoppage *in transitu*. In each case the freight would be to be paid by the consignee; in each case the ship would be hired by him, and there would be no difference, except that, in this case, the ship, in consequence of the agreement, goes from England to fetch the cargo; in the other case, the vessel would bring it immediately from the loading port. Both in the one case and in the other the contract is with the master for the carriage of goods from one place to another; and until the arrival of the goods at their port of destination, and delivery to the consignee, they are in their passage, or transit, from the consignor to the consignee. If a man contract with the owner of a general ship to take goods which are equal to half the tonnage of the ship, and the master complete the loading of his ship with the goods of others, there would be no question but there might be such stoppage. And surely it will not be said that the right of stoppage depends on the quantity of the goods consigned. In support of the defendant's claim, the case of *Fowler v M'Taggart* has been relied on. The more proper name of that case is *Fowler v Kymer et al.*, which was tried before Mr. Justice Grose at Bristol. But that case is very distinguishable from this. There the bankrupts, Hunter & Co., were in possession of a ship, let to them for a term of three years, at £52, 10s. a month, they finding stock and provisions for the ship, and paying the master; during which time they were to have the entire disposition of the ship, and the complete control over her. The ship had been one voyage to Alexandria, and had the goods put on board her to carry them on another voyage to the place; not for the purpose of conveying them from the plaintiff's to the bankrupts, but that they might be sent by the bankrupts upon a mercantile adventure, for which they had bought them. There the delivery was complete. And the facts of that case differ widely from this, where Crane had no control over the ship, and had merely contracted with the master to employ his ship in fetching goods for him.' *Bothlingk v Inglis*, 3 East 395.

In Scotland, these cases were decided:—

Robertson & Aitken v More, 1801, M. App. Sale, No. 3. On the 25th February 1796, Sinclair & Williamson purchased 127 quarters of wheat from Robertson & Aitken, with whom it was to remain till an opportunity occurred of sending it to Leith. The buyers having afterwards purchased, by their agent in that part of the country, another quantity of grain, hired a vessel at Leith, and sent it to the port of Eyemouth to take delivery of both quantities; and, accordingly, both were put on board, and the vessel sailed again for Leith. The bills of lading and invoices were regularly sent to Sinclair & Williamson. They became bankrupts; and the grain in the harbour of Leith was claimed by the sellers. There was some difference of opinion on the bench as to whether the delivery in this case was actual delivery; but it was at last decided that the grain might be stopped.

Pierson v Baxter, 8 July 1807, F. C., Hume 688. A similar judgment was given where the ship was chartered by the buyer for the purpose of carrying the grain. The judge-admiral, in respect it was not denied that the wheat ‘in question was put on board a ship or vessel, chartered by Henry Thomson the purchaser, found that the putting said wheat on board a vessel so chartered was equivalent to actual delivery into the hands and custody of the purchaser, and that the right to stop *in transitu* was thereby barred.’ This judgment was altered by the Court of Session. [See *Smith Merc. Law*, 7th ed. 555.]

¹ ‘Si quis merces in horreo repositas vendiderit,’ says Gaius, ‘simul atque claves horrei tradiderit emptori, transfert proprietatem mercium ad emptorem.’ Dig. lib. 41, tit. 1, l. 9, sec. 6; Instit. lib. 2, tit. 1, sec. 44.

² In the case of *More v Dudgeon & Brodie*, 3 July 1801, n. r., the latter had sold to Sinclair & Williamson a quantity of grain deposited in a loft. The question related to the delivery of the key, and the effect of it. But the Court was clear (on the supposition that the key was truly delivered) that the circumstance of the sellers having it in their power, by an open compartment over a communication door, to get access to the loft, and bar the door on the inside, to the exclusion of the buyers, could have no effect in destroying the reality of the delivery and possession. [See *Maxwell & Co. v Stevenson & Co.*, 1831, 5 W. and S. 269, where delivery of the key was held actual delivery of goods in a warehouse.]

within an enclosure, the doors of which may be shut against the buyer, has any force [176] in destroying the effect of the delivery of the key.¹

11. Where the seller's warehouse is one in which goods of others also are received for rent, the taking of rent by the seller is held delivery in England.² But that is not yet decided as the law of Scotland.³

12. Where standing trees are bought, they cannot be instantly cut down and removed, and the practice is to mark them for the buyer. Such marking is good constructive delivery.⁴

13. In the sale of growing corn, no actual removal can take place till the corn be reaped. A delivery by symbols was held good to exclude creditors; but it has not been determined whether the transit could be held as completed.⁵

14. But in the sale of cattle, the practice is extremely common to mark them with the buyer's mark, and leave them for grazing in the enclosure of the seller, the buyer paying rent. This seems to be effectual delivery.⁶

15. In selling a farm-stock of sheep, it is often difficult to deliver them to the buyer; for they are scattered over many miles of pasture hills, and cannot be collected. The delivery is in parcels: the shepherds alone know when they have gone through the whole; and the sheep cannot advantageously be removed from their native farm. Usage seems to give the only rule where the question turns on the completion of the transit.

16. There is another case of necessity, which seems to give sanction to constructive delivery: viz., where goods are purchased from a manufacturer before some necessary operation of his art is completed. Contracts of this kind are frequent. A person buys a ship on the stocks; or a piece of cloth at the printfield; or a vase in the hands of a goldsmith unfinished; or a merchant, having an order from abroad for cotton goods, goes round among the manufacturers, and buys all the cloth upon their looms in a state of preparation. Actual change of the possession is generally speaking impracticable; but if the accidental

¹ Stein bought from Somerville & Co. a quantity of whisky, which was counted over and lodged in a cellar, and the key delivered to the purchaser. The purchaser became bankrupt; and when the goods were demanded, the seller refused delivery, because the bills were bad. The answer was, that there was no longer any power of retention, the delivery being completed by delivery of the key. The seller replied, that he held the full power of the outer gate, by which alone access could be obtained to the loft. In the papers there was some discussion on the point under review, but no decision on this question. I should rather be inclined to think, that as this circumstance could have no effect in disturbing the right of possession of the tenant of a loft or granary so situate, and as he might demand and enforce access at any time, so should it prove of as little avail in a question of the kind now under consideration. And the remarks that incidentally fell from the judges in the case of Dudgeon & Brodie, seemed to me to favour this conclusion. In that case there was no room for a direct judgment on the point. The loft was situate within a court, the door of which was locked at night; but this court was not exclusively the property of the vendors: several others had cellars and lofts there, and the gate was common. 18 April 1796, 3 Pat. 462.

² *Hurry v Mangles*, 1 Camp. 452. See below, Of Stopping *in transitu*; also p. 190. [Smith, Merc. Law, 554.]

³ [See the contrary decided in *Anderson v M'Call & Co.*, 1866, 4 Macph. 765; *Matheson v Allison*, 1854, 17 D. 274.]

⁴ [See *Paul v Guthbertson*, 1840, 2 D. 1286; and particularly the opinions of the majority of the judges, which are adverse to the above doctrine. See also *Duff v Brown*, 11 July 1817,

6 Pat. 337; *Anderson v Ford*, 1844, 6 D. 1315; and the opinions in *Boak v Megget*, 1844, 6 D. 662.]

⁵ *Grant v Smith*, 1758, M. 9561. It was held, that a quantity of growing corn being sold while yet green, the property passed by symbolical delivery, so as to exclude the seller's creditors, by whom it was afterwards pointed when ripe. [See *Elder v Allen*, 1833, 11 S. 902, where it was held that pointing of a crop of wheat in December, and which was only then braided, was incompetent,—distinguishing from the case of a crop fully, or nearly fully grown. In England, the sale of growing grass, growing timber, etc., 'not made with a view to its immediate severance and removal from the soil, and delivery as a chattel to the purchaser, is a contract for the sale of an interest in land;' 'but *fructus industriales*, such as growing crops of turnips, etc., are considered goods and chattels.'—Add. Cont. p. 39.

See, on the subject of paragraphs 12 and 13, Brodie's Stair, App. pp. 897–8. The distinction between the case of unfelled timber and growing corn appears to be that, till separation, the former is *pars soli*, the latter a moveable.]

⁶ In an old case, where cattle were sold, and marked by the buyer, and a bill given for the price, the cattle were left in the seller's enclosures till the buyer could conveniently take them away. Some were taken away. The servant who had the charge of the enclosures joined the rebels in 1745, and under his direction the rest of the cattle were carried off. The Court held the buyer liable for the price. *Campbell v Barry*, 1748; *Elchies, voce Sale*, No. 7. [*Lang v Bruce*, 1832, 10 S. 777. But see *Boak v Megget*, 1844, 6 D. 662.]

bankruptcy of those manufacturers were to entitle their creditors to seize the goods, and there were no means of securing the property to the buyer, ruin might, in extensive speculations, ensue to the foreign merchant and his factor. Where, in such cases, the evidence of the contract is clear; where the subject purchased is specific; and where there is no ground for pleading on the effect of reputed ownership, as giving additional credit¹ to the holder of [177] the goods; there is a constructive tradition sufficient to transfer the property, the price being paid.²

17. In England, where a specific existing subject has been sold, and all the delivery has been given which the nature of the case admits, although the thing continues in the hands of the vendor, it has been held as constructively delivered.³ But where the subject is not in existence at the time of the contract, it is held that no property passes till it is finished and delivered; the contract for the time being considered as entire, not to be separated into parts.⁴

In Scotland the purchase of a specific subject or materials, the price being paid, is,

¹ As to which, see below, On Reputed Ownership and Collusive Possession.

² If we seek for authority for this doctrine in the civil law, we shall find it, 1st, In the constitution of Honorius and Theodosius the younger, which lays down that a donation or sale, with retention of the usufruct, requires no other tradition: 'Sed omni modo idem sit in his causis usumfructum retinere quod tradere.' Cod. lib. 8, tit. 54; De donat. l. 28. 2d, We shall find the principle laid down by Ulpian (in the 77th law of the Pandects, De rei vind. lib. 6, tit. 1), that in donation a feigned tradition, resulting from the retention of the subjects in the character of tenant, puts the donatory in possession, and transfers to him the property. The doctrine of the civil law on this subject is thus delivered by the editor of the Pandects: 'Traditionis fictæ species est, quum is, qui rem alicui traditurus est, hanc illius nomine se possidere constituit, v. gr. usumfructum retinendo simpliciter; etiamsi non stipulatus fuerit emptor venditorem viri boni arbitrato fructurum, quæ cautio in constituendo usufructu interponi solet. Hoc enim ipso quod sibi usumfructum retinet jam rem tanquam alienam tenet, eamque jam non sibi emptori et per hoc hujus possessionem ad emptorem transfert. Idem est si conduxerit.' Pothier, Pandect. vol. iii. p. 109.

The question has given birth to much controversy on the Continent. On the one hand, it was contended that tradition alone, and not convention merely, transfers property (Lib. 3, tit. 3, Cod. de Pact. l. 20); and whatever may be the effect of such agreement between the parties, a feigned tradition, without any external act, can have none against third parties (Belordeau, liv. 1, chap. 18). On the other hand, it was maintained, that by such agreements the vendee truly takes possession, and acquires the property; for we may acquire possession and property by the agency of a third person, and in these cases the seller takes possession in the buyer's name. And against the law of the Codex is opposed the 3d and 9th law of the Pandects, De acquir. poss. lib. 41, tit. 2, and the 77th law, De rei vind. lib. 6, tit. 1; Guy Pape, decs. 112. With this latter opinion the lawyers of chief authority on the Continent concur. [By the present laws both of France and Holland, the property is held to be transferred when the contract is completed.]

The doctrine of this and the two following paragraphs has been severely animadverted upon by Mr. Brodie, App. to Stair,

905, note, and 898 et seq. See also *Boak v Megget*, 1844, 6 D. 662; *Wylie & Lochhead v Mitchell*, 17 Feb. 1870; *Parsons on Contracts*, ii. 131 et seq.; *Story on Sale*, 233, and cases *Benjamin on Sale*, 228-236 and 268-270, and cases.]

³ *Manton v Moore*, 24 Nov. 1796, 7 Term. Rep. 67, 73. A canal company employed Langwith as their engineer to build locks and bridges. He purchased materials, which he laid down on the company's premises, the banks of the canal. In this situation the company advanced him money, and he made a bill of sales to them of the materials, and, to make all sure, gave a symbolical delivery by a halfpenny. A question occurred between the company and the assignees under Langwith's bankruptcy. This case may be resolved into two questions: 1st, Whether this was a good delivery to transfer property? 2d, Whether the assignees were not entitled to challenge it under 21 James I. c. 19, sec. 11, as a case of collusive possession? The Court of King's Bench sustained the delivery as effectual, being the only delivery possible in the circumstances of the case.

See below, p. 189, where, in the more recent determinations in England, such delivery has been held effectual to divest the seller of his right to stop. [Smith, Merc. Law, 510; Addison, Cont. 6th ed. 176.]

⁴ *Mucklow v Mangles*, 1 Taunt. 318. In this case, Royland, a barge-builder, undertook to build a barge for Pocock. Before the work began, Pocock advanced money to account; and as the work proceeded, he paid him more, to the amount of £190, the whole value of the barge. When it was nearly finished, Pocock's name was painted on the stern. Two days after the work was completed, an execution was issued against Royland, and the barge was taken in execution. It was given up to Pocock on an indemnity; and in an action of trover by the assignees of Royland, a verdict was given for them. On a motion that the sum of £190, the price of the barge, should be deducted from the amount of the verdict, on the ground of the property having vested in Pocock, the Court of Common Pleas refused the rule. They held the property not to be passed till the barge was finished and delivered, and drew the distinction between the sale of an existing subject and the contract, *Do ut facias*. 'If the thing be in existence at the time of the order,' said Heath, J., 'the property of it passes by the contract, but not so where the subject is to be made. See the next note.'

without actual delivery, effectually completed by such constructive possession as the case admits; and this may take place successively, without any necessity of the whole being completed.¹

18. In this class of contracts a distinction is to be made between what may be [178] called a generic and a specific purchase. If I go into a goldsmith's shop, and order and pay for a vase of a certain shape, and weight, and fineness, which the workman agrees to make for me, I am a mere personal creditor of his for the vase: there is in such a case no delivery, real or feigned, and consequently no transference nor constitution of a real right. But if I find standing in the shop a vase begun, and purchase and pay for that specific vase, which I order him to proceed in finishing for me, the property of the vase will be transferred to me by the feigned tradition. And the same consequence would seem to follow, if I purchase and pay for a mass of silver, or a quantity of dollars, which I set apart and order to be made into a vase. In either case it would be absurd to carry away the materials or the vase, by way of taking possession, when it was to be instantly returned for manufacturing. Every objection to the holding of feigned delivery as a completion of the transference applies as strongly to the device of actual delivery and the immediate return of the materials to be manufactured.

19. In no other case does the law of Scotland seem to hold delivery sufficient for passing the property, in which there is not a manifest change of custody. In England, from the operation of the special statute already alluded to, the same effect should be expected; and, till lately, there was no case in which, against the policy of the Act of James I., goods were held to be sold and effectually delivered, without passing out of the warehouse of the seller, or some alteration of place indicative of change of property. But this came to be relaxed on one occasion, where altering the situation of commodities, in execution of a sale and

¹ The following case is nearly the same with the English case last quoted:—

Simson v Duncanson's Crs., 1786, M. 14204. Simson employed Duncanson to build a ship; the materials of the hull to be furnished by the builder, the masts and other articles by the employer. The price was to be paid in three sums: one at laying the keel, one when the ship was planked to the gunwale, and the last when she was launched. After receiving the first sum, the builder failed; and the factor for the creditors claimed the vessel as the untransferred property of the bankrupt. The Court held Simson to be the proprietor in consequence of the particular nature of the bargain, and the appropriation of the vessel from the time of laying the keel.

Lord Justice-Clerk M'Queen said, that, taken upon general principles, it was a nice question; but he thought the special nature and terms of the contract should decide it. In the case of a simple bargain for the building of a ship, the materials to be furnished by the builder, he would incline to the opinion that the unfinished vessel belonged to the builder or his creditors; but in the particular case when, by the contract, one-third of the price was to be paid when the keel was laid, another when the building was advanced, he held that there was an appropriation of the vessel to the employer from the time of laying the keel. In this opinion Lord Eskgrove concurred. The rest of the Court went chiefly on the ground that the creditors of Duncanson, taking the benefit of the contract, could not refuse credit for the payments which had been made to Duncanson himself.

In comparing those two cases, so nearly similar, there is perhaps a distinction which may entirely reconcile them. In the English case there was no contract, as in the Scottish, to make progressive transfers, and no progressive conveyances

were executed. Accordingly the Court of Session proceeded on the principle that the agreement was merely of the nature of the contract, *Do ut facias*, of the civil law, to pay money for a barge to be finished; but seem to have held that, till completed, the obligation of the builder was only an executory contract, which could not transfer property.

At all events, I incline to think the Scottish determination the more correct, in holding the property of what was finished capable of appropriation on payment of the price, though still retained in the vendor's hand for the purposes of the contract. Perhaps the principle of accession might have operated in some degree in adding the property of each new part of the work to that which was already considered as vested in the buyer.

To this question, perhaps, the principle laid down by Julian in the 61st law of the Pandects, *De rei vind. lib. 6, tit. 1, sec. 1*, may apply. Julian, in commenting on a response of Minicius (who, being asked whether a ship, repaired with the wood of another, continues the property of the repairer, answered that it did), draws a distinction where a ship is built with another's materials: '*Nam proprietates totius navis*,' says Julian, '*carinæ causam sequitur*.' [See *Wood v Russell*, 5 Barn. and Ald. 942; *Clarke v Spence*, 4 Ad. and El. 448; *Laidler v Burlinson*, 2 M. and W. 602. It would seem that, without such successive appropriation consequent upon payment of instalments of the price, the property of the article in the course of being manufactured remains with the workman if he supplies the materials. *Mucklow v Mangles*, 1 Taunt. 318; *Atkinson v Bell*, 8 Barn. and Cress. 277.

See, on the case of *Simson v Duncanson's Crs.*, the elaborate observations of Mr. Brodie, App. to Stair, 900 et seq., and note.]

transference, though the commodity had not passed out of the seller's custody, was held sufficient to entitle the buyer to have the goods, the circumstances not admitting of an immediate removal;¹ but the case partook, in some degree, of the nature of partnership. [179] In another case, it seems to have been taken for granted, that goods deposited in a hovel belonging to the seller, for the purpose of the buyer taking them away, were delivered to all effect but that of divesting the power to stop.² And more recently it has been held, that wherever the universal custom is such as to make the public aware of the possibility of a transference while the goods continue with the seller,³ it is an effectual constructive delivery, and even good as actual tradition, if the vendee has marked the goods as his own, or if he has paid warehouse rent for them.⁴ There seems to be a qualification of this doctrine, however, where something remains to be done by the vendor in measuring over or separating the goods.⁵

¹ *Flynn and Field*. These persons, being at Liverpool with the intention of purchasing plantation tar, found lying on the quay, to be disposed of, 500 barrels belonging to Matthews. It was agreed that they should purchase two-thirds of the whole, and take the other third on consignment for sale for Matthews—he to pay the cartage and portage, and expense of shipping the whole, and they to sell his share free of charge; and that, in execution of this bargain, the goods should be removed from the quay, and lodged in a warehouse till an opportunity should occur of shipping them. All this was clearly expressed in a bill of parcels, containing an acknowledgment for the bills. Matthews accordingly put the tar into a warehouse or cellar of his own; and having become a bankrupt, his assignees took possession of the tar remaining in the bankrupt's warehouse. Lord Hardwicke ordered the property to be given up on two grounds: 1. That this was a joint concern, and common property, and the possession of one was the possession of all; and, 2. That Matthew's possession was merely a temporary custody, because the buyer of the tar had not an opportunity of selling it, by shipping it off immediately to Ireland. 1 Atk. Rep. 185.

² *Goodall v Skelton*, 2 H. Blackst. p. 316.

³ See *Thackthwaite v Cook*, 1811, 3 Taunt. 487. Moore sold seventy-eight pockets of hops to plaintiff, who paid for them. They were to remain with the seller at a rent till the plaintiff should re-sell them. A custom in the hop trade was relied on as sanctioning the transfer; the hops remained unmarked. Verdict for the plaintiff was, on a rule for non-suit, held bad. The Court required a custom such that persons dealing with the trade may see and know that the goods may possibly not be the property of the possessor, and thought a new trial unnecessary, as no evidence could be given, consistent with the evidence in the cause, that could prove such custom as is required.

In *Knowles v Horsfall*, 1821, 5 Barn. and Ald. 134, several casks of brandy were sold, some of them in seller's own vaults, some of them in bonded vaults of one Ledson. The price was paid. No notice was given to Ledson, and the casks in the seller's custody remained there without rent, only marked with K in chalk. It was relied on as a sufficient custom to make strangers aware of the possibility of another right, that goods thus situated are frequently sold without delivery, and it was said that the transaction in question was publicly known. The Court held, 1. That notice to Ledson would have passed the property; but, 2. That neither the casks in his custody, and far less those in the seller's own vaults, were

effectually passed; but, as under the statute, still as in the order and disposition of the bankrupt. [Smith, Merc. Law, 7th ed. 700.]

⁴ In *Hammond v Anderson* (see below, Art. 2, *in fin.*), the weighing of the goods by the buyer was a fact much relied on as completing the transit.

In *Hurry v Mangles*, 1 Camp. 452, Lord Ellenborough held 'the acceptance of warehouse rent as a complete transfer of the goods to the purchaser. If,' says he, 'I pay for a part of a warehouse, so much of it is mine. This is an executed delivery by the seller to the buyer.' Again, he says: 'It would be overturning all principles to allow a man to say, after accepting warehouse rent, "The goods are still in my possession, and I will detain them till I am paid." The *transitus* was at an end. The goods were transferred to the person who paid the rent, as much as if they had been received into his own warehouse, and there deposited under lock and key.'

In *Stoveld v Hughes*, 1811, Hughes sold a quantity of timber lying at his own wharf, and it was marked with Dixon the buyer's initials. Dixon re-sold it, and the second buyer brought a notice from Dixon to deliver it to him. Hughes went to the wharf, and showed the timber to the second buyer, who in his presence marked it with his initials. Part of the timber had been delivered to the first buyer before this new sale. The second buyer paid the price to Dixon, who failed, without paying Hughes. The question was, whether Hughes could stop as against the second buyer? The Court of King's Bench held unanimously that the transit was at an end by the marking in presence of the seller. 14 East 308.

⁵ *White v Wilks*, 1813. Shuttleworth bought from Wilks twelve tons of linseed oil at £1200; but not being immediately in want of it, and it never having been measured off, it was agreed that it should remain in the cisterns under Wilks' care, the purchasers paying rent for the warehouse room. The invoice had this note: 'Mr. Wilks holds the above in cisterns for Messrs Shuttleworth's accommodation, charging them 1s. per ton per week rent.' Before the bills were accepted, the buyers failed. The assignees brought an action of trover against the seller. Mansfield, Ch. Justice, on a motion for a new trial (verdict having gone for the seller), said: 'In trover for a quantity of sugar, where the sale had been agreed upon, but there had been no actual delivery, the Court was of opinion the action was not maintainable (*Austin v Craven*), and certainly sugar is of a more divisible nature than oil. The question here is the separation, which I think is essential for the support of this action; and there certainly

In Scotland there is only one case in which property has been held as passed to [180] the buyer while lying without necessity in the warehouse of the seller; and it seems to require a very full reconsideration of the matter before this decision is admitted as law.¹

has been no separation of the oil in question.' The rule refused. 1 Marshall, Rep. C. P. 2.

See also above, *Bloxam v Saunders*, p. 176. [On the subject of the transference of property in unascertained goods, under the law of England, the expositions of Mr. Justice Blackburn, in his Treatise on Sale, have obtained a high degree of authority. According to this author, in order to a change of property, there must be not only an appropriation of certain goods to the purposes of the contract, but also (expressly or impliedly) an assent on the part of the purchaser to the terms on which this appropriation is made. *Godts v Rose*, 17 C. B. 230; *Campbell v The Mersey Dock*, 14 C. B. N. S. 412. Where the assent of the purchaser to the appropriation is not given, such appropriation is revocable by the party who made it, and not binding on the other party, unless it were made in pursuance of an authority to make the election conferred by the agreement (*Black. on Sale*, 127). Where, from the terms of the contract, the vendor is to despatch the goods, or to do anything to them which cannot be done till the goods are appropriated, he has a right to choose what the goods shall be, and the property is transferred by the despatch or other act (*ibid.* p. 128). Appropriation may, on this principle, be made by placing the goods in bags or bottles furnished by the purchaser. *Aldridge v Johnson*, 7 Ell. and Bl. 885; *Langton v Higgins*, 4 Hurl. and Norm. 402; and see *Logan v Le Mesurier*, 6 Moo. P. C. Ca. 116. A delivery of a part of the goods sold will not be considered constructive delivery of the whole, if anything remains to be done either to ascertain the specific goods or their price. *Simmons v Swift*, 5 B. and C. 857; *Acraman v Morrice*, 9 C. B. 449, 19 L. J. C. P. 57. See Tudor's Mercantile Cases, *voce Hansen v Meyer*, pp. 610 sqq.; Addison on Contracts, 6th ed. 193; Benjamin on Sale, pp. 241-271.]

¹ The case to which I allude in the text I have fully reported, not that it may stand for a precedent, but that the peculiarities of the case may be pointed out, and the danger of holding it as a precedent fully explained.

Broughton v Aitchison, 15 Nov. 1809, F. C. On 9th September 1807, Aitchisons, bakers in Edinburgh, bought 8 bolls of wheat from Crow & Wood in Leith, and had it delivered. Being pleased with the quality, they on 17th September entered into a bargain by letter for 90 bolls more at the same price, the original quantity being included in the contract: 'We hereby offer you 98 bolls Virginia wheat, at 40s. per boll, to be settled one-half in cash, and the other by bill at three months.' This was accepted by a counter letter. The bill was granted, and part of the cash paid; the rest offered when the question arose. The wheat was part of a cargo which lay in a loft hired by Crow & Wood, and under the care of Aitken, their own servant. At the time of the bargain, the greater part of this cargo had been sold to different persons, but a considerable quantity (161 bolls) still lay in the loft; and it appears that Crow & Wood intended to sell to Aitchisons all of this quantity that remained unsold. The buyer was to take the wheat when convenient for him, and he received an order to enable him to do so, addressed to the servant who had the care of the loft: 'Deliver to J. & A. Aitchisons,

Edinburgh, 90 bolls Virginia wheat, from Cathie's high loft.' The other buyers gradually received deliveries to the amount of 62 bolls, after the bargain with Aitchisons; and at last Crow & Wood called their creditors together. At this time there lay 99½ bolls in the loft, 90 of which were sold to Aitchisons, the rest belonged to the vendors. The day after the creditors were called together, Aitchisons applied for their wheat, which was refused, on the ground that the bankrupts could do nothing to alter the condition of their creditors. An application was then made to the sheriff, and he granted warrant for delivery of the wheat. The question came into the Court of Session by bill of suspension for the factor under the sequestration. The Lord Ordinary held, 'That neither the order of delivery by Crow & Wood to Aitchisons, nor that obtained from the sheriff, could be held equivalent to actual delivery and possession of a quantity of wheat remaining in the warehouse at the time of the bankruptcy, so as to operate as a transfer of the property, or prevent its passing to the interim factor as part of the sequestered estate.' In the First Division of the Inner House there was much difference of opinion; but by two judgments, the determination of the Lord Ordinary was reversed, and it was found, 'That the property of the wheat in question was legally vested in the vendees.'

This judgment is not to be held as a precedent; for not only was there much division of opinion on the bench, but some of the judges proceeded on a misapprehension of the facts. Thus, 1. It was held that the 8 bolls first purchased were part of the original bargain, and that actual delivery of a part was delivery of the whole. 2. That the subject sold was, in truth, a specific subject, not part of a mass; for at the bankruptcy all the grain had been taken away but this, the small remnant not being entitled to consideration, being only the 90th part of the whole. 3. The most important mistake, in fact, was, that Aitken was a mandatory, not the servant of Crow & Wood, but one who could, and did, act as the servant of the buyer after the purchase.

The opinion of the majority of the judges, so far as it touched the abstract point, seemed to be, that the necessity of their trade required bakers to have a power of continuing their grain in the loft where it was purchased, and taking delivery gradually, and that an order like the one in this case was all the delivery that the case allowed: that where the price is paid, part delivered, and an order given for the rest, the transfer is completed: that this being, in truth, the sale of a specific subject, the payment of the price, with an order to deliver, transfers the property: that insolvency of the seller could not stop delivery legally required; and here delivery was required before bankruptcy; nay, a warrant of the sheriff was granted, which must be held equivalent to delivery.

The opinion of Lord President Blair was extremely strong against the judgment. He began with stating this as a case of infinite consequence to the law. He held that this was a concluded bargain on the 17th September, when the sellers were in good credit; and that, in consequence of it, the respondents had a good title to sue for implement by delivery.

[181] It cannot be said that there is any judgment fixing the law, that either marking goods¹ or the payment of warehouse rent has in Scotland the effect of delivery, where the goods are with the seller. In one case the measuring out of grain, and setting it apart, when that was done by the seller, was not held final delivery.² It may well admit of a different construction where the same thing takes place respecting goods in the hands of a third party.³ See below, p. 195.

Such a right, however, is merely personal—a *jus ad rem*: it ranks among personal creditors, some of whom claim money, others wheat, there being no difference among obligations from the subject of them. Aitchisons here claim as being proprietors, and holding antecedent to the bankruptcy a *jus in re*. The question is, whether, at the date of the proclaimed insolvency, when the creditors were called together, the property was transferred? After that, the bankrupts could do no effectual act. If they had paid a debt, the trustee might have had restitution; if they had delivered wheat, it might have been reclaimed for the creditors.

The payment of the price is to be laid out of the question; for nothing is better fixed than that payment of the price has no effect whatever on the transfer of the property. Yet this has in some degree been allowed to enter into consideration. Suppose that the buyers had failed without paying the price, would the wheat in Crow & Wood's possession have belonged to the buyer's creditors as part of their sequestrated estate? On principle, there can be no doubt that if the property is transferred in the one case, so must it be in the other. The completion of the *contract* of sale and payment of the price have no effect at all in transferring without delivery: *sasine* in land, actual possession in moveables, are absolutely indispensable.

Then what possession was held by the sellers before their bankruptcy? This grain was not under deposit; it was in their own hands—in the hands of their own servant. The possession was the same which a merchant has of goods in his shop, or a gentleman of his furniture; not civil, but actual possession. To transfer the property, the *titulus transferendi* must have been accompanied with the same possession which the seller had. But here there was no delivery, even in appearance, made of the grain. An order was given, it is said, and it was intimated to Aitken: suppose this intimation proved, is this delivery of moveables? No. There must be something ostensible; something to pass to the vendee the same possession which the vendor had. As to constructive delivery, this is not a case for it. Where goods are in the hands of a third party, an order and intimation places the buyer in the seller's situation: so of goods at sea; goods in a bond-cellar. But here, no necessity, no civil possession by a third party. The buyer might have got delivery; the order entitled him at any time to do this, but he did not. He trusted to the bankrupts; so did the other creditors: and how should he be in a better situation than they? How justify a sale and transference *retenta possessione*, which is reprobated by law?

Practice, and the necessity of trade, have been founded on. It may be common for the buyer, if he trusts the seller, to leave the goods in his hand; and this is convenient. But does it therefore follow that the real right goes with the buyer? Such a doctrine would outrage that most valuable rule, which makes property and possession in moveables go together; it would subvert all the common principles of mer-

cantile dealing. If I buy, and don't choose to trust to the seller, I pay and carry off my purchase, and trust only to the goods. But shall I, having done so, be exposed to the claim of a former buyer, who has bought, and got the anomalous kind of transfer founded on in this case? It would be found that the new rules adopted in order to simplify, would only confound and lay embargo on traffic in moveables. Transfer the argument to pledge: If this kind of delivery is sufficient to transfer property, so must it be to constitute pledge; and a debtor wishing to give a pledge, does it by an order on his own servant! Is this law? These doctrines are most dangerous, and contrary to the fundamental principles of the law of Scotland; and will, if admitted, destroy at length all security and uniformity in the law of transference.

If the application to the sheriff had been made before the declared insolvency, an order would have procured delivery; and, if disobeyed, would have been equivalent to delivery. But on the 30th September the insolvency was proclaimed, and the property fixed in the creditors as at that time. See a report of this case, 15 Fac. Coll. 411.

¹ [As to marking, see Pothier, Vente, No. 315.]

² Salter bought sixty bolls of malt from Knox & Co., to be delivered afterwards. He paid the price, being about £67. About two months afterwards, Knox & Co. gave notice to Salter that they had measured out and set apart for him the stipulated quantity. A few days afterwards, Knox & Co. having failed, the factor on their sequestrated estate took into his possession the whole malt found in their warehouses. Salter applied to the Court of Session for a warrant to have the sixty bolls delivered up to him. But the judges were unanimous in rejecting his claim. It was observed by one of the judges, 'That a purchaser had indeed an equitable claim to the goods of which he had paid the price; but however equity may afford relief, by undoing what had been illegally done, it cannot, in a question with third parties, supply the want of those things which, though required by the law, have been left undone.' *Salter v Knox's Factor*, 1786, M. 14202.

³ [In a case that occurred before the passing of the Mercantile Law Amendment Act, an act of delivery was held sufficient, although the goods still remained in the premises of the seller. A pipe of port wine had been bought and paid for, was bottled off for the buyer, and placed in a binn appropriated to his use, and so marked in the binn-book. The question arose on the bankruptcy of the wine merchant, and the delivery was held complete, so as to pass the property to the buyer. *Gibson v Forbes*, 1833, 11 S. 916. (See to the same effect, *Lang v Bruce*, 1832, 10 S. 777; *Henry v Dunlop*, 1842, 5 D. 3.)

Both *Gibson v Forbes* and *Lang v Bruce* must be read subject to the law laid down in the later cases of *Matheson v Allison*, 1854, 17 D. 274, and *Boak v Megget*, 1844, 6 D. 662. They are both doubted by Ross, L. C. Comm. Law, vol. ii. p. 567.]

20. It is not a possession equivalent to delivery, where, goods being in a warehouse, or grain in a granary, the buyer or his servant receives the key to sift the grain or air the goods, the key being returned to the sellers.¹

21. It does not seem to be sufficient to answer the purpose of delivery, that samples have been taken while the commodity remains with the seller. Samples are useful [182] in affording evidence of a completed *contract*, and a test of comparison should any question arise concerning the quality or identity of the article sold.² But as a badge of delivery, or as supplying the place either of actual or constructive tradition, the taking of samples has no effect.³

22. Delivery to a person in order to have some operations of art performed on goods sold, is not delivery to the vendee, where the workman is employed by the vendor; as, where a goldsmith sold plate, on which the purchaser wished to have his arms engraved, and the goldsmith sent for an engraver, to whom he gave directions to engrave the arms, and bring the plate to the workman for payment, the goldsmith was found entitled to stop as *in transitu*.⁴ But, on the other hand, there seems to be little doubt, that if one buy goods, and order them to be delivered for manufacture to his own engraver or bleacher, who, on finishing the operations of his art on them, is to bring them to the vendee as his paymaster, the delivery will be held as complete.⁵

23. Where the contract of sale is complicated with *locatio operarum*, it does not seem to be settled whether mere delivery of the materials be sufficient to transfer. If, intending to build a house, I purchase the materials, and employ a mason and a carpenter to construct and fashion them to my wish, the materials, the stone, the lime, and the wood, when brought upon my premises, are actually delivered to me, independently of the operations of the builder and the carpenter. There are here two contracts distinct—a contract of sale, and a contract of *locatio operarum*—which may be completed independently of each other. But if I contract with a builder, and he procure the materials, are those materials, when laid down on my ground or deposited in my sheds, actually delivered, although that final act, which was to close the workman's undertaking, and to complete the transfer of the particular materials, is unperformed? In the more complex machines, it is necessary not only to have the wheels, etc., properly prepared and nicely fitted, but to have a person of skill to erect them in the place where the engine is to be used. Watt and Boulton, for example, when they receive an order for a steam-engine, not only send the various parts of the engine, but send persons along with it properly qualified to place the work. In the same way, where a machine is to be improved, or, having received injury, any of the wheels are to be taken off and others substituted, the engineer does not hold his order as completed merely by sending the necessary wheels, but he sends a workman to put them up. On the other hand, it often happens that, in large manufactories, engineers are kept by the manufacturer for the purpose of attending to the machinery; in which case, the person who furnishes the

¹ *Dudgeon & Brodie v More*, 3 July 1801, n. r., where the above circumstances were held insufficient to pass the property.

² With a view to which, the samples should be sealed at making the bargain. *Cheap*, 1713, M. 14238.

³ In this case, *Hill v Buchanan*, 1785, M. 14200, samples were delivered; but although this kind of delivery was aided by other circumstances, the Court refused to hold the property as transferred; and this judgment was affirmed in the House of Lords. The case was, that Buchanan, having imported a cargo of tobacco, offered for sale to Messrs. Wilson & Brown thirty hogsheads, 'to be delivered to you, or order, at Greenock, as it lies in the king's cellars, and at the weight it passed at the king's scales,' etc. Wilson & Brown accepted of the offer, and samples were delivered. Eight of the

twenty hogsheads were actually delivered to the order of the purchasers, and put on board a vessel; but they becoming bankrupt next day, gave up the bill of lading to the vendees, who got it cancelled by the shipmaster, and a new one granted to themselves. On account of some irregularity in the shipping of the hogsheads, they were relanded and lodged again with the rest, by order of the custom-house officers. The trustee under the sequestration claimed the property of the whole, as transferred to Wilson & Brown. But the Court decided in favour of Buchanan, the vendor. Affirmed in the House of Lords, 11 April 1786, 3 Pat. 47. [*Jowitt v Stead*, 1860, 22 D. 1400.]

⁴ *Owenson v Morse*, 7 Term. Rep. 64.

⁵ [See *Eadie v Mackinlay*, 7 Feb. 1815, F. C.; a special case.]

wheels, etc., is not required to send a person to place them. In cases of this kind, the determination [183] may often be difficult; but probably a distinction would be made between vendition when simple, and when complicated with the contract of *locatio operarum*. Wherever the contract is fairly resolvable into simple vendition, the possession of the thing ordered, the delivery of it upon the premises of the vendee, seems to be sufficient as an absolute and perfect transference. Where, again, it is resolvable into a contract for performing a particular act or piece of labour, of which the articles sent are merely the materials, the act of delivery seems not to be complete till the work be performed.¹

ART. II.—TRANSFERENCE OF GOODS IN THE CUSTODY OF ANOTHER FOR THE SELLER.

This division of the subject includes several important cases, the decision of which depends on this principle, that whatever changes the custody, and makes him who originally held for the seller continue his possession for the buyer, alters the property as effectually as it could be altered by actual delivery.

I.—GOODS IN THE HANDS OF WHARFINGERS, WAREHOUSE-KEEPERS, AND AGENTS.

1. Where goods are lying in the hands of a warehouseman or wharfinger at the time of the sale, the transfer of them in the wharfinger's book to the name of the buyer, by order of the seller, completes the delivery, making the wharfinger thenceforward the custodian for the buyer.²

[184] 2. But it is not indispensable that there should be a transfer in the books. It is the notice to the custodian that operates as a transfer of the property.³ In the law of Scotland

¹ [See note, p. 198.]

² *Main v Maxwell*, 1710, M. 9124.

Harman v Anderson, 1809, 2 Campb. 243.

Withers v Lyss, 1815. Here Lyss & Co. sold rosin lying in their warehouse, and received payment. Withers & Co., the buyers, desired it might for some time continue there in this manner. They then sold to Bromer, by a broker, and sale-notes exchanged, and a delivery order was given addressed to Lyss & Co.: 'Please weigh and deliver to Mr. D. Bromer, our rosin in matts, about 30 tons, more or less.' This order was lodged with Lyss & Co., but no one came to have the rosin weighed. Bromer stopped; and the question was between Withers & Co. stopping the goods, and the assignees for the creditors of Bromer. Verdict went for the former, on the sole ground that the weighing, which was necessary to ascertain the price, was not done; and Lord Chief Justice Gibbs said, that 'if nothing had remained to be done to ascertain the price, a delivery order lodged with the warehouseman is a sufficient transfer of the possession.' 4 Campb. 237. See below, p. 196. [Add. Cont. 6th ed. 171. Sm. Merc. Law, 7th ed. 511.]

³ [It appears certain that a transfer in the books of the custodian is not necessary (Lord Ellenborough in *Harman v Anderson*, 2 Campb. 243; Blackburn on Sale, 234); but it is decided in England that mere notice to the custodian is not effectual to change the custody without the custodian's assent, express or implied, to his becoming holder or bailee for the purchaser. Nor is it so without an intent in the mind of the purchaser that the custodian shall become an agent to hold possession for him, even though the custodian should consider himself as agent to hold possession for the purchaser. In order to operate a change of possession there must concur the authority of the seller, the assent of the custodian, and the

acceptance of the buyer: the transfer of possession takes place only when the vendor, the purchaser, and the custodian agree together that the latter shall cease to hold the goods for the vendor, and shall become the agent of the buyer in retaining custody of the goods for him. A *non repugnantia* on the part of the custodian when the notice is given will imply his assent (Blackburn on Sale, pp. 234 and 236); but his refusal or dissent, even though wrongful, will prevent the constructive possession held through him by the vendor from becoming the constructive possession of the vendee. *Bentall v Burn*, 3 B. and Cr. 423 S. C., 5 Dowl. and Ryl. 284; *Jackson v Nichol*, 5 Bing. N. C. 508; *Lackington v Atherton*, 8 Scott. N. S. 38, 7 Mann. and Gr. 360; *Bill v Bament*, 9 M. and W. 36; *Lucas v Dorrien*, 7 Taunt. 278; *Woodley v Coventry*, 32 L. J. Ex. 185; *Harman v Anderson*, 2 Campb. 243. In *Bentall v Burn* an attempt was made to distinguish the case of a public dock company holding a Treasury certificate, and so under obligation to receive goods into their warehouses and transfer them from seller to buyer, from the case of a common warehouseman; but the Court said, that though the dock company might be bound by law when required to hold the goods on account of the vendee, and though they might render themselves liable to an action for refusing to do so, still, if they did wrongfully refuse, the original possession of the vendor would remain unchanged. In *Jackson v Nichol*, and in *Lackington v Atherton*, the vendee repeatedly demanded the goods from the holder before any stoppage *in transitu*; but it was held that, on account of the want of assent on his part to hold them for the purchaser, the vendor's possession was not determined. See also *Farina v Home*, 16 M. and W. 119. In *James v Griffin*, again (2 M. and W. 623), the bankrupt purchaser had often used Beale's

a transfer of the custody has always been held as effectual delivery to the buyer.¹ On the same principle, Lord Ellenborough delivered the law in the sequel of the case of Harman, already referred to.² The change of custody may be proved in many ways; as by a transfer in the book, acceptance of the order by the custodier,³ the testimony of clerks or of the

wharf as his warehouse for lead; but being insolvent, he did not wish to accept a cargo of lead, purchased but not paid for by him, which had come to the wharf, and which, in order merely to set the ship free, he told the captain to land on the wharf. He intended this not to be a delivery to himself; but he did not communicate his intention to the wharfingers, who considered themselves as agents to hold possession for him. The majority of the judges (Parke, Bolland, and Alderson, B.B.) held that, except as a test of its reality, it did not matter whether he communicated the intention or not, and that though the holders of the goods meant to hold them for the buyer, that did not render their possession the constructive possession of the buyer, because *the buyer's assent* was wanting. See also *Salte v Field*, 5 T. R. 211, as explained by Lord Kenyon in *Barnes v Freeland*, 6 T. R. 86, and *Brown on Sale*, pp. 556, 564,—a case in which the reception of goods by a person who intended to receive them for the buyer was rendered ineffectual as a constructive possession by the buyer, on account of the buyer's uncommunicated intent to reject the goods formed before they reached the agent's hands. It is, however, necessary to distinguish the case where a third party holds the goods as *bailee of the vendor*, from that in which they are merely lying at a free wharf, or on the ground of a third person *not the bailee of the vendor*. In the latter case no assent by this third person is required to change the possession, which will be effected by the goods being put at the disposal of the vendee. *Tansley v Turner*, 2 Bingh. N. C. 151; *Cooper v Bill*, 34 L. J. Ex. 161. In Scotland it appears to have been *assumed*, though never expressly decided, nor perhaps questioned, that mere *intimation* of the vendor's order is sufficient to operate a change of the constructive possession of goods in the hands of a custodier. Probably this arose from confounding a delivery order with an assignation, or from the analogy of the effect of a presented but dishonoured draft, in transferring to the holder the right to the drawer's funds in the hands of the drawee. Some countenance to the idea that a delivery order is an assignation of the vendor's personal rights, or a document of title to the subjects, is given by the opinions of the judges of the First Division in *Pochin v Robinow & Marjoribanks*, 1869, 7 Macph. 622; and by *Hamilton v Western Bank*, 1856, 19 D. 152. But see *contra*, *Arbuthnot v Paterson or Bisset's Crs.*, 1798, M. 14220; and *M'Ewan v Smith*, per Lord Cottenham, C., and Lord Campbell (6 S. Bell, 340, 352), and the observations of Mr. Brodie, App. to Stair, p. 874, note. The question as to the nature of a delivery order by the law of Scotland involves that of the seller's right to countermand it, as well as the question whether, besides intimation, it requires the custodier's assent to make it operate a change of possession. In England such a note is certainly not a document of title, but a mere means of possession. (See *Ackermann v Humphrey*, 1 C. and P. 53; *Jenkyns v Osborne*, 7 M. and Gr. 699; *Griffiths v Perry*, 28 L. J. Q. B. 204; *Farina v Home*, 16 M. and W. 119; *Blackburn on Sale*, pp. 273-4, and p. 297; *Benjamin on Sale*, pp. 612-615, 623.) Apart from any doubt there may be as to whether such an order is by the law of Scotland

an assignation or document of title (not a mere executive document, deriving whatever effect it has from some previous transaction between the grantor and grantee lying behind it), there appears to be no legal ground for holding that mere notice or intimation to a non-assenting custodier should operate a change of constructive possession from vendor to vendee, any more than it does in England. See *Blackburn on Sale*, pp. 248-250; *Benjamin on Sale*, pp. 127-9, 503, 575, and 602; *Brodie, App. Stair*, 873-4, note. See also *Von Savigny on Possession*, book ii. sec. 28.]

¹ In the case of *Hall & Co. v Auld*, 12 June 1811, F. C. (to be afterwards detailed), the doctrine of a change of custody by notice to the custodier, being equivalent to actual delivery, was stated by Lord President Blair as the undoubted law of Scotland, and fully acquiesced in by the Court.

² In *Harman's* case (*supra*, p. 194, note 2), the Attorney-General, arguing on the direction given to the jury, moved to reduce the damages, on the ground that, as to one parcel of the butter, *no transfer had been made in the defendant's books*. The fact was, that, as to this parcel, the delivery note was sent to the wharfinger; but he neither made any transfer in his books, nor *did anything to testify that he accepted the delivery note, or held the goods on the buyer's account*. Lord Ellenborough said: 'After the note was delivered to the wharfinger, he was bound to hold the goods on account of the purchaser. The delivery note was sufficient, without any actual transfer being made in the books: from thenceforth they became the agents of Dudley, the bankrupt. They themselves might have a lien on the goods, and be justified in detaining them till that was satisfied; but, as between vendor and the vendee, the delivery was complete, and the right to stop *in transitu* was gone.' The other judges concurred. 2 Campb. 245.

Stonard v Dunkin, 1809, 2 Campb. 344.

³ *Hawes v Watson*, 1824, 2 Barn. and Cress. 540. A quantity of tallow lying on wharf, sold with an order to the wharfinger. The vendor sold to another, and the wharfinger gave to that other a written acknowledgment that he had transferred the tallow to his account. On the original buyer's bankruptcy, the Court of King's Bench held the tallow to be with the wharfingers, as agents of the last purchaser.

On this view of the law, doubts may be entertained of one part of the decision of the Court of Session in the case of *V. Arbuthnot v Paterson*, 1798, M. 14220.

By the leases of the estate of Arbuthnot, Fordoun, and others, the tenants were bound to deliver annually certain quantities of oats and barley to the Viscount. In 1796 his Lordship wished to raise money by a sale of the grain then due to him, and Messrs. Bisset & Sons purchased the whole, and granted bills for the price, being £1141. Upon which Lord Arbuthnot's factor issued precepts or orders to the tenants to deliver the grain to Messrs. Bisset & Sons; and the tenants in some cases bound themselves in writing, at the foot of the orders, to deliver; in others, they refused to do so. Upon the bankruptcy of Bisset & Sons, without paying their bills, a competition arose between Lord Arbuthnot and the

custodier, the post-mark of a letter transmitting the order, or proof of the presentment of the order, or notice to the custodier.¹

3. Acts of ownership done by the buyer, with the seller's authority, upon goods in the custody of a warehouseman or other custodier, will be available to pass the property, on this principle, that such acts of ownership effectually give notice of the transference, and change the custody.² We have already seen³ that, in England, the payment of warehouse rent, or the marking of goods by or for the buyer, have been held to pass the property, even where the goods were in the seller's own custody. That, on strict principle, seems to be doubtful as law in Scotland; but the same acts have been admitted to this effect, the goods [185] being in the hands of a custodier;⁴ and the cases, though English, are good precedents in Scotland.

trustee for the creditors. The Court found, that 'the factor for the creditors has right to the price of the parcel of grain which was under accepted precepts by the tenants, but that Lord Arbuthnot has a right to the price of the parcel of grain which was in the hands of the tenants who did not accept the precepts upon them.

[As to Arbuthnot's case, note, 1st, that this was not the final judgment, but was recalled by an 'almost unanimous interlocutor,' adhered to on representation; and, 2d, that the grain in the hands of the tenants was unspecified—nay, probably, from the dates, even unthrashed. The tenants were not *custodiers* for Lord Arbuthnot, but *debtors* under obligation to deliver a quantity of grain *in genere*, which would only become specific by their selecting for delivery a certain part out of the entire quantity in their possession; and even then this part would be, and till delivery of it, remain, the undivested property of the tenants, and not of Lord Arbuthnot. Till delivery, their possession was their own, not his Lordship's through them. Neither the intimation nor acceptance of the precepts, therefore, could transfer any constructive possession of, or any property in, this grain from Lord Arbuthnot to the buyer. It was properly argued as a question whether the precepts or delivery orders operated as *assignments* carrying the tenant's personal obligation to deliver grain to Lord Arbuthnot from him to the buyer, and it was held they did not. (See Brodie's observations on the case, Stair, App. 874, note.) The case of *Hawes v Watson* is also misunderstood, and so misled the minority in *M'Ewan v Smith* in the Court of Session. The case turned not on change of constructive possession as between vendor and vendee, but on the principle of estoppel barring the custodier, who had attorned to the buyer, from denying, in the face of his own acknowledgment, that he held the specific goods as the vendee's property. (See it explained in Blackb. p. 164; Brodie, St. App. 878. *Woodley v Coventry*, 32 L. J. Ex. 185.)]

¹ In *Bloxam v Morley*, 1825, it was taken for granted by Bayley, J., in delivering the judgment of the Court, that notice to one in whose warehouse the seller had his goods deposited, would have made a perfect transfer to the buyer. 4 Barn. and Cress. 952, foot of page.

See also *Knowles v Horsfall*, Barn. and Cress. 134 et seq. [Observe that, in order to transfer the property, the notice must be given to the warehouse-keeper or actual custodier: it is not enough that it is given to the seller's importing agent if he is not the custodier. *M'Ewan v Smith*, 9 D. 434, aff. 6 Bell 340; *Melrose v Hastie*, 1850, 12 D. 665; and see *Whitehead v Anderson*, 9 M. and W. 518.]

² [Such acts must, however, denote unequivocally the change of constructive possession. In *Dixon v Yates* (5 B. and Ad. 313) the buyer's cooper marked the casks with the buyer's initials in the warehouseman's premises; but the seller's possession was held undivested thereby, for marking is an equivocal act, and may be merely for the purpose of identifying the goods. *Smith v Allan & Poynter*, 1859, 22 D. 208. Compare Pothier, Vente, No. 315.

Where the custodier is sequestered, the notice should be given to his trustee. *Eadie v Mackinlay*, 7 Feb. 1815, F. C.; 2 Ross L. C. Comm. Law, 568. It was stated by the Lord Justice-Clerk and Lord Meadowbank that *verbal* notice to the custodier would have been sufficient. The letter of the buyers claimed delivery of the hides as being tanned for them, and offered to pay the charges, but did not mention that they had been sold to them by the person for whom the custodier held them. Lord Meadowbank intimated, that if the custodier knew the fact of the sale, that would have been sufficient to transfer the property to the buyers, so as to exclude the seller's creditors. It does not seem material whether the authority, from the vendor to the vendee, to take possession, actual or constructive, be merely implied from the contract of sale vesting the right of possession in the purchaser, or be given expressly; and it probably does not affect this right whether the authority be in writing or not, though by recent statutes the effect of at least one species of written delivery order in the hands of a factor or agent is considerably enlarged. See *Dixon v Yates*, 5 B. and Ad. 313, and Mr. Justice Blackburn's comments on it (Sale, pp. 231-3). So the custodier's assent need not be formally expressed by recorded transfer, but is as effectually expressed by word of mouth, or by silence under circumstances which make silence indicative of assent (p. 234).]

³ Above, pp. 189, 190.

⁴ *Wright v Lawes*, 4 Espinasse 82, where wine was delivered to an agent of the buyer at Yarmouth, and the buyer being at Norwich, came to Yarmouth, tasted, and took samples of the wine. It was ruled by Lord Kenyon that the transit was completed.

In a late case, Lord Ellenborough said: 'The change of mark from A to B, on bales of goods in a warehouse, by the direction of the parties, was clearly held by the House of Lords, in a late case, to operate as an actual delivery of the goods, and this after three days' argument at their bar; though I own it appeared to me that the case only required to be stated in order to be disposed of at once.' Dict. in *Stovell v Hughes*, 14 East 312. ['The payment of rent in these cases

4. Where goods already in the hands of a manufacturer are sold, and notice of sale given, with an order of delivery addressed to the manufacturer, he will be held, like any other custodier, as the servant of the vendee, to hold the goods for the buyer.¹

5. But where anything remains to be done by the sellers in the way of ascertaining the price or quantity of the commodity sold, or in order to put it in a deliverable state, the transfer is not completed by a delivery note given to the buyer, addressed to the keeper of the goods, with notice to the custodier, or even by a transfer in the custodier's books. Till the commodity is weighed, or till the other act, whatever it may be, shall be performed, which remains to be done in order to put the commodity in a deliverable state, the property is untransferred.² This was settled in England, *first*, in the case of a sale of starch, where the amount of the price was to depend upon the weight.³ Next, it was settled that the delivery by a note intimated to the wharfinger was not completed in a sale of oil, where the price and quantity were both ascertained, but an operation customary in such sales remained unperformed: viz., that the seller's cooper should search the casks, and a broker ascertain the foot-dirt and water in each, for which allowance is made, and then that the casks should be filled up.⁴ A distinction was made by Lord Ellenborough between that case and another, where a person having sold 10 tuns of oil out of 40 contained in a cistern, afterwards accepted a delivery note from the buyer in favour of a third party.⁵ In this last case he held that the goods were in a deliverable state, and nothing remained to be done

is a circumstance to show on whose account the goods are held.' Lord Ellenborough in *Harman v Anderson*, 2 Campb. 243. So, in *Hammond v Anderson* (1 N. R. 69), the weighing of goods merely for the buyer's own satisfaction, and which formed no ingredient in the contract, was held a very important circumstance as an unequivocal act of possession and ownership on the part of the buyer (per Lord Ellenborough in *Hanson v Meyer*, 6 East 614.).]

¹ [If the goods exist in the specific form under which they are sold. Where they have not at the sale received that form, the intimation of a delivery order will pass no property till they do receive that *specificatio* which is necessary to make them that which is sold. See *Black v Incorporation of Bakers and Rowan*, 1867, 6 Macph. 136. Wheat being sent to mill to be ground into flour, bran, and thirds, the owner sold the bran and thirds to be produced (retaining the flour for himself), and gave buyer delivery order on miller for them. At the date when this order was intimated, the bran and thirds had no separate existence, the wheat being still unground; but before the buyer's bankruptcy, which occurred subsequently, the whole products of the wheat had been separated, and the bran and thirds existed *in formâ specificâ*. The seller then countermanded delivery. But the Court held that the bran and thirds, as they came into existence in specific shape in the process of grinding the wheat, became the property of the buyer, under the operation of the intimated delivery order; that it made no difference that the buyer had anticipated the actual production of the subject which he had bought, by intimating the order before *specificatio* commenced; that no right of property in the unground wheat vested thereby, and that if the buyer had failed without paying the price before the actual production of the subject of sale from the wheat, the seller, as undivested owner of the wheat, could have retained the wheat and countermanded the grinding, or *specificatio*, which was contemplated by the contract to take place. But that the delivery order took effect in operating constructive delivery as soon as the subjects of sale were produced, and as

they had been produced in specific shape before the countermand, the seller was held too late to stop the transference of the property in them. In England it is also decided that the custodier may give assent to hold the goods for the buyer, or attorn to him *in advance*, and this will be effectual when the order is presented (*Benjamin, Sale*, pp. 503, 615, and cases.).]

² [See note, next page.]

³ *Hanson v Meyer*, 1805. Wallace & Hawes employed Wright, a broker, to buy starch from Meyer. It lay at the Bull Porters, Seething Lane. Wright bought it at £6 per cwt., and exchanged the bought and sold note. He bought all Meyer's starch lying there, more or less, at the above rate; and the mode of delivery usual was followed: viz., the seller gave a note to the warehouse keeper 'to weigh and deliver to Wallace & Hawes all my starch.' This order was lodged, and delivery of part was required. Part was accordingly weighed and taken away; the rest remained unweighed, and at the buyers' charge, at the Bull Porters, till the buyers failed. The seller got the remainder of the goods. Action trover by assignees of the buyers. Verdict for Meyer the seller, under the direction of Lord Ellenborough. The Court of King's Bench held the weighing to be precisely necessary to alter the property, as being necessary to ascertain the price to be paid; and therefore judgment went for the defendant, Meyer the seller. 6 East 614. See above, p. 194, *Withers v Lyss*. [Add. Cont. 6th ed. 177-9; *Smith, Merc. Law*, 7th ed. 488.]

⁴ *Wallace v Breeds*, 1811, 13 East 522. [In the case of *Hansen v Craig & Rose*, 1859, 21 D. 432, this operation was held not to be so necessary to the ascertainment of the subject, as to prevent the risk being transferred to the purchaser, where the goods were in the seller's hands. It may therefore be doubted whether, in the case of goods in neutral custody, the operation would now be held necessary to the completion of delivery. See Lord Ardmillan's opinion in *Black v Rowan*, 6 Macph. 136.]

⁵ See below, p. 198, note 3, *Whitehouse v Frost*.

by the seller in order to complete the sale as between him and the buyer; whereas in the [186] former much remained to be done before the custody as for the buyer was complete. In a sale of 10 out of 18 tons of flax in the possession of a wharfinger, the rule was confirmed, that something remaining to be done on the part of the seller to put the flax into a deliverable state, the transfer is not completed by an order to deliver intimated to the wharfinger while those acts are not performed.¹

In a case in Common Pleas, Lord Chief Justice Gibbs said: 'The principle upon which both Courts of King's Bench and of Common Pleas have decided is this, That the order sent by the vendor to the wharfinger to deliver the goods is sufficient to pass the property to the vendee, provided nothing remains to be done to ascertain the price, but to make the delivery. If it be necessary by the terms of the contract, or by the order to the wharfinger, that anything should be done previous to the delivery, the transfer is not complete till that thing be done.'²

6. If everything on the part of the seller be done which is necessary before delivery, then, although the order for delivery applies only to a part of a larger quantity under the care of the wharfinger or agent, the transfer of the custody will be completed as to that part. Thus, in England, an order of delivery of 10 tuns of oil, part of 40 tuns contained in a cistern, under the care of a third person, was held to make a complete transfer, on being accepted by the custodian.³

Where goods are lodged in the warehouse of a general commission agent, to be disposed of for the benefit of the owner, the dealings are generally made in the name of the agent, and the bill taken payable to the owner of the goods. But there seems to be no reason to doubt that the principle which regulates the transfer in the cases already mentioned would be held applicable to this case; and that from the moment the sale is completed by delivery of the bill on the one hand, and weighing or marking or approving of the goods on the other, the custody is changed and the transfer completed; so that there shall not thenceforward be any right in the seller to stop the goods as *in transitu*, more than if a delivery note had been given by the seller, and intimated to the custodian.⁴

¹ *Busk v Davies*, 1814, 2 Maule and Selwyn 397. See also *Austen v Craven*, 4 Taunt. 644; *Shepley v Davies*, 5 Taunt. 617.

² *Withers v Lyss*, 1815, 1 Holt's Rep. N. P. 18, and 4 Campb. 239. See above, p. 194, note 2. [In order that a transfer of goods in the hands of a custodian may have the effect of delivery to the buyer, it is essential that the custodian be an independent party, and not an employee or agent of the seller of the goods. *Anderson v M'Call*, 1866, 4 Macph. 765.]

³ *Whitehouse v Frost*. Dutton & Bancroft were proprietors of 46 tuns of oil lying in one of the cisterns of the oil-house at Liverpool, and they held the key of this cistern. They sold 10 tuns of it to J. & L. Frost, and received the price. The Frosts afterwards sold these 10 tuns to Townsend, who gave his acceptance for the price, and got from the Frosts, along with the bill of parcels, an order of delivery, addressed to Dutton & Bancroft. This order was taken to them by Townsend, and they on the face of it wrote, '1809. Accepted, 14th February, Dutton & Bancroft.' Townsend was made a bankrupt, and his assignees made a demand against Dutton & Bancroft for the 10 tuns of oil, which still remained commingled with the rest. The action was trover by the assignees against Frosts and Dutton & Bancroft, and a verdict was found for the plaintiff, subject to the opinion of the Court. Lord Ellenborough held, that 'from the moment of acceptance of the order, Dutton & Bancroft became bailees of Townsend, the vendee: the goods had arrived at their

journey's end, and were not *in transitu*. All the right, then, of the sellers was gone by the transfer, and they could no longer contradict that delivery to which they had virtually acceded, by means of their order on Dutton & Bancroft, accepted by the latter.' The other judges concurred. 12 East 614.

[If it is meant that there can be any change of constructive possession operated by intimation of a delivery order in an unseparated part of a mass lying in a custodian's hands, this is not law in Scotland. There cannot be so much as a *jus ad rem specificam* in such circumstances. Even in England the case of *Whitehouse v Frost* 'is scarcely ever mentioned without suggestion of doubt or disapproval.' Benjamin on Sale, p. 242. See *White v Wilks*, 5 Taunt. 176; *Austen v Craven*, 4 Taunt. 644; *Campbell v Mersey Dock Co.*, 14 C. B. N. S. 412; *Smith, Merc. Law*, 489; *Blackburn on Sale*, p. 125.]

⁴ [To avoid the misapplication which it rather appears the author has made of the English authorities on this subject, it is especially necessary to observe what the precise question is in any given case. I. It may be: Whether the personal contract of sale in the particular case is such as to indicate an intention in the parties immediately to transfer the *general property* in *specific chattels* sold, and with it the *risk*, to the vendee; or whether it is meant (for it is a pure question of intention) that these shall not pass until the performance of certain things agreed to be first done; which, if that is the

II.—GOODS WAREHOUSED FOR THE DUTIES.—COMMENTARY ON THE WAREHOUSING ACTS.

The Warehousing Acts, which have engaged much of the attention of the Legislature for nearly a century, have for their object some very important points of commercial policy. The duties payable to Government on foreign goods imported, are properly due only upon

intention, are dealt with as conditions of the contract suspending its ordinary operation, which is immediately to transfer the property, and the risk as an incident of property, to the vendee. The rules which the English courts have since the time of Lord Ellenborough adopted, in the absence of express statement, to ascertain the intention of the parties, are these: (a) Where the *vendor* is to do anything to put the goods into deliverable state (*i.e.* that in which the buyer is bound to accept them), the performance of that thing is, in the absence of contrary indications, taken to be a condition precedent to the property and the risk passing to the vendee. This is a construction adopted out of favour to the vendee, on the ground that the vendor's delay in doing what he is bound to do before he can call on the vendee to accept, ought not to prejudice the vendee, who would be prejudiced by the transfer to him of the property, and therewith the risk of the goods, while the vendor's delay still kept them in his own hands, and so subject to his lien in security of the price. It is presumed, therefore, that the vendor was meant to do these things before he is entitled to the benefit he gets by the property and risk passing. But this presumption does not arise if the things to be done by the vendor are things *which might be done after* he has put the goods into the state in which he can call on the vendee to accept them; nor does it hold where the acts are to be done *by the vendee*. (b) Where anything remains to be done *to ascertain the price*, as by testing, weighing, or measuring goods, where price depends on quantity or quality, the doing of it is presumed to be intended as a condition precedent to the passing of the general property and risk, *though the individual goods be ascertained, and they be in deliverable state*. This rule is probably just the rule of the civil law regarding that completion of the contract which is necessary to pass the *periculum*. The law of England does not require a certain sum in moneys numbered to be fixed as the price before the contract be perfect; the civil law does. The existence of this rule in the English law, as a test of the intention to pass the risk (which only passes with the property), is ascribed to its direct and hasty adoption by Lord Ellenborough and his contemporaries from the civil law. (c) Where the *buyer* is bound by the contract to do anything which is indicated to be meant as a condition, precedent or concurrent, on which the passing of the property is to depend, it will not pass till the condition be fulfilled, even though the goods are ascertained and deliverable, nay, actually delivered into the buyer's possession.—II. Again, the agreement may be to sell a thing *not specific*. Here the contract is an executory agreement, and the property and risk cannot pass, because the subject is not ascertained. By appropriation of specific goods to the contract, that which was a mere agreement to sell becomes an actual bargain and sale, and the property and risk thereby pass. It is plain that the preceding questions do not present any analogy to our questions of tradition, as a criterion of the transference of *dominium*. Some of them may be analogous to the question with us, whether the personal contract is so complete as to transfer the *periculum*

rei venditæ. Those at least under I. (b), *supra*, may always, and those under II. sometimes, afford apposite illustrations of this question. But from the case of *Hansen v Craig & Rose*, 1859, 21 D. 532 (see the Lord Justice-Clerk's observations), it appears in the highest degree doubtful whether cases under I. (a), *supra*, are available to test the passing of risk with us. The return of the risk to the seller, who is *in mora* to deliver (see *Ersk.* iii. 3. 7; *Stair* i. 14. 7, and i. 17. 15; *Pothier*, *Vente*, No. 58; *Brown, Sale*, Nos. 511–515), is by no means the same principle. It appears that the risk and *jus ad rem specificam* may pass with us in many cases in which, under I. (a), *supra*, the general property and risk would not pass in England. It is also not quite clear that with us a *jus ad rem specificam* may not be acquired capable of being converted by intimation of a delivery order on the custodian into a right of property, although there remain things to be done which shall prevent the *periculum* from passing to the vendee. (Compare the opinions in *Hansen v Craig & Rose* with the Lord President's opinion in *Black*, 1867, 6 Macph. 136, quoted *infra*.) Of course, if with us the personal contract is not so complete as to pass the *jus ad rem specificam* to the vendee, it is impossible that he can, while matters remain so, acquire any property through the medium of the custodian's possession. But our rules, as to when the personal contract is complete for that purpose, or for the purpose of passing the risk, are not the same as those which in England regulate the transfer of the general property and risk under I. (a), *supra*; nor as those which prescribe what is necessary to pass the property and risk under II., *supra*. Great caution is necessary in using such cases, either in reference to questions of risk, or of the acquisition of the *jus ad rem specificam*, or in questions as to constructive delivery. The cases falling under I. (c) are merely analogous to such cases in our law as *Macartney v Macreadie's Crs.*, 1799, M. App. Sale, No. 1.—III. There is, however, a third question possible in such cases, which does present analogies available to us in questions of the transference of property by a change in the constructive possession held by a custodian. Where goods are in the hands of a custodian, the seller's authority to him to give possession to the vendee may be conditional; and where it is so, the custodian, as the agent of the seller, is not authorized to give possession, nor the purchaser to take it, until the conditions are fulfilled. The personal contract may be complete, and the general property and risk passed, but the contract may contain conditions suspending the buyer's right to claim possession; or the delivery order may contain directions in the nature of such conditions, not in the contract itself. If the conditions in the delivery order are authorized by the contract, they will bind the custodian and the buyer also; and on intimation of the order, though nothing be said by the custodian, he will not be understood to consent to hold the goods for the buyer until the conditions are fulfilled. An express unconditional assent on his part would stop him from denying that the possession was in the purchaser. (*Stonard v Dunkin*, 2 Camp. 344; *Hawes v Watson*, 2 B. and C. 540; *Gosling v Birnie*, 7 Bingh.

the sale of those goods—when the merchant derives his profit from the market. To demand [187] payment of the duties in the very moment of importation, and this, too, payment in cash, not as in the dealings of merchants with each other by bills, in which the time of actual advance is made to answer to that of probable reimbursement, greatly increases the weight of the duties to the merchant, while it diminishes the public revenue, and operates

339; *Woodley v Coventry*, 32 L. J. Ex. 187; *Beddle v Bond*, 34 L. J. Q. B. 137; *Blackburn on Sale*, 161-5.) But it seems that even an actual delivery of possession by him, without fulfilling the conditions, would not affect the vendor (see *Bishop v Shillito*, 2 B. and Ald. 329, note *), or amount to such a legitimate possession as would, in the language of our law, transfer the *dominium*. If the English cases presented only the naked question just explained, how far the bailee was authorized to give possession without fulfilment of the conditions of the authority addressed to him, there would be no difficulty in using them as authorities on the question of tradition among ourselves. But where the condition in the order is one expressed or implied in the terms of the contract itself, there generally lies behind the question as to the custodian's authority to give possession, the anterior question whether that condition, as a part of the contract, had not the effect of suspending the usual operation of a bargain and sale, and of preventing the general property from passing, which is the foundation of the buyer's right to the possession. Or the condition in the order may be a necessary consequence of the goods sold being unascertained, as part of a larger mass, or the like; in which case the question may also go back, from the mere point as to the conditional or unconditional authority given to the custodian to give possession, to the anterior question *whether an executory agreement transmits any property* before the ascertainment of the subject sold, without which the buyer can have no right to possession. If the case turns on these anterior questions, it is hardly of any use to us as an authority on delivery. It is sometimes extremely difficult to perceive on which ground the case is decided. It is only the point as to the custodian's authority that is of importance to us in questions as to tradition. The case of *Hanson v Meyer*, *e.g.*, stated in the author's note, involves both points. All the starch was sold; but from the circumstances of the case, weighing was required by the contract to ascertain the price, and therefore (*supra*, I. (b)) the property had not passed, and the vendee had therefore acquired no right to possession. But the order was to 'weigh and deliver'; and according to Mr. Justice Blackburn, the case was decided on the ground that the authority to give possession was conditional only. (*Sale*, pp. 155, 238.) The doctrine involved in the anterior question was not at that time matured, and *Hanson v Meyer* did not decide it then, though the case is now quoted as an authority for that doctrine. The judgment was carefully worded, so as to decide no more than that the weighing was made a condition precedent to the purchaser's right to take possession. *Wallace v Breeds*, *Busk v Davies*, *Austen v Craven*, *Shepley v Davies*, are all cases in which the agreement was for the sale of a chattel not specific; and they therefore involved the point that no general property had passed in any subject, nor any right of possession (*supra*, II.), as well as the question as to the custodian's authority to deliver being made only conditional on preceding specification of the subject, and this condition unfulfilled. They are, however, all authorities for the proposition, that where the autho-

rity given to the custodian is limited by a condition which is to be fulfilled by him before delivery, the fulfilment of the condition will be necessary before there can be an effectual change even of the constructive possession, the custodian's acceptance of the order not operating that change till such fulfilment. In *Hanson v Meyer*, and the other cases mentioned, the weighing was by the contract to precede the delivery. But in *Swanwick v Sothorn*, 9 A. and E. 895, where the order contained directions to weigh, the Court held that this was not a condition authorized by the contract—that the warehouseman's entry of the order in his books determined the vendor's rights without the weighing, which, as not being part of the bargain, was not binding on the buyer, who chose to waive it. It seems, therefore, that the condition in the order will not necessarily affect the transfer of possession merely because it is in the order, but that it should be authorized by the contract; and that the vendee's taking the order with such condition will not imply his assent to it, at least that such assent will be revocable. See, as to the subject of this note generally, *Blackburn on Sale*, pp. 147-157, 160, 167, 171, 237-240; *Benjamin on Sale*, pp. 221, 241, 607; *Story on Sale*, Nos. 294-317; *Brodie, Stair*, App. 872-9.

When the author lays it down in the text as matter of Scotch law, that the transfer is not completed by notice to the custodian, 'where anything remains to be done by the sellers in the way of ascertaining the price or quantity of the commodity sold, or in order to put it in a deliverable state,' he was probably misled by the English rules as to what shall suspend the passing of the risk and the general property of which risk is an incident, into ascribing to the same circumstances an equal influence in preventing the change of constructive possession by an intimated delivery order. It is certainly not precisely necessary that the price or quantity be ascertained before the constructive possession can be changed; nor does it always arrest such change, that some preliminary operation is necessary to put the goods in a state for delivery. Whatever influence these things may have in questions of *periculum*—whether different or not—the Lord President, in *Black v Rowan*, etc., 6 Macph. 136, stated that, 'when the subject of sale is in the hands of an independent third party, and a delivery order by the seller in favour of the buyer has been duly intimated to the custodian by the buyer, constructive delivery will take place, whatever may be the precise condition of the goods, even though the quantity be unascertained, provided the mass be sold; even though the price be unascertained, provided it be at a rate which afterwards can be certainly fixed by ascertainment of the quantity;—even though the goods be lying in such a state that some preliminary operation is necessary to put them in a state for delivery. Such circumstances can have no legitimate effect where the actual possession of the third party custodian is—by means of an intimated delivery order—converted from a possession for the seller into a possession for the buyer; for then the custodian is no more at liberty to redeliver to the seller or his order, than before the intimation of the delivery order he would have been at

as a restraint on importation. The object of the warehousing system is at once to relieve the trader from the pressure of this advance; to free him from the risk of the perishing of the goods before they are sold; to encourage importation even of goods prohibited to be sold or used here, to the effect of making this country a great emporium of trade, filling our warehouses with goods, to be kept safely there till a market at home or abroad shall open; and to facilitate the operations of commerce in relation to goods thus warehoused for use and sale in this country, by having them exposed to sale in the warehouse, without requiring payment till they are taken out for consumption.

This system was first¹ recommended to adoption by Dean Tucker, in his discourse on trade; afterwards proposed to Parliament by Sir Robert Walpole, but without effect; then revived and recommended by Mr. Pitt, and at last digested in a practicable shape under the administration of Mr. Addington. Successive Acts have been passed for improving this system; and in the year 1823 an Act was passed, in the nature of a consolidating Act, 'for making more effectual provision for permitting goods imported to be secured in warehouses or other places, without payment of duty on the first entry thereof;' and the subsisting Act, which has come in place of it, is entituled³ 'An Act for the warehousing of goods,' and comprehends, with the relative Acts concerning the customs, the whole system as now in operation. Of this Act it may be proper to give a short analysis, before resuming the inquiry into the transference of delivery of goods thus warehoused.

I.—PROVISIONS OF THE WAREHOUSING ACT.

The whole laws relating to the customs were lately repealed and placed on a new footing, which forms the subject-matter of fourteen statutes, including those for the registering of ships and for the warehousing of goods.⁴ In particular, the repeal of the former laws included 'all the laws relating to the warehousing of goods; and the new Act is to take effect from and after 5th January 1826,⁵ for the warehousing of goods imported into the United Kingdom, without payment of duty upon the first entry thereof; or notwithstanding that such goods may be prohibited to be imported into the United Kingdom, to be used therein' (sec. 1).

1. The objects of the Act are: 1. To secure the duties payable to Government on goods lawfully imported for use and sale in this country; 2. To guard against the evasion of the laws, against the use or sale of prohibited goods, consistently with the privilege of stowing such goods in British warehouses; and, 3. To permit the transfer of goods without

liberty to deliver to the buyer or his order.' Perhaps it may be said that, provided nothing remains to be done to make the contract complete enough to give the buyer a *jus ad rem specificam*, and nothing remains to be done *prior* to delivery *in favour or for behoof of the vendor*, and nothing which by the contract he is entitled to insist on having done as a condition suspensive of delivery. The intimation of the delivery order will operate a change of the constructive possession from vendor to vendee, whether what remains to be done—whatever it be—is to be done by the one or the other of them, or by the custodian. 'If the things to be done are entirely in favour of the purchaser, and such as he may dispense with, they cannot affect constructive delivery.' Per Lord Deas in *Black v Rowan*.]

¹ Sir Robert Walpole's famous *excise scheme* proposed the system in reference to wine and tobacco in 1733. Dean Tucker's Essay was published in 1750.

² 4 Geo. IV. c. 24, passed 12th May 1823, repealed by 6

Geo. IV. c. 105 (along with the other laws of the customs) as from 5th July 1826.

³ 6 Geo. IV. c. 112.

⁴ 6 Geo. IV. c. 104 to 118 inclusive.

⁵ As to the commencement of the Act, it may be observed that, in the repealing Act (6 Geo. IV. c. 105), the repeal is to take effect from 5th July 1826. But to clear all doubts it is enacted (by 6 Geo. IV. c. 111, sec. 17), that any regulation which is appointed to come into operation on 5th January shall be deemed the only subsisting regulation in force relative to that matter. [The same clause was repeated in the subsequent Warehouse Acts, 3 and 4 Will. IV. c. 57, sec. 9, and 8 and 9 Vict. c. 91, sec. 9; but it appears to be omitted from the Customs Consolidation Act 1853, 16 and 17 Vict. c. 107, which repeals the 8 and 9 Vict. c. 91 (except sec. 51), but does not *expressly* repeal the 3 and 4 Will. IV. c. 57, which was consolidated with several others into the 8 and 9 Vict. c. 91, but not repealed by it. See 25 and 26 Vict. c. 63 (repealing clause), sec. 2.]

the necessity of paying the duties, preserving the lien of shipowners for their freights in particular cases.

1. WAREHOUSING PORTS.—In order to afford the means of safely warehousing goods, it was by former Acts¹ provided, that the commissioners of the treasury should be empowered [188] to appoint by warrant, to be published in the Gazette, ports in which any goods, or any particular goods, or any particular articles, should be warehoused; while it was declared lawful for the commissioners of the customs to direct and allow the warehousing in *any* port of such goods as were not prohibited, or such as were not required by the commissioners of the treasury, or by statute, to be placed under special security. By the new Act, the commissioners of the treasury are to appoint by warrant, from time to time, what ports are to be warehousing ports, for the purposes of the Act; and the commissioners of the customs, under the control of the commissioners of the treasury, have the power of appointing in what warehouses, of special or of ordinary security, in such ports, and in what parts of such warehouses, any goods, and what sorts of goods, may or may only be kept and secured without payment of the duties.²

2. WAREHOUSES under this Act are of two descriptions: those of special security, and those of ordinary security.³ 1. Warehouses of special security are either such as are appointed by an order of the commissioners of the customs, published in the Gazette,⁴ or such as are connected with wharfs for the landing of goods, and enclosed with such wharfs within walls, 'as required by any Act for the constructing of such warehouses and wharfs, being legal quays.'⁵ The purpose of appointing such warehouses of special security is, that a more complete protection may be afforded to the manufacturers of this country against the sale of the prohibited articles,⁶ and the abuse checked of importations against the Navigation Laws.⁷ 2. Warehouses of ordinary security are such as are authorized by order of the commissioners of the customs for the warehousing of goods for sale or consumption, requiring no extraordinary precautions, but merely such as shall ensure the payment of the duties.⁸

3. SECURITY FOR DUTIES is given partly by bond, partly by lien.⁹ The bond is either, 1. A general bond given by the proprietor or occupier of the warehouse, with two sufficient securities for payment, within three years, of the full duties of importation on all goods which shall be warehoused therein, or for the due exportation thereof (sec. 8); or, 2. A similar bond by the importer, in respect of the particular goods imported by him, to be in force for three years, and no longer (sec. 8); and which may be superseded by the bond of the purchaser, in case of sale of the goods, without removal (sec. 28). It is not necessary here to detail the regulations for settling the account of duties; for checking the decrease or increase; or for giving relief of duties in case of accidental loss in landing, warehousing, delivery, or shipping. The goods can be taken from the warehouse only on due entry, and under the care of officers for exportation; or on due entry or payment of the full duties

¹ 4 Geo. iv. c. 24, secs. 5 and 14, and former statutes.

² 6 Geo. iv. c. 112, sec. 2.

³ A distinction may also be observed between warehouses and king's warehouses. 'Warehouses' (without the addition) 'are any house, shed, yard, timber yard, or other place in which goods may be lodged without payment of duty, or although prohibited to be used in the United Kingdom.' King's warehouse is a place provided by the Crown for lodging goods therein for security of the customs. 6 Geo. iv. c. 107, sec. 115. See also sec. 133.

⁴ *Ib.* secs. 3 and 7.

⁵ *Ib.* sec. 3. By 6 Geo. iv. c. 107, sec. 135, legal quays existing at the date of the Act are to continue so; and power is given to the king to appoint ports and quays in future for the landing of goods.

⁶ 4 Geo. iv. c. 24, sec. 6: 'Whereas it is expedient, for the protection of the manufacturers of this country, that the several goods and merchandise, the importation of which hath been prohibited by any Act, etc., but which by virtue of this Act may be imported and warehoused, for the purpose of exportation only, should be lodged and deposited in warehouses of special security.'

⁷ See 6 Geo. iv. c. 107, secs. 52, 53, 54, relative to prohibitions and entry for exportation only.

⁸ All warehouses appointed under previous Acts are to continue as if under this Act.

⁹ The bonds made under former Acts to be in force as if under this Act.

in ready money for consumption, if they be such as may be used in the kingdom (sec. 16). If it be necessary to take proceedings for recovery of the duties, the remedy is double, [189] viz. on the bond, or by sale of the goods. If the former be adopted, the sureties in the case of a bond by the importer, or the warehouse-keeper and his sureties in case of a general bond, will be entitled to an assignment of the Crown's remedy. If the goods are not taken out of store within three years, either for consumption or exportation (unless further time be allowed by the commissioners of the treasury), they may, by the commissioners of the customs, be ordered to be sold, subject to the conditions to which they were subject previous to the sale; a further time of three months being allowed for the clearing of the goods from the warehouse. The produce of such sale is to be applied, not to the payment of the duties—for still the goods *may* be exported by the buyer, when no duty will be exigible—but to the payment of warehouse rent and other charges, and the overplus, if any, paid to the proprietor. But the goods so sold, if not relieved within the three months, are to be forfeited (sec. 14). When goods are carried to the king's warehouse for security of the duties, or to prevent them from coming into home use, warehouse rent is to be paid for the time during which they remain therein, 'at the same rate as may be payable for the like goods when warehoused in any warehouse in which such goods may be warehoused without payment of duty,'¹ or as shall be fixed by the commissioners of the treasury or of the customs.² And in case such goods be not duly cleared from the king's warehouse within three months, they may be destroyed, if not worth the duties, or sold by auction for home use or for exportation; and the produce, if sold for home use, applied to the duties, and in either case to the warehouse rent and charges,—the overplus to the person appointed to receive the same.³

4. Goods are either prohibited or not prohibited. 1. If prohibited either absolutely to be sold, or to be sold when imported contrary to the Navigation Laws, the object of the security provided is to prevent the rivalry with British commodities, or rivalry with British navigators, and to secure exportation as the sole condition of clearing the goods from the warehouse. 2. If not prohibited, they may either be sold for consumption or for exportation: in the former of which cases, the payment of the duties forms the sole condition of the clearance; in the latter, the exportation of the goods forms the condition. The arrangements authorized by the Act for the accomplishment of these objects, and facilitating a market for goods, consistently with safe custody and with indulgence for payment of duties, relate to the entry and warehousing of the goods; the examining and due preservation of them; the sale of them in the warehouse; and the preservation of the rights of the parties interested in the goods.

(1.) Upon the entry and landing of any goods to be warehoused, the proper officer of the customs shall take a particular account of them, mark the contents on each package, and the word 'prohibited' on such as are not allowed to be imported for home use; and the goods shall be carried to the warehouse under the care or with the authority of the officer; and in such manner, by such road, by such persons, and at such time, as he shall appoint (secs. 12, 13). With the goods so warehoused the proper officer is charged, till duly discharged on their being taken out for use, or for exportation, or sold for charges and duties.

(2.) The facilities for examining; for removing to another port or another warehouse in the same port; for sorting, separating, and repacking; or for taking out for cleaning, or managing, improving, and bottling of wine and spirits, are particularly detailed in the Act.⁴

(3.) The facilities for sale of the goods not prohibited are of great importance in the present inquiry. Under former Acts there was a degree of uncertainty relative to [190]

¹ 6 Geo. IV. c. 107, sec. 133.

² 7 Geo. IV. c. 48, sec. 9.

³ 6 Geo. IV. c. 107, sec. 134. Provision is also made for payment in the first place out of the price of the freight of

such goods as may have been landed by officers without payment of the freight.

⁴ 6 Geo. IV. c. 107, secs. 10, 20–27, 29–36.

the custody and transfer of goods, which led to many questions. In the subsisting Act, by sec. 9, goods secured in warehouses in the actual occupation of the importer or proprietor of the goods, and which shall be *bona fide* sold by such importer or proprietor, shall be validly sold, although allowed to remain in the warehouse, provided the agreement shall be in writing, signed by the parties, or there shall be a written contract by a broker or person legally authorized; and the price shall be paid or secured, and the transfer entered in the officer's book ordered to be kept for the purpose.¹

(4.) There are regulations for preserving uninjured the rights of parties; and, *First*, The owners of the goods are to be indemnified against embezzlement, damage, or loss occasioned by the negligence of officers. On prosecuting the officer to conviction, the importer or proprietor of the goods is to have exemption from duty on the goods lost, damaged, or embezzled; and the damage sustained is to be paid and made good by the commissioners of the customs or excise, under orders to be established (sec. 39). *Secondly*, The masters and owners of ships in which goods shall be imported, and landed, and lodged in the custody of the proprietors of docks, have their claim of freight preserved to them over the goods in the dock warehouse; and the proprietors of the docks, their servants or agents, are authorized, empowered, and required, on notice given to them, to detain and keep such goods till the freight, rates, and charges be paid, or a deposit made sufficient to answer therefor (sec. 45).²

II.—TRANSFERENCE OF GOODS WAREHOUSED AND UNDER BOND.

Returning from this short analysis of the Warehousing Acts, it is now to be explained how goods under the operation of those laws are to be transferred.

Goods secured under the Warehousing Act either belong to the person who is proprietor or occupier of the warehouse; or to persons who have no other concern with the warehouse than in having their goods deposited there. And these cases are regulated by different rules.

GOODS THE PROPERTY OF WAREHOUSEMAN.

Goods which belong to the occupier of the warehouse, stood formerly in a predicament in which it was difficult to effect a transference of them while they continued in the warehouse. The occupier of the warehouse was, under former laws, properly speaking, the custodier of goods lodged there; the officer having only a superintendence and key for security of the duties. And the question might arise, whether, after a sale by the proprietor of goods lodged in his own warehouse, there was, by the law of Scotland, such tradition as

¹ 'That if any goods lodged in any warehouse shall be the property of the occupier of such warehouse, and shall be *bona fide* sold by him, and upon such sale there shall have been a written agreement signed by the parties, or a written contract of sale made, executed, and delivered by a broker, or other person legally authorized, for or on behalf of the parties respectively, and the amount of the price stipulated in the said agreement or contract shall have been actually paid, or secured to be paid, by the purchaser; every such sale shall be valid, although such goods shall remain in such warehouses, provided that a transfer of such goods, according to such sale, shall have been entered in a book to be kept for that purpose by the officer of the customs having the charge of such warehouse, who is hereby required to keep such book, and to enter such transfer, with the dates thereof, upon application of the owners of the goods, and to produce such books upon demand made.' The regulation was first introduced in 4 Geo. IV. c. 24, sec. 82; and the following ex-

pression, that goods thus sold 'shall, by such sale, be transferred and vested in the buyer to all intents and purposes,' is weakened in the new Act, with what view does not appear.

[Under this clause was decided the case of *Maxwell & Co. v Stevenson & Co.*, 1830, 8 S. 618, and H. of L., 4 April 1831, 5 W. and S. 269, where the importer of oats, having bonded them in his own warehouse, and then sold them, gave the buyer's agent the key of the warehouse, but made no entry of transfer in the custom-house officer's book, as directed by the Act. The buyer failed; the seller attempted to retain. The question was, whether the statute was imperative and superseded the common law, or merely directory. The House of Lords, reversing the judgment below, held the statute not imperative, but directory, and the transference of the property complete.]

² See also above, for freight secured on sales in king's warehouse, by c. 107, sec. 134.

to pass the property? or by that of England, such termination of the order and dis- [191] position of the goods in the warehouse proprietor, as under the statute of James I. to put an end to reputed ownership? The difficulties attending this situation are removed by the recent Acts, whereby, 1. The officer is charged in such cases with the duty of keeping a book of transfer; and, 2. A written contract of sale, with notice and entry in the officer's book, is declared to make a complete sale.¹

GOODS IN THE BOND WAREHOUSES OF THIRD PARTIES.

Goods lodged in a warehouse not in the ownership or occupation of the proprietor of the goods, are by the statute left to the common law; and it would seem that the same rule should apply to the case of goods originally belonging to the occupiers of the warehouse, but sold as above, and an entry made in the officer's book; in consequence of which such goods are completely separated from the warehouseman's own property.

Goods in this predicament are either in the warehouses of docks, or in ordinary warehouses.

I. DOCK WAREHOUSES.—The confusion arising in the loading, landing, and warehousing of goods, and the dangers of collision, damage, and speculation, both to the revenue and the merchant, on ordinary wharfs, have led to the establishment of docks in the great emporiums of trade, with the proper accompaniments of wharfs and warehouses. The effect of this in practice is important. These are private institutions under legislative sanction.² The dock companies are remunerated by means of rates authorized by the several Acts to be levied. And it is a counterpart of this right, that the public shall enjoy the security as well as facilities of the docks and of the warehouses (for rent), while their goods are in the course of being landed or deposited there. On the occasion of any question relative to the safety or transference of goods in any dock warehouse, or on any dock wharf, the particular provisions of the Act relative to that dock ought to be referred to, lest any peculiarity in the Act should alter the disposition of the common law on the subject.³

Generally speaking, however, the dock company, or the proprietors and directors of the dock, will be held as custodiers of goods landed and lodged in their warehouses. In the London, West India, and other docks in the Thames, and in those of Bristol, Liverpool, etc., very regular arrangements are made, and books kept, and receipts or certificates granted. Under those arrangements it has been held,—

¹ 6 Geo. iv. c. 112, sec. 9; [8 and 9 Vict. c. 91; 16 and 17 Vict. c. 107, Customs Consolidation Act.] In a case which occurred in the Court of Session some years before this Act, the idea of a record in which such an entry might be made, to the effect of completing a sale in such circumstances, occurred as a consequence deducible from the regulations of the then subsisting Acts. *Auld v Hall & Co.*, 12 July 1811, 16 Fac. Coll. 290. Lord President Blair said: 'That the law of Scotland and custom of merchants concur in requiring intimation of the sale; and this intimation must be entered in a book which, by statute, must be kept for that purpose, and which affords a security nearly equal to that of the record of sasines in land rights.' But there was nothing in those former Acts to support such a result, and the usages of different ports were so various, that in some there was a distinct set of books, in which every alteration of the property appeared; in others no record whatever was kept. [See *Maxwell & Co. v Stevenson & Co.*, 8 S. 618, 5 W. and S. 269. Delivery of key of warehouse held equivalent to entry in the warehouse books.]

² In England, the London Docks in 1800 (39 and 40 Geo.

iii. c. 47; 55 Geo. iii. c. 3), the West India Docks (39 Geo. iii. c. 69; 42 Geo. iii. c. 113), the East India Docks in 1803 (43 Geo. iii. c. 126; 54 Geo. iii. c. 228), with two others called the Rotherhithe Docks, are for the accommodation of the port of London. There are also docks at Bristol and at Liverpool, the two other principal ports of England. [See an abstract of the London Dock Acts in *Mercantile and Maritime Guide*, by G. Wilmore, Q.C., and Edwin Beedell (1856), p. 922 et seq.; and as to these and the other principal docks in England and Scotland, the article 'Docks' in *MacCulloch's Commercial Dictionary*.

In Scotland docks are established at Leith, as the port of Edinburgh, by certain Acts, 28, 38, 39, 45, 47, 53 Geo. iii., and 7 Geo. iv.; *Loc. and Pers. Acts*, c. 105.]

³ There is one general law, however, applicable to all dock establishments, by which the freight of goods landed under the provision of the Warehousing Acts is secured by a continuance of the lien to which such goods were liable while on board. 6 Geo. iv. c. 112, sec. 45. This will demand attention afterwards, in treating of lien for freight. Below, Book iv.

[192] 1. That due notice to the warehouse-keeper is sufficient to complete the transference, as in a question with creditors. This has been laid down by the greatest authorities in England, on the same principle which rules the transference of goods in the hands of wharfingers.¹ There is no case on this point in Scotland; but the principle on which the English law proceeds is distinctly recognised with us.

2. The proper course, however, is to make the transfer by endorsement of the dock warrant. The inconvenience was felt of going to the docks on the occasion of every transfer, to see notice duly given; and the existence of a document capable of endorsement, with the ready analogy of a transferable bill of lading (see below, p. 212), introduced the practice of

¹ *Lucas v Dorrien*, 1817, 7 Taunt. 278. Here Doorman applied to Dorrien, his banker, for £10,000 on his note, with a collateral security over sugars in the West India Docks. The dock checks were delivered, duly endorsed, and the money was advanced. A change afterwards was made for certain dock checks of molasses, which also were duly endorsed. The certificates were preserved and examined at the warehouse, and the clerk said they were sufficient. Some of the goods were taken out of bond, others remained. On the bankruptcy of Doorman, the clerk of the dock company refused further delivery without assent of the assignees. In an action by the assignees, one question was, Whether the assignees were entitled to recover for the molasses? Judgment went for the banker. Mr. Justice Dallas said: 'The clerk of the dock company, on the dock warrant being exhibited to him, said, "This will suffice." Therefore I must take it that the dock company, through their agent, had notice of the transfer; and though nothing was done in consequence of that notice, it falls within the case in *Campbell*, where Lord Ellenborough held that the mere giving notice to the wharfinger, without anything done thereon, was effective to complete the transfer of property.' Mr. Justice Burrough said: 'The moment that notice was given to the dock company, they were converted into trustees for the defendants, if it be necessary so to contend.' But the case, though it would have been decided in favour of the banker on this ground, did not, in fact, require the aid of actual notice; for the whole Court held the *endorsation alone sufficient*.

[In addition to the cases referred to by the author on dock warrants and similar documents, see also *Keyser v Suse*, Gow 58; *Hoare v Dawes*, 1 Dougl. 371; *Farina v Home*, 16 M. and W. 119; *Bartlett v Holmes*, 22 L. J. C. P. 182; *Johnson v Stear*, 33 L. J. C. P. 130; *Meyerstein v Barber*, L. R. 4 H. L. 317. The author has stated that goods in the possession of dock warehouse-keepers, etc., may in England be effectually transferred by the mere endorsation of the warrant, without intimation to the custodier, on the analogy of bills of lading, and he intimates an inclination to hold that to be law in Scotland. Mr. Brown (*Sale*, Nos. 676-679) has been led into the same mistake. But the cases down to *Keyser v Suse* are all differently explained by Mr. Justice Blackburn in his *Treatise on Sale*, pp. 297-307, and those down to 1869 by Mr. Benjamin (*Sale*, pp. 607-623); and the result appears to be, that by the law, as now settled by the judges in England, the endorsement and transfer of a dock warrant, warehouse certificate, dock delivery order, or other like document of title, by a vendor to a vendee, is not such a delivery of possession as divests the vendor's lien, and therefore, we may conclude, not such a delivery of possession as will transfer the

dominium in Scotland from seller to buyer. There have been attempts at various times to assimilate the endorsement of dock warrants, wharfingers' receipts, delivery orders, and similar documents, to the endorsement of bills of lading. The general nature of these documents, which issue from the holder of goods in warehouses under the statutes, is, that they acknowledge the holder of the document, or his endorsee, to be the person to whom the holder of the goods is bound to deliver them, and so far they resemble bills of lading. But their negotiability is not justified, as that of bills of lading is, by the impossibility of seeking out the holder of the goods, and taking actual or constructive possession, and there is no custom of merchants sufficient to support it. According to Parke, B. (in *Farina v Home*), such a warrant is only an engagement by the custodier to the original holder of it, or any one he may appoint; and the custodier holds as that person's agent, and his possession is that person's possession, until he, the custodier, *attorns* to the appointee, and agrees with him to hold for him. Then, and not till then, is he the agent or bailee of the appointee, his possession the appointee's possession; and *then only is there a constructive delivery to him*. 'In the meantime, the warrant, and the endorsement of the warrant, is nothing more than an *offer to hold* the goods as the agent of the assignee.' Care will be taken to distinguish delivery orders of this kind from the ordinary delivery order granted, not by a warehouseman to the owner of goods, but by the vendor of goods upon a bailee who holds possession of them as agent of the vendor. It was decided in *M'Ewan v Smith* (6 Bell 340, 352), and in *Griffiths v Perry* (28 L. J. Q. B. 208), that such a delivery order also differed in effect from a bill of lading, and did not by mere endorsement, without intimation, change the constructive possession held through the bailee by the granter or endorser of it. It is thought that delivery orders of this kind are not meant to be included in the definition of 'documents of title' given in the Factors Acts, but only those granted by warehouse-keepers and wharfingers. A conflict of view, however, as to the nature and legal operation of these warehouse and wharfingers' documents seems to exist between the decisions of the English Courts on the one hand, and the legislation embodied in the Factors Acts and other recent statutes on the other; as to which see Benjamin, *ut supra*. The anomaly had been pointed out by Mr. Brodie (*Stair*, Suppt. pp. 873, note, and 896) as resulting from the Factors Act of 6 Geo. IV. c. 94. Observe the exceptional operation which such documents have in the hands of a factor (but not in those of the owner of the goods) under the Factors Acts. Benjamin and Blackburn, *ut supra*, and cases, *ibid.*; Smith, *Merc. Law*, 7th ed. 510; Add. Cont. 6th ed. 815.]

transferring by means of the document or dock warrant alone. The parties, by the original conception of those certificates or dock warrants, arrange the mode of transfer; for there is printed a blank delivery order, to be filled up when the goods are sold.¹ The practice of England is quite settled, that goods in this situation may effectually be transferred by endorsement of the warrant; and it is now sanctioned by judicial determinations giving effect to such transfers, as consistent at once with mercantile usage and legal principle.²

¹ A dock certificate on a transfer is in this form:—

Warrant of Transfer, {No. of order, 500.
{Ship's rotation, No. 30.

West India Dock Warehouse, No. 6.—I certify that the following three casks, lot 6, of coffee imported by the ship Aurora, Captain T. Smith, from Jamaica, entered by J. B. & Co. on the 10th May 1826, have been transferred in the books of the warehouse into the name of John Smith. Rent commences 26th June 1826, inclusive. (Date and subscription.)

No. 20, folio 520.

Entered, J. W. SANSUM, clerk.

(Then a schedule of the marks and weight of each cask.)

A blank delivery order is subjoined, printed thus:—

LONDON, 1st July 1826.

Deliver the above-mentioned goods to
or order.

No.

Examined and entered the 10th August 1826.

² In *Spear v Travers*, 1815, one of those dock certificates, after passing through several hands, was transferred to Spear as a security for £2000 by Greaves. Greaves had not paid the price to Mr. Mealy, from whom he bought the goods, and to aid Mealy the original holder of the certificate (in whose name the goods still stood on the books) gave notice to stop; and having applied for a duplicate certificate, on a false statement that the former had been lost, he got it. Under the direction of Gibbs, Chief Justice, a verdict was given for Spear. The gentlemen of the special jury observed that, in practice, the endorsed dock warrants and certificates are handed from seller to buyer, as a complete transfer of the goods. 4 Campbell 251.

In the above case of *Lucas v Dorrien* (see p. 206, note 1), this doctrine was well canvassed and established. Mr. J. Dallas says: 'There are two parts in the case of Harman and Anderson; and though Lord Ellenborough, C. J., did say at the trial that the transfer in the books passed the property, yet he afterwards says, "The delivery note was sufficient, without any actual transfer being made in their books." *Spear v Travers* is valuable for two purposes: 1. It shows what Gibbs, C. J., held respecting the operation of these dock warrants. 2. It shows that a special jury have expressed an opinion upon the subject. The sugars must be deposited with the dock company for securing the duties. The warrant itself contains a form of endorsement. What can be stronger to show the intention of the parties that the property should pass by endorsement than the form of endorsement put on it in the original making of the instrument?' Again he says: 'I have been several times stopped by a special jury, they being satisfied that the goods pass from hand to hand by endorsement of these instruments. All special juries cry out with one voice that the practice is that the produce lodged in the docks is transferred by endorsing over the certificates and dock warrants; and therefore

there is no reputed owner if he does not produce his certificate.'

Mr. Justice Burrough says: 'This instrument is perfectly well known to all traders, and it is also known to them that the goods pass by endorsement of it, and there is no reason why they should not: it is a transfer of a mere chattel, and there is no reason why an order for delivery of the goods should not pass the property. I should have thought, independently of the notice to the dock company, that the property was transferred by the mere endorsement for a valuable consideration.' Again: 'I know not whether these instruments were in use at the time when the case of *Gordon v The East India Company* was decided; but Lord Kenyon, C. J., relies there on the absence of a document which Taylor could have carried to market for the purpose of disposing of that property. Here is that document. What Mansfield, C. J., says in *Thackthwaite v Cock*, 3 Taunt. 491, is material to the present case. He says: "There is not such a clear, distinct, and precise custom proved, as would enable others to see that these may not be the hops of the possessor." Here subsists, I will not call it a custom, but so clear an understanding of the trade, that this instrument by endorsement would pass the property, that every one may see that they are no longer the property of the bankrupt, who has ceased to possess this document.'

In *Zwinger v Samuda*, 1817, 7 Taunt. 265, there was a fraud. Roebuck, in order to buy coffee, got from Samuda money, in security of which he transferred the coffee by the usual note into Samuda's name in the dock books. He then sold it to Zwinger, and, on a false pretence, got from Samuda the certificate, with Samuda's name signed to the blank delivery order. On the faith of this, Roebuck got the price from Zwinger. Samuda stopped delivery at the docks; and the question was, Whether he could against Zwinger? It was adjudged he could not. Dallas, C. J., said: 'The person who enabled Roebuck to commit this fraud was the defendant, by lodging these delivery notes in Roebuck's hand, and enabling him to go to market with them. The act of Roebuck, therefore, was the act of the defendant. It is said that it would be inconvenient if property may be transferred by these delivery notes. The best test of their convenience is the use of them, which has obtained ever since these docks have been erected. Two witnesses very conversant with this trade stated, that there was a general practice prevalent to receive these warrants in the market, and to pay for the goods therein specified, without going to the dock-house to examine whether any stop was put on them. Without saying that this is such an usage as to constitute a rule of law, there is, in the particular case, enough to show that there is no foundation for the observation that the practice will be productive of inconvenience. It is enough, therefore, to say, that the persons who hold these bought notes have given a valuable consideration for them, and that therefore they are entitled

In Scotland, the practice has been extremely loose. The docks established here have not been ordered, in respect to the arrangements for recording the entry and transfer of goods, with sufficient precision or regularity to serve as the groundwork of that convenient practical system which prevails in England; but the principles and the analogy on which that usage has proceeded are the same in Scotland as in England.

In cases such as have now been stated, a competition between a person purchasing on the transfer of a dock warrant, and one purchasing with notice to the dock company or [193] its officers, might be of doubtful issue. If the above were by statute prescribed as the regular method of transfer (as in the case of goods belonging to the proprietor of the warehouse; *supra*, p. 204), it might be doubtful whether any other mode of transfer would be effectual. But this is a mode introduced by usage alone, proceeding on the practical arrangements made, and the facilities thereby afforded for the transaction of business. It [194] would, however, seem that the holder of the dock warrant was preferable: 1. Because this may fairly be held as the mode of transfer stipulated and agreed to by the importer or depositor of the goods, in the very form of the receipt received from the warehouse; 2. Because the mercantile usage is, to rely on such transfer by endorsement; and, 3. Because a purchase made without care taken to see the dock certificate cleared indicates something of collusion.¹

II. ORDINARY BOND WAREHOUSES.—1. In the ordinary bond warehouses, not connected with docks, there seems to be no such uniformity of practice as to be the safe foundation of a usage similar to that of the dock warrant transfers. In some warehouses for bond goods in Scotland the arrangements are very correct; and in practice there have occurred cases in which regular entries in the warehouse books have been made, and formal receipts or transfer notes have been delivered by the warehouse-keeper for goods deposited. And to a certain extent the practice has prevailed, that where the buyer again sells the whole quantity contained in such note, he gives over the note with an endorsed transfer to the second buyer. This is a course of practice similar to the English usage in the case of dock warrants; but less regular and settled, and not to be relied on as having the force of mercantile usage, or as the groundwork of any settled rule of transference. In some cases which occurred nearly twenty years ago, it was questioned whether such transfer was equivalent to a complete delivery of the goods, as if they had been taken out of bond, or as if the delivery order had been fully intimated to the keeper of the cellar? The Court of Session held the delivery to be complete.² The determination of the question was not merely as between the

to the property.' Park, J.: 'I am of the same opinion: it is the defendant who is to blame for sending out Roebuck into the world with these symbols in his hands; and the plaintiffs, by purchasing them, obtain a right to the delivery of the coffee. As to the custom, it is asked by the defendant's counsel, How can a custom grow up in so short a time as hath elapsed since the making of these docks? But in the Newfoundland case (*Noble v Kennoway*, 2 Doug. 510) it was held that one year was enough for a practice of trade to grow up.' Burrough, J.: 'I hope it will be understood that the Court does not proceed upon anything like a custom in this case: the only use to be made of the evidence of the practice of the trade, is that put by my brother Dallas: it shows that no inconvenience results from the use of these warrants.'

¹ In the arguments delivered in the above cases (p. 207, note 2), the law of such a case will be found almost delivered. [See p. 206, note 1.]

² *Tod & Co. v Rattray*, 1 Feb. 1809. In November 1802, Ritchie & Son imported rum, and it was lodged in the king's cellar, under the care of M'Lauchlan & Co. Ritchie & Son sold 91 puncheons to M'Kellar, who granted bills, and they

gave an order on M'Lauchlan & Co. by letter, which, after specifying the particular casks, bore: 'You will please deliver the above-noted 91 puncheons of rum to the order of Mr. D. M'Kellar, charging us with cellar rent to 30th December next, should any lie so long.' Ten days afterwards, M'Kellar sold 22 puncheons to Mathie, and gave him an order of delivery, addressed to M'Lauchlan & Co. Mathie again sold to Frew nine puncheons for £268, and the money was paid. Frew received a note of the puncheons thus purchased by him, with an order on M'Lauchlan & Co. to 'deliver to the order of Mr. R. Frew the undernoted nine puncheons of Jamaica rum, he paying cellar rent, one month after date.' This order was intimated to M'Lauchlan & Co., and Frew's name marked as purchaser after Mathie's, 6d. per puncheon being paid for this entry. Many months afterwards Mathie became a bankrupt, without having paid for the rum to M'Kellar, who had sold to him; and M'Kellar claimed a right to stop it, as *in transitu*.

The judges found themselves embarrassed by the former cases, especially by that of Auchie, Ure, & Co., which was a solemn decision not then reversed, but which several of the

purchaser, on the faith of an endorsed order, and the creditors of the seller; but it went the whole length of finding, that to all intents and purposes, in a case of stoppage *in transitu*, the delivery note as completely carried the property as, in the case of Lickbarrow, a negotiable bill of lading was found to do, where endorsed to a buyer while the goods were at sea. It was, on the one hand, maintained that the usage was so uniform as to admit that [195] analogy: on the other, it was maintained that no such usage was either proved or could (in the short time that had elapsed since the Bonding Acts were made) possibly be established to the effect of constituting a rule of mercantile law. The Court of Session held that the right of the original seller to stop *in transitu* could not be claimed or made effectual against subsequent purchasers paying the price on the faith of a transfer of the delivery note.¹ Looking to the entire want of uniformity in the practice of the country, it is difficult to estimate the precise effect of these determinations. In England, the judges have rested much on the uniformity of the practice, as giving notice to every one who shall deal with the importer or owner of goods, that he is not, in the case of dock certificates, to hold himself safe to buy on mere notice, without calling for the certificate. But this principle cannot rule cases in Scotland, from ports where the usage is not settled. Notice under the common law will furnish the only sure rule to be followed, even in cases where usage is alleged.

2. Where there is no settled usage, or where the delivery note still remains in the hands of the original buyer, the principle of change of custody has been admitted as good; and is indeed the only groundwork of a mode of transfer short of a complete change in the disposition of the goods.

3. The Act of 6 Geo. iv. c. 112, sec. 28, makes provision for the case where a new owner changes the bond, releasing the original owner. Little doubt can be entertained that this would be an effectual alteration of the property.

4. But it has been doubted what shall be sufficient notice to change the custody, and who is properly custodier, to whom the transfer of goods warehoused is to be intimated? A great deal of discussion took place at one time on questions of this sort, before the system of the Bonding Acts was fully completed. It was in the Court of Session questioned whether it was not necessary that the duties should be paid and the goods actually taken out of the cellar, and delivered to the vendee, in order to make a complete transfer? And in three several cases it was determined that an order of delivery on the keeper of the warehouse, though accompanied by a notice of that order, and a transfer in the cellar books, was not sufficient to transfer the goods.² But the House of

judges thought very questionable. But they entertained much less doubt respecting this peculiar shape of the case. The majority of the Court was satisfied, 1. That it is the practice of trade to carry on dealings to a very great extent in rum, etc., while it continues in bond; and that merchants are accustomed to trust to the delivery and intimation of an order for the quantity sold. 2. That it is of most essential benefit to commerce that this course of delivery should not be discouraged, and that it is truly the policy of the Bonding Acts to give uncontrolled power of trade, subject only to the pledge for the duties. And, 3. That the analogy of Lickbarrow's case should be admitted, and that a vendee receiving delivery by an order and intimation, and paying full value for the goods, is not to be questioned, or to have the goods withheld for payment of the price due on some prior sale. The case was first decided thus in the Court of Session, before its division (31 May 1808). It then came under review of the First Division, and Lord President Blair added the weight of his opinion to the determination. [15 F. C. 132.]

¹ *M'Eachern v Ewing & Co.*, 1824, 2 S. 724, N. E. 603.

In this case, rum bonded in Greenock was sold to Menzies, and by him to Gordon. No notice was given to the warehouse-keeper till he demanded payment of the duties from the importer, when he was told the rum had been sold to Menzies. Menzies paid the duties and got the rum. The Court held the delivery to be correct, and refused to admit a proof of usage that goods passed only with the delivery order. [See *M'Ewan v Smith*, 9 D. 434, 6 Bell 340; *Melrose & Co. v Hastie*, 1850, 12 D. 665, 13 D. 880, 14 D. 268, and see particularly observations in the House of Lords, 1 Macq. 698.]

² *Campbell, Ruthven, & Co.* were importers of rum, of which while in the king's cellars they sold 50 puncheons to Telfer & Co. Samples were delivered, but no order of delivery. The buyers authorized Robertson, a commission agent, to sell their rum, and he had free access to it, Telfer & Co. sold the rum, and gave this order on Robertson: 'I have agreed with Mr. Taylor for the rum in your hand; please, therefore, deliver it to his order.' This was by the purchaser sent to Robertson, with orders respecting the future sales, in a new course of employment, as his agent. On

[196] Lords reversed these judgments,¹ and notice to the warehouse-keeper was held effectual to transfer.

In England the same principle is recognised, to the effect of not only passing the property, but of satisfying the requisition of the Act of James I. as to reputed ownership.²

But although notice made to the keeper of the warehouse, and recognised by him, is in law sufficient to transfer the property, it is far from being well settled how such notice is to be given;³ and it seems to be matter for a jury on the facts of each case.

The keeper of the warehouse is properly the custodian of the goods. The officer of the revenue has no duties of that sort to perform, except in so far as he is ordered by the

payment of duties, 18 puncheons were delivered; 32 had been sold to different dealers, but were still unremoved when Telfer & Co. failed, without having paid the price, and the importers stopped the goods. This was found a good stoppage. Winter session 1803, n. r.

Robertson, Harvey, & Co. v Cra. of Adam. Robertson, Harvey, & Co. were importers of rum, which was bonded. William Adam purchased from them, and received an invoice with the warehouse-keeper's receipt, and an order of delivery to Adam endorsed; who intimated his holding the receipt, and the order, to the keeper of the warehouse. He sold 2 puncheons, which on payment of duties were delivered. He failed without paying the price, while 6 puncheons were still in bond. The sellers applied for those, and having paid the duties, received them. Adam's creditors demanded restitution. The Commissary of Glasgow held the delivery to be complete. Lord Meadowbank, in the Bill Chamber, affirmed that judgment. But the Court held that the delivery was not complete, so as to divest the importers of their right to stop. 24 Nov. 1803, n. r.

Auchie, Ure, & Co. v Spence. Auchie, Ure, & Co. were importers of rum, which was placed in bond in the cellars of Sandieman & Co. of Greenock. Auchie, Ure, & Co. sold 32 puncheons by auction to Mathie, and he drew for the price on Hugh Mathie & Co. at four months. An invoice was delivered, with an order to the keeper of the warehouse subjoined: 'Please deliver to the order of William Mathie, the under-mentioned 32 puncheons of rum.' Eighteen of the 32 puncheons were accordingly delivered on payment of the duties. The order was intimated to Sandieman & Co. In their scantling-book, Mathie the purchaser's name was duly entered by them opposite to the several puncheons; and the order itself was filed among the other orders in Sandieman & Co.'s custody. Mathie the vendee, and also Hugh Mathie & Co., failed without paying the bill; and Auchie, Ure, & Co. applied judicially to stop the 14 puncheons still in bond. The water-bailie of Clyde 'found Auchie, Ure, & Co. entitled in law to reclaim the 14 puncheons of rum sold by them to the defender Mathie, still remaining in the king's cellars, in respect the price thereof has not been paid.' The cause was then removed to the Court of Session, and Lords Balmuto and Hermand successively in the Bill Chamber adhered to this judgment; and the Court affirmed their sentence. The judges whose opinion went to support this judgment, proceeded chiefly on the ground of the decided cases, strengthened by what they understood to form the uniform line of distinction between actual and constructive delivery: the former requiring delivery into the corporeal possession of the vendee; the latter giving effect to acts short of this, for the special purpose of completing transference where the price is paid. On

the other hand, Lord Meadowbank vindicated his judgment in the Bill Chamber in the former case, on the ground that such order and intimation were equivalent to the delivery of the key of the warehouse; that the warehouse became thenceforward that of the vendee, where the goods lay at his risk, and at his disposal, subject only to the king's pledge; and that the commerce of all bonded goods, and the very existence of the privilege intended by the Bonding Acts, required that it should be possible to make an effectual transference, without the necessity of paying the duties in order to get actual delivery. 18 Dec. 1804, n. r.

¹ **Auchie & Co. v Spence**, 16 March 1810, 5 Pat. 291. The House of Lords, by their judgment, 16th March 1810, 'Find that the pursuers in the application to the water-bailie (Auchie, Ure, & Co.) are not entitled in law, in respect that the price was not paid, to retain the puncheons of rum in question sold by them to William Mathie, which were remaining in the king's cellars: find that, in the circumstances of this case, these goods ought (in a question as between the vendor and vendee thereof, in whose possession the same were) to be considered as being in the possession of William Mathie, the vendee, before he became bankrupt; inasmuch as Messrs. Sandiemans ought, in such a question between such parties, in the circumstances of this case, to be considered as holding them prior to the bankruptcy, as the agents and servants of the vendee only; and it is therefore ordered and adjudged, that all parts of the several interlocutors complained of, so far as they are inconsistent with this finding, be, and the same are hereby, reversed: And it is further ordered, that with this finding the cause be remitted back to the Court of Session in Scotland, to do therein and as to the several interlocutors complained of, as this finding requires and as is consistent therewith.'

It may be observed, that on occasion of a case which occurred prior to this judgment, Lord President Hope, before the division of the Court, urged the importance of adjudging this point differently from the determination in *Auchie & Co.'s* case; and the Court came to be satisfied accordingly, on a more careful review of the system of the Bonding Acts, that the former determination was erroneous. **Tod & Co. v Ratray**, 1 Feb. 1809, *supra*, p. 208, note 2.

² **Knowles v Horsfall**, 1821, 5 Barn. and Ald. 134. In this case one of the parcels of brandy was in the bond warehouse of Ledson. And in King's Bench, Lord Chief Justice Abbot, and Bayley and Best, Justices, were of opinion that, if notice had been given to him, the goods would have been effectually transferred, and out of the order and disposition of the vendor. [See **Maxwell & Co. v Stevenson & Co.**, 5 W. and S. 269.]

³ [See **M'Eachern v Ewing & Co.**, 1824, 2 S. 724, N. E. 603.]

9th section of the recent Act to keep a book for the transfer of goods, the property of the warehouse-keeper. It is to be wished, perhaps, that this appointment had been a little broader, so as to include all transfers in ordinary bond warehouses. But in absence of [197] such regulation, the officer is properly the guardian of the right of the Crown alone, as concerned for the duties; a mere superintendent, on account of the revenue, of the proceedings of the warehouse-keeper. With the exception of the cases provided for in the 9th and 28th sections of the Act (above, pp. 204 and 209), it neither is required by the Act, nor is it the practice, to make intimation to the officer of any change in the ownership of the goods, which is not accompanied with a removal or alteration of the goods themselves. And the officer would take no notice of such intimation, though made to him, as not having any effect on the Crown's right. It is to the warehouse-keeper, therefore, that notice of a transfer is to be made. He is the custodier for the merchant, and becomes by such notice (according to the rule already laid down) the servant and custodier of the buyer.¹

A question already alluded to may be again mentioned as incident to all the situations which fall under this section: viz., What shall be the effect of delivery begun, but not completed, as requiring a series of repeated acts? In the simple case of delivery between seller and buyer direct, there seems reason to conclude that the delivery might be stopped at any point of time, the price not being paid, and the buyer becoming bankrupt.² But where the goods are in the hands of a third party as custodier, the principle which seems to rule the case is the change of custody. If notice of the buyer's right and acceptance of the charge on his account be sufficient to complete the transfer, the commenced delivery seems to be good evidence of such notice and acceptance; entitling the buyer thenceforward to consider the custodier as his agent, provided the contract be entire. And this I take to be the true principle of the cases cited below, where the delivery was held complete.³

¹ [M'Ewan v Smith, 6 Bell 340; Melrose v Hastie, 1 Macq. 698.]

² See above, pp. 182, 183.

³ *Slubey v Heyward*. George & Henry Browns ordered Slubey & Smith to send 7061 bushels of wheat, to be paid for at a future day. The wheat was shipped at Baltimore on board the Pomona, the bills of lading deliverable to the buyers, and by them sold to Scott. When the ship arrived, the goods were entered in the name of Scott's agents at the custom-house. Two days after, 800 bushels were taken out by Scott's agents on his own account; and the Browns becoming bankrupts, the original sellers gave notice to the ship-master to stop delivery. The Court were of opinion, 'that, under the circumstances of this particular case, the *transitus* was ended by the delivery of the 800 bushels of wheat, which must be taken to be a delivery of the whole, there appearing no intention, either previous to or at the time of the delivery, to separate part of the cargo from the rest.' 1795, 2 Hy. Blackst. 504.

The determination of this case is stated as a general decision, and relied on in the subsequent case of *Hammond v Anderson*, 1 Bosanquet and Puller, N. S. 71. In that case, a number of bales of bacon lying at a wharf, being sold for an entire sum, an order was given to the wharfinger to deliver. The buyer came, weighed the whole, and took away some bales. He then failed, and the seller attempted to stop, by ordering the wharfinger not to deliver. And although, by the custom of trade, the seller was to pay charges of warehouse for fourteen days, the buyer was held to have taken

possession of the whole, and the seller to have no right to stop what remained with the wharfinger. All the Court concurred in thinking that the seller having undertaken for the warehouse rent was a mere incident, which did not enter into the case; but they relied on these points: 1. That the contract was entire; 2. That the case was stronger than *Slubey v Heyward*, in so far as the whole was weighed over by the buyer, which was a taking of possession of the whole; and, 3. That the leaning had gone far enough in favour of stoppage.

In a late treatise on charter-parties, Mr. Lawes seems to think that an important distinction may be taken where the seller gives delivery of a part, and where the buyer or his servants separate part from the rest, and take that part away (p. 510). But it seems inexpedient to multiply small distinctions in such cases, and it really does not appear that there is any satisfactory ground in law for the distinction; for it cannot be doubted that the mere weighing over, without taking away a part, would not complete the delivery.

On these cases, the doctrine is thus stated absolutely by Lord Chief Justice Abbot (*Law of Merchant Ships*, 11th ed. 428): 'If the master has begun to unload, and has delivered part of the cargo to the consignee, the consigner's right to countermand is wholly at an end, and cannot be exercised over the residue of the cargo.'

[Note that the text and notes present the confusion already noticed between what is necessary to accomplish tradition and what terminates the state of *transitus* in questions of stoppage. As a question of tradition, part delivery by a

SUBSECTION III.—TRANSFER OF GOODS AND MERCHANDISE WHILE IN THE HANDS OF SHIPMASTERS AND CARRIERS.

[198] Goods sold may already be in the hands of a shipmaster, carrier, or other person employed to transport them; or they may be delivered to the carrier or shipmaster expressly for the buyer. The completion of the transfer in these two distinct cases depends on different principles.¹ The former case I shall consider here; the latter falls under the next section.

A transfer of goods in the hands of a carrier most frequently happens while the goods are at sea. In the direct passage of goods by land carriage, and even in the regular carriage by smacks, so universally established now in the coasting trade, the buyer has it commonly in contemplation to obtain a direct delivery to himself. And only a receipt is given for the goods, deliverable to the buyer, or according to the address. In the importation of goods from foreign countries, the intention more frequently is, that the consignee should, in the way of general sale, take advantage of the market to which the goods are sent. In such cases, the obligation of the shipmaster is so conceived as to facilitate a sale of the goods, even before their arrival. The shipmaster grants to the shipper a BILL of LADING, acknowledging that goods of a particular description have been delivered to him in good condition; and binding himself to deliver them at the port of destination, either to the shipper, or his order or assigns, or to the bearer, or to the consignee or buyer by name, or his assignees. When the consignee's name is not expressed, the consignor endorses his own name on the bill, either filling up the endorsement with an order to a particular person, or leaving it

custodian on the vendor's order will imply the custodian's previous assent to hold the whole goods as the vendee's agent, unless there be express indications of an intention on his part to deal differently in relation to distinct portions of the goods. The change of constructive possession, where it is authorized by the order or contract without any physical acts required to be first done, is effected at once by the custodian's assent to convert himself from the seller's into the buyer's agent. That assent is an indivisible mental act, which in this case instantly completes the transference of the property; and the physical delivery which is afterwards given by the custodian, as now the agent of the vendee, cannot affect the question. Where the custodian, before delivery can be given, is bound by his authority to perform some physical operation on the goods, consisting of a series of separate acts—as to weigh and deliver a number of barrels, or count and deliver the whole of an unascertained number of hides—nice questions may arise as to whether the constructive possession is changed as to each portion of the goods as it undergoes the operation, or whether the change is suspended till the operation be completed upon the whole goods. That there is nothing inconsistent in the idea of the constructive possession being in certain cases changed progressively or by instalments, according to the progress of the preliminary operation on the goods, is proved by the case of *Black v Rowan*, 1867, 6 Macph. 136; but the conditions of the question will not always be the same. There can, however, be no question that the tradition is perfect as to each portion which the buyer actually receives from the vendor's actual possession into his own possession, of a larger quantity in the course of protracted delivery. The solution of the questions alluded to as possible in the case where a countermand is given while a custodian has performed this preliminary operation as to part only of the goods, would probably depend on the nature and objects of the operation: whether, as in the case of weighing the contents of 50 barrels, it is com-

plete as to each barrel without reference to the weight of the rest; or whether, as in the counting of the hides, it is only complete after the whole have been included in the operation;—whether, in short, with reference to its meaning and purpose, it is a divisible or indivisible operation. As the custodian's assent may be given prospectively and in advance (*Salter v Woollams*, 2 M. and G. 650; *Wood v Manley*, 11 Ad. and El. 34; *Benj. Sale*, 503, 615), the inception of the preliminary operation would probably be held to establish that assent as given prospectively as to the whole, but subject to the proper and sufficient performance of the condition; and the sufficiency or insufficiency of the performance in part, as compliance with the order of the seller, will then present a question having the same conditions as if the vendee had been in course of receiving delivery from the custodian of portion by portion as the operation was performed; or as if, instead of one custodian acting for the time in two characters, there had been two separate agents for vendor and vendee engaged in the operation, the one receiving the parts as they were weighed or counted by the other. (See *Brodie*, St. App. 877.) But all these questions are quite different from the question in *Slubey v Heyward* (whether partial delivery by the carrier or middleman ended the state of *transitus* as to the whole cargo); and the question in *Slubey v Heyward* was again quite different from that in *Hammond v Anderson*, which was, whether a warehouseman (not a carrier) who had no preliminary operation to perform in the interest of the vendor (for the weighing was merely for the buyer's own satisfaction; and, besides, it was completed as to the whole lot), did, by allowing the vendee to weigh the whole and remove part, indicate thereby an assent to become agent to hold for the vendee. If he did so assent, he necessarily in those circumstances assented as to the whole goods at once.]

¹ See the editor's note appended to this section, page 214.

blank in the name of the consignee. In the former case, the bill has the same effect as if taken originally to the person named in the endorsement; in the latter, it is equivalent to an undertaking to deliver to the holder of the bill of lading. The shipmaster is, in the common case, to hold himself as trustee for the person by whom fulfilment of the obligation in the bill of lading is demandable; for the consignee named in the bill or in the endorsement; or for the person holding a legal conveyance from him; or for him who holds the blank endorsement.

The endorsement and delivery of the bill of lading is thus, without intimation, good delivery to the buyer. The nature of the shipmaster's contract is, that he binds himself to deliver to the holder the goods shipped, and to hold those goods for him who shall, by endorsement, acquire right to the bill of lading. No intimation, therefore, is necessary to convert the possession; but the delivery of the document, upon the sight of which the shipmaster is bound to give up the goods, and without which he cannot be forced or entitled to do so, transfers at once the right and the civil possession.¹

In England this doctrine is well established.² The cases which have occurred in Scotland upon bills of lading are comparatively few; but they establish this principle clearly, [199] that the assignment of the bill of lading is a complete transference of the property, where the question turns not upon the right to stop *in transitu*. This doctrine was held in a case so early as the middle of last century;³ a few years afterwards there was a similar determination;⁴

¹ [Barber v Meyerstein, 21 Feb. 1870, Law Rep. 4 H. L. 317. In this case it was also held, affirming judgments in C. P. and Ex. Ch., that as long as the shipmaster's engagement is not completely fulfilled (landing at a sufferance wharf not being such fulfilment), the bill of lading is a current instrument; and the first person who, for value, gets a transfer of one of the set of bills of lading, acquires the property of the goods represented, *assuming always that the endorser has authority to sell* (p. 214, note 2).] In France, no sale of a *ship* at sea could deprive the creditors of the seller of their right to it, but *goods* might be sold by the bill of lading. Valin lays down the law thus: 'We must conclude, then, that the negotiation or assignment of an invoice or bill of lading completes the transference to the person receiving them, without waiting for the actual tradition, or requiring notice, like the endorsement of a letter of exchange, or a note payable to the bearer' (vol. i. p. 608).

² 'If goods by bill of lading are consigned to A, A is the owner, and must bring the action against the master of the ship if they are lost; but if the bill be special, to be delivered to A to the use of B, B ought to bring the action. But if the bill be general to A, and the invoice only shows that they are upon the account of B, A ought always to bring the action, for the property is in him, and B has only a trust. *Per totam curiam*, and per Holt, Chief Justice, the consignee of a bill of lading has such a property as that he may assign it over. And Shower, J.; said that it had been adjudged so in the Exchequer.' *Evans v Martlet*, 1 Lord Raymond 271.

In *Wright v Campbell* (according to a note of it taken by Mr. Justice Buller, though it is differently reported by Sir James Burrow, vol. iv. 2046-51), Lord Mansfield laid it down, 'that ever since the case in Lord Raymond, it had always been held that the delivery of a bill of lading transferred the property at law.' 2 Term. Rep. 74.

In the case of *Lickbarrow v Mason*, Mr. Justice Buller said: 'It has been argued at the bar, that no case has yet been decided that a bill of lading does transfer the property; but in answer to this, it is to be observed that all the cases upon the subject (*Evans v Martlet*, *Wright v Campbell*, *Cald-*

well v Ball), and the universal understanding of mankind, preclude that question.' 2 Term. Rep. 75. [See *Sm. Merc. Law*, 7th ed. 304.]

³ *M'Lauchlan & Drummond*, merchants in Maryland, having borrowed from Robert Swan of Annapolis in Maryland £152, gave him an endorsed assignment to a bill of lading of 38 hogsheads of tobacco, consigned by them to James Johnston, merchant in Glasgow. The bill of lading bore delivery at the aforesaid port of Glasgow unto Mr. James Johnston, or to his assigns. The cargo was delivered to Johnston before the bill of lading came to hand, and was arrested in his hands by the creditors of the consignors. A competition arose between Swan, the endorsee to the bill of lading, and those creditors of the consignors; which, of course, turned upon the point, whether the cargo remained still the property of the consignors, or was legally transferred to the endorsee? 'It was the opinion of the Court,' says Lord Kaimes, 'that the assignment on the back of the bill of lading made a complete transference of the property to Robert Swan;' and upon that medium he was preferred. *Buchanan & Cochran v Swan*, 1764, M. 14208. Lord Kaimes, in reporting this case, has omitted to mention the assignable nature of the bill of lading.

⁴ In 1765, Dunlop, in Virginia, consigned some tobacco to Hastie & Jamieson, the proceeds to be applied in payment of the price of goods which Dunlop had received from them. This bill of lading was to H. & J. and their assigns. The ship arrived, and the cargo was arrested by a creditor of Dunlop, the consignor. The consignees pleaded that the property was transferred; and founded on the mercantile practice of Holland, Britain, and America. The Lord Ordinary and the Court of Session found, 'That there appears no sufficient evidence that the said Archibald Dunlop was divested of the property of the cargo in favour of Hastie & Jamieson, and consequently that the same was liable to be affected by the diligence of his creditors.' But in the House of Lords the judgment was reversed, and it was declared that the appellants Hastie and Jamieson have a special property in the cargo,

and the principle was afterwards very strongly confirmed, first in the Court of Session and afterwards by the House of Lords,¹ and is now settled law.

But the custody thus held by a shipmaster is regarded as so peculiar, and so much is attached to the notion of *passage* while the goods are still on their voyage and undelivered, that as between the seller delivering over a bill of lading and the buyer receiving it, the delivery is not considered as equivalent to actual delivery, nor the custody as transferred to the full effect already noticed in the case of wharfingers and other custodiers. The *transitus* [200] is still held to subsist, and the goods may be stopped. And there is only one exception to this rule, viz. in the case of third parties who have purchased from the vendee on the faith of the bill of lading as a negotiable instrument. This important doctrine will afterwards be fully considered.²

preferable to the respondent's arrestments. *Hastie & Jamieson v Arthur*, M. 14209, 2 Pat. 251.

¹ Monteith was consignee of a parcel of sugars, and had a blank endorsed bill of lading. He sold the goods to Bogle while they lay on board in the harbour of Greenock, and gave over to him the bill of lading blank endorsed. Bogle gave an obligation to Dunmore & Co., the shipowners, for payment of the freight; and Monteith having become bankrupt, Dunmore & Co., as creditors of Monteith on another account, unshipped the goods, put them into their own warehouse, and refused to deliver them up till Monteith's debt was paid. There were two questions: 1. Whether, supposing the property not to be transferred to Bogle by the transference of the bill of lading, Dunmore & Co. could claim a lien or retention for a former debt? And, 2. (which is the question we are at present considering), Whether there was a transference of the property or not? 'A majority of the Court was of opinion that the proper possession of the goods was held, not by the shipmaster or owner, but through them by the shipper, and then by the endorsee to the bill of lading *animo*; delivery of possession being made in an effectual manner, and such alone as the case was capable of: and therefore they sustained Bogle's claim for the goods as legally transferred to him. *Bogle v Dunmore*, 1787, M. 14216. This judgment was affirmed on appeal.

But the Court found, in the case of *Young v Stein's Crs.*, 1789, M. 14218, that an endorser of a bill of lading to a factor was not such a transference of the possession as to entitle him to insist that the vessel, when driven back to her port, should set sail, that he might have retention for advances previously made. [See also *Balfour v Baxter*, 1852, 24 Jur. 290.]

² [Much misapprehension as to the precise legal effect of the endorsement of a bill of lading having arisen from the famous opinion of Buller, J., in *Lickbarrow v Mason*, so often referred to by Professor Bell, and the misapprehension having also apparently extended itself to the cognate subject of delivery orders of other kinds, it may be proper to point out that most of the positions on this subject of endorsement of bills of lading contended for by him in that case were overruled, and that the course of subsequent decisions has gone to affirm the doctrine laid down on this point by Lord Loughborough in Exchequer Chamber. Mr. J. Buller's doctrine was, that the endorsement of a bill of lading of itself transfers the property in the goods, in the same way that the mere endorsement of a bill of exchange of itself carries to the endorsee the right to the contents. It is now settled that the

mere endorsement of a bill of lading, irrespective of the endorser's title to or authority over the goods, and of any antecedent contract between endorser and endorsee for the transfer of the property, absolute or qualified, does not confer on the endorsee any legal right of property or possession in the goods. The validity and measure of the right or interest transferred by endorsement of the bill of lading depends on the title of the endorser, and the terms of the transaction in furtherance of which the endorsement is made. All that the mere endorsement confers on the endorsee is a bare authority to receive the goods; and that authority may, as matter of evidence, go far to show that he has also acquired, by some valid *titulus transferendi domini* underlying the endorsement, a right of property and possession in them (see *Dracachi v The Anglo-Egyptian Navigation Co.*, Law Rep. 3 C. P. 190, 37 L. J. C. P. 71); but unless there be such a title or authority in the endorser, and such a bargain with the endorsee as would, independently of the endorsement, give an interest in the goods, the endorsee acquires no interest in them by the mere endorsement. If the holder of the bill of lading has no interest in the goods, and no authority from the real owner to sell an interest in them, he cannot (in cases to which the Factors Acts do not apply) give to his endorsee any title in the goods, although the endorsee has *bona fide* given value for the endorsement. The endorsement of a bill of lading gives no better right to the goods than the endorser himself had (except in cases where an agent *entrusted with it* may transfer it to a *bona fide* holder under the Factors Acts); so that if the owner should lose, or have stolen from him, a bill of lading endorsed in blank, the finder or thief could confer no title upon an innocent third person, even for value paid. The actual possession which the shipmaster holds is constructively the legal possession of the owner of the goods; and that possession will, by the endorsement, become constructively the legal possession of the endorsee for all purposes (except that of terminating the *transitus* as between vendor and vendee), provided the endorsement is made by the owner or by his authority, and in furtherance of a transaction intended to confer the legal possession on the endorsee; but not otherwise except under the Factors Acts. Neither the property and possession, nor the legal right to the property or the possession, runs with the endorsement and delivery of the paper. (Lord Loughborough in *Mason v Lickbarrow*, 1 H. Bl. 357; Eyre, C. J., in *Haille v Smith*, 1 B. and P. 570; Lord Ellenborough in *Coxe v Harden*, 4 East 211; *Newsom v Thornton*, 6 East 17; and *Waring v Coxe*, 1 Camp. 369; *Patten v Thompson*, 5 M. and S. 350; *Gurney v Behrend*, 3 E. and B.

SUBSECTION IV.—TRANSFERENCE BY DELIVERY TO A THIRD PERSON AS REPRESENTING THE BUYER.

The acts of delivery which have been enumerated may, as already said, be performed either to the buyer in person, or to those employed to act as his hands,—his servants,

622, 23 L. J. Q. B. 265—per Lord Campbell, C. J.; and see *Coventry v Gladstone*, L. R. 6 Eq. 44; Blackburn on Sale, pp. 270–297.) Of course the title of *bona fide* third persons receiving an endorsement for value from the vendee will prevail against the vendor who has *actually* sold and transferred the bill of lading to the vendee, although he may have been induced by the vendee's fraud to do so. (*Pease v Gloahac*, L. R. 1 P. C. App. 219, 3 Moore P. C. N. S. 556. See Benj. Sale, pp. 318–330; Brown, Sale, Nos. 599–602.) The endorsement of a bill of lading, though made without qualification appearing in *græmio* of the writing, will create only a right of security, and not of property, if the agreement on which it is given is restricted to that purpose (*Re Westzynthus*, 5 B. and Ad. 817; and Blackb. Sale, p. 295. *Spalding v Ruding*, 6 Beav. 376, 15 L. J. Ch. 374; *Berndtson v Strang*, L. R. 4 Eq. 486, note); and its effect will be restrained, if it is made with some more limited purpose, to what the maker intended, unless the endorsee be a factor within the Acts. In Lickbarrow's case, Lord Loughborough laid down the law in terms which deserve to be kept in view in reference to the whole class of documents which are intended to regulate the transfer of possession. 'A bill of lading is the written evidence of a contract for the carriage and delivery of goods sent by sea for a certain freight. The contract in legal language is a contract of bailment. 2 Lord Raym. 912. In the usual form of the contract the undertaking is to deliver to the order or assigns of the shipper. By the delivery on board, the shipmaster acquires a special property to support that possession which he holds in the right of another, and to enable him to perform his undertaking. The *general property* remains with the shipper of the goods until he has disposed of it by some act sufficient in law to transfer property. The endorsement of the bill of lading is simply a *direction of the delivery of the goods*. When this endorsement is in blank, the holder of the bill of lading may receive the goods, and his receipt will discharge the shipmaster; but the holder of the bill, if it came into his hands casually, without any just title, can acquire no property in the goods. A special endorsement defines the person appointed to receive the goods; his receipt or order would, I conceive, be a sufficient discharge to the shipmaster, and in this respect I hold the bill of lading to be assignable. But what is it that the endorsement of a bill of lading assigns to the holder or the endorsee? A right to receive the goods, and to discharge the shipmaster as having performed his undertaking. If any further effect be allowed to it, the possession of a bill of lading would have greater force than the actual possession of the goods. Possession of goods is *prima facie* evidence of title; but that possession may be precarious, as of a deposit; it may be criminal, as of a thing stolen; it may be qualified, as of things in the custody of a servant, carrier, or factor. Their possession without a just title gives no property; and the person to whom such possession is transferred by delivery must take his hazard of the title of his author. . . . Bills of lading may be assigned for as many different purposes as goods may be delivered. They may be endorsed to the true owner of the goods by the freighter, who acts merely as his servant. They may be endorsed to a factor

to sell for the owner. They may be endorsed by the seller of the goods to the buyer. They are not drawn in any certain form. They sometimes do, and sometimes do not, express on whose account and risk the goods are shipped. They often, especially in time of war, express a false account and risk. They seldom, if ever, bear upon the face of them *any indication of the purpose of the endorsement*. To such an instrument it seems impossible to apply the same rules as govern the endorsement of bills of exchange. . . . If bills of lading are not negotiable as bills of exchange, and yet are assignable, what is the consequence? That the assignee by endorsement must inquire under what title the bills have come to the hands of the person who takes them. Is this more difficult than to inquire into the title by which goods are sold or assigned? . . . Is it, then, nothing that an assignee of a bill of lading gains by the endorsement? He has all the right the endorser could give him—a title to the possession of the goods when they arrive. He has a safe security if he has dealt with an honest man. . . . The conclusions which follow from this reasoning, if it be just, are: 1st, That an order to direct the delivery of goods endorsed on a bill of lading, is not equivalent, nor even analogous, to the assignment of an order to pay money by the endorsement of a bill of exchange. . . . 3d, That it is not negotiable as a bill, but assignable; and passes such right, and no better, as the person assigning had in it. This last proposition I confirm by the consideration, that actual delivery of the goods does not of itself transfer an absolute ownership in them without a title of property; and that the endorsement of a bill of lading, as it cannot in any case transfer more right than the actual delivery, cannot in every case pass the property; and I therefore infer that the mere endorsement can in no case convey an absolute property.' This reasoning is confirmed by Lord Campbell, C. J., in *Gurney v Behrend*, where he said: 'The bill of lading only represents the goods, and the transfer of the symbol does not operate more than a transfer of what is represented.' It places bills of lading, and the endorsements of them (except where the Factors Acts interfere), on the footing of being mere documents regulating or symbolically representing physical possession, and not in themselves, and apart from an antecedent *titulus*, carrying any title or right of any kind but the naked authority to receive or hold that possession. However unqualified the terms of the order to deliver possession may be, it is not to be dealt with as an *ex facie* absolute title to the goods, or as a document professing to deal with right or title at all. It requires no qualification to prevent it operating as a conveyance of the holder's title; for it is to be taken as meant exclusively to regulate the mere physical possession of the goods, which must be the same, whether it is to complete a sale, a security, a donation, or a bailment. Yet, of course, even in this view it may be qualified; for even a naked authority to receive physical possession may be intended to operate only on condition. See *Mitchell v Ede*, 9 L. J. Q. B. 187. The same law must apply to any other delivery order. Yet the Court of Session, in *Hamilton v The Western Bank*, 1856, 19 D. 152, and in subsequent cases, have dealt with such orders as *ex*

clerks, and agents, having orders from him to take final delivery in his name, and into his stock.¹

1. Where a buyer sends his servant, or commissions his clerk, or empowers any third party as his factor and special agent, to receive delivery of goods bought by him, the delivery so received will be considered as effectual to divest the seller, and effect a complete transfer of the property, as if the delivery were made into his own hands.²

2. Delivery even to a wharfinger, authorized to receive goods in his warehouse as into the buyer's stock, and where the buyer is accustomed to hold goods so delivered as at their ultimate destination for his behoof, is delivery as effectual as if made into the buyer's own warehouse.³

[201] 3. Delivery to a third person for behoof of the buyer, and to abide the buyer's orders for their future destination, is complete delivery, to all purposes.⁴

facie absolute written titles to moveables, disregarding the real purpose of the antecedent transaction, which these orders for delivery of possession were meant to explicate. See *Pochin v Robinow*, 1869, 7 Macph. 622; and also as connected with this subject, *Connal & Co. v Loder, et al.*, 1868, 6 Macph. 1095; and the observations of the Lord President in *MacKinnon v Nanson & Co.*, 1868, 40 Sc. Jur. 560. *Hamilton v Western Bank* is seriously invalidated by *Young v Lambert*, 1870, 39 L. J. P. C. Ca. 21, on all the points taken in the judgment of the Inner House. There appears to be grave reason for reconsidering these determinations.]

¹ 'Per procuratorem, tutorem, curatoremve,' says Paulus, 'possessio nobis acquiritur.' And Ulpian says: 'Procurator si quidem mandante domino rem emerit protinus illi acquirit possessionem.' Dig. lib. 41, tit. 2; De acquir. vel. am. possess. l. 1, sec. 20, and l. 42, sec. 1. See also Cod. lib. 7, tit. 32; De acquir. poss. l. 1.

The doctrines of the civil law on this point are well summed up in a few words by Pothier:—'*La tradition réelle est celle qui se fait par une préhension corporelle de la chose, faite par celui à qui on entend en faire la tradition, ou par quelqu'un de sa part. Lorsque la chose est un meuble corporel, la tradition réelle s'en fait à une personne, en la remettant entre ses mains, ou en celles d'une autre qui la reçoit pour elle de son ordre. Par exemple, si j'ai acheté un livre chez une libraire, ce libraire me fait la tradition réelle de ce livre en me le remettant entre les mains, ou entre les mains de mon domestique par qui je l'ai envoyé querir.*' Pothier, Tr. du droit de Propriété, No. 195, vol. iv. p. 417. See also Tr. de la Possession, No 49 et seq., vol. iv. p. 539.

Possession is by Lord Stair defined 'the holding or detaining of anything, by ourselves or others, for our use;' and he proceeds to show, that a person 'who detains or holds a thing not at all for his own use, but for another's, who doth detain by him as a servant or procurator, doth not possess:' the possession is in the principal. B. ii. tit. 1, sec. 17. And in another place he lays down the law, that a mandator, or agent, empowered to act for others, 'may acquire, transact, or contract, immediately in name of his constituent; in which case the real right stands immediately in the person of the mandant, and the obligation constitutes him creditor,' etc. B. i. tit. 12, sec. 16.

² Such, accordingly, is pretty universally the law of the continental states. Cassaregi Discursus de Commercio, Disc. 38, Nos. 51, 52.

This doctrine was very early admitted by the Court of

Session in the case of *Prince v Pallet*, where goods having been ordered to be sent by a particular shipmaster, were held actually delivered when put into the shipmaster's hands. Udney having ordered three tuns of wine from Bordeaux by one Gillespie's ship, the wine was delivered to Gillespie, who put it on board. Udney's circumstances becoming suspicious, the foreign merchant wrote to a correspondent in this country to receive the goods from the skipper when they arrived, and to prevent them from coming into Udney's hands. A competition arose between the seller and a creditor of the buyer arresting the goods in the hands of the shipmaster. The Court found, that the wine being delivered to the skipper upon Udney's order, the property was stated (vested) in Udney. 1680, M. 4932.

In England the doctrine seems never to have been questioned.

³ The doctrine I have laid down seems first to have been delivered by Mr. Justice Chambre in the case of *Richardson v Goss*, where it was not, however, necessary to determine the point. 'If it were necessary to determine the point, I should strongly incline to think, that if a man be in the habit of using the warehouse of a wharfinger as his own, and make that the repository of his goods, and dispose of them there, the journey would be at an end when the goods arrived at such warehouse.' 3 Bos. and Pul. 127.

This doctrine was adopted very fully in the subsequent case of *Scott and others v Pettit*. Berkly, a merchant in London, ordered goods from Walker of Manchester, which were forwarded to his address at the Bull and Mouth Inn, London. From that inn they were sent to the house of Pettit, a packer, in consequence of a general order to send all goods thither directed to Berkly. Berkly lived in lodgings, and had no warehouse of his own; and on the goods arriving at Pettit's house, they were booked for Berkly, and unpacked by Pettit on his account. Berkly absconded, and the seller reclaimed the goods. In a question between him and the assignees of Berkly's estate, the question was, Whether the goods were actually delivered? and the Court of Common Pleas held that they were, that there was no ulterior destination, and that the *transitus* was at an end. 3 Bos. and Pul. 469. [See also *Rowe v Pickford*, 8 Taunt. 83; *Wentworth v Outhwaite*, 10 M. and W. 436. Smith, Merc. Law, 7th ed. 554. Add. Cont. 6th ed. 203.]

⁴ *Dixon v Baldwin*, 1804. Battiers, traders in London, were in the custom of sending orders to Baldwin for goods to be forwarded to Metcalf & Co. at Hull, in order to be shipped

4. Delivery to a factor authorized to dispose of the goods, or to send them on a new destination, or to the best market, has been held complete delivery to all intents and purposes.¹

5. Delivery to a person on the part of the buyer, though not for the purpose of terminating the transit, and bringing the goods to their ultimate destination, but merely that the goods may be forwarded in their journey and *transitus* to the buyer, on the ultimate destination which he has given them, is good delivery, the price being paid. But it has been held, that where in such a case the price is not paid, the transit is not irrevocable. The person who receives the goods is considered merely as a middleman; receiving goods as for the buyer, but still holding a lien as for the seller.² See sec. 2, *Stopping in transitu*.

for Hamburg; and when the goods arrived at Hull, the Battiers sent orders to Metcalf & Co., where and to whom to send the goods at Hamburg. The goods in question were thus sent: They were, by direction of the Battiers, sent in packages with a certain mark, 'for order, and to be forwarded to Messrs. Metcalf & Sons, to be shipped for Hamburg as usual.' The Battiers failed; the sellers went to Hull and stopped the goods, four bales having been actually on board for Hamburg. One question in the case was, Whether the delivery had been completed to the buyer? Lord Ellenborough thought the delivery complete: 'The goods had so far gotten to the end of their journey, that they waited for new orders from the purchaser to put them again in motion, to communicate to them another substantive destination, and without such orders they would continue stationary.' Lawrence and Le Blanc, J., agreed with him. Grose, J., held 'that the right to stop *in transitu* was not at an end when the vendors took possession of the goods.' 5 East 175, 188.

¹ *Leeds, etc. v Wright*, 1803, 3 Bos. and Pul. 320. The doctrine confirmed, 5 East 175. *Dixon v Baldwin*. See preceding note. [Add. Cont. 203.]

² [Throughout these pages it must be kept in view that the author's desire to treat stoppage *in transitu*, not as an anomalous remedy of equitable origin, but as a natural and consistent development of the legal principles of the contract of sale, have forced him to remould the legal doctrine of delivery in a quite inadmissible way. It is sometimes said that stoppage is an extension of the seller's lien in England, and his right of retention in Scotland; but this statement, which is only a rude and imperfect illustration, becomes with the author a statement of the precise legal principle and *rationale* of stoppage. But then the impossibility of conceiving a lien or right of retention to exist after the goods have been delivered to the vendee or his agent, forces him to assert the principle, that wherever stoppage is competent there has been no delivery, or only an imperfect, or, as he calls it, a constructive delivery; and hence a great many refinements and distinctions between acts which are and those which are not delivery; and sometimes, as here, the same act and tenure of possession is held to be or not to be delivery on a criterion, such as payment or non-payment of the price, which has nothing to do with the possession, but solely with the right of stoppage. The author holds that goods are liable to stoppage because they are not yet perfectly delivered, nor the exercise of the vendor's lien or retention yet rendered impossible, and that stoppage is just an exercise of these rights prolonged. But when the question comes round to this, On what principle goods put on shipboard for a vendee can be held imperfectly delivered, or the possession of the owner not given up,

—really his answer is just an attempt to set up their liability to stoppage as a criterion to distinguish between perfect and imperfect delivery, and so his argument moves round in a vicious circle. In the text, he deals with the case of goods shipped to a vendee. If the price is paid, of course they cannot be stopped; if it is not paid, they can. But suppose there are two separate portions of one cargo shipped by a vendor to a vendee, under the same bill of lading, one paid and the other not paid: there is no distinction in regard to the delivery given, or the possession held, which can be drawn between the one and the other. Yet, as there is a distinction between the portions in the matter of liability to stoppage, and as, according to the author, stoppage is a consequence of incomplete delivery, he is forced to make the incompleteness of delivery, which he asserts to exist in the one case, consist in the fact that the price has not been paid, and the completeness of the delivery in the other in the payment. But the payment or non-payment cannot alter the fact as to the nature of the possession received and held by the master under the single bill of lading, the terms of which apply to both portions of the cargo alike. For whom the master holds possession of the goods, is a matter depending on the terms and conditions on which the vendor put them into his custody, as these are expressed in the bill of lading; and if the result is, as to one portion, that he holds them for the vendee, then how—the same terms being applicable to the other portion—can his possession of the latter portion be different from his possession of the former? The simple question in regard to the transference of the property is, For whom does the shipmaster receive and hold the possession entrusted to him by the vendor? Is it for the vendor or the vendee? Of course, if a seller wishes to prevent the legal possession and the property from passing from him, he may deliver the goods to the shipmaster on such terms as shall make the latter *his own* agent, to receive and hold the actual possession *for him*, and not for the vendee. (*Turner v Trs. of the Liverpool Docks*, 20 L. J. Ex. 393, 6 Ex. 543; *Ellershaw v Magniac*, 6 Ex. 570; *Van Casteel v Booker*, 2 Exch. 691; *Waite v Baker*, 2 Ex. 1; *Walley v Montgomery*, 3 East 585; *Jenkins v Brown*, 19 L. J. Q. B. 286; *Abbot, Shipping*, 11th ed. p. 284; *MacLachlan, Shipping*, 589.) But where the bailment is not of this special character, but is merely a delivery of goods to a shipmaster as a common carrier for conveyance to the vendee, there is no question that the law holds the carrier to represent the vendee, as *his* agent for the purpose of receiving and holding the goods *for him*, and that the possession of the carrier is the possession of the vendee. It is well settled that the delivery of goods to a common carrier, *à fortiori* to one specially designated by the purchaser, for

6. Where goods are bought to be delivered to the buyer at a distance,¹ and having arrived at their journey's end, are put into the hands of a wharfinger, or into a public warehouse or cellar, not at the desire and appointment of the buyer, but for the convenience of the carrier or shipmaster, and to wait the appearance of the buyer to claim them,—this is not delivery to pass the property: the goods are still in the hands

conveyance to him or to a place designated by him, constitutes a receipt by the purchaser. In such cases the carrier is in contemplation of law the bailee of the person to whom, not of the person by whom, the goods are sent; the latter, in employing the carrier, being considered as an agent of the former for that purpose. (*Dawes v Peck*, 8 T. R. 330; *Waite v Baker*, 2 Ex. 1; *Fragano v Long*, 4 B. and C. 219; *Dunlop v Lambert*, 6 Cl. and F. 600; *Meredith v Meigh*, 2 El. and Bl. 364; *Cusack v Robinson*, 1 B. and S. 299; *Hart v Bush*, E. B. and E. 494, 27 L. J. Q. B. 271; *Smith v Hudson*, 34 L. J. Q. B. 145; *Dutton v Solomonson*, 3 B. and P. 582—per Lord Alvanley, C. J.; *King v Meredith*, 2 Camp. 639; *Vale v Bayle*, Cowp. 294; *Abbot, Shipping*, 284, 11th ed.; *Benjamin on Sale*, pp. 130, 514; *Atkinson on Sale*, p. 199 et seq.; *Harle v Ogilvie*, 24 Jan. 1749, M. 10095; *Prince v Pallet*, M. 4932; *Brodie, Stair*, App. 859; *Brown, Sale*, No. 522.) If, however, the vendor should sell the goods, undertaking to make the delivery himself at a distant place, the carrier is the vendor's agent; *Dunlop v Lambert*, 6 Cl. and F. 600; *Benj. Sale*, p. 514. Such, then, in the ordinary case, being the character in which the carrier receives and holds the goods, viz. as the agent of the vendee, it is obvious that the constructive possession acquired by the vendee through him amounts to tradition of the property, just as in the case of constructive possession acquired through a warehouseman who has assented under a delivery order from the vendor, to assume the character of agent for the vendee. The notion that the carrier 'receives the goods as for the buyer, but still holds a lien as for the seller,' or, as it is put at p. 233, 'receives the goods for the preservation of the seller's lien on the one hand, and the buyer's right of property on the other,' is quite untenable. It seems to be an attempt to escape from the consequences of the fact, that the corporeal possession of the goods had been given up to a person representing the buyer, which, as the author admits, vests the property in the buyer. This can only be accomplished by delivery; yet, as the right of stoppage may still exist, the attempt is made to represent the carrier's agency to receive possession as neutral or as double, and the delivery of a peculiar and imperfect kind. Without referring to the difficulties of the carrier holding, while possessing for the vendee, the English vendor's adverse right of lien for the unpaid price, it is sufficient to say that the notion of a neutral or double agency is quite inconceivable on the principles of Scotch law. By that law the seller has no lien; his right of retention is the assertion of a right of undivested property. How the carrier whom the seller, as the buyer's agent for that purpose, has employed to receive and hold the goods for the buyer, and as the buyer's property, can have employed him at the same time to hold them as his, the seller's, undivested property, or how the carrier could undertake both agencies at once, it is difficult to conceive.

The right of stoppage *in transitu* is not a consequence of the seller's property or possession being undivested, and its competency does not interfere with, but presupposes, delivery.

'To put goods in a state of *transitus*, the seller must have parted with the possession of the goods. Unless the seller has parted with the possession, his remedy is not stoppage *in transitu*, but in Scotland retention, and in England an exercise of the seller's right of lien.' Per Lord President in *Black v Rowan*, 1867, 6 Macph. 136.]

¹ [The case meant is, where the buyer stipulates or the seller undertakes that he, the seller, shall make delivery, not on shipboard, but at the place of the buyer's residence, or some other place of delivery at a distance from the seller. In such a case the buyer has not the usual animus to receive possession on shipboard, nor any animus to receive but at the place designated, nor the seller authority to employ the carrier to receive and hold for the buyer; and the corporeal possession of the carrier, therefore, does not vest the buyer with the property. (See *Warnkoenig*, Inst. Juris Rom. Privati, sec. 303; *Benj. Sale*, p. 514.) Where the buyer has given orders as to the particular carrier or class of carriers by whom the goods are to be sent, the animus to receive or hold possession by any other agent being wanting, it seems that delivery to any other as on the buyer's account will not merely make the risk return to the vendor, but will prevent the property itself from passing to the vendee by means of the corporeal possession of one whom the vendee has excluded from being his agent. See *Harle v Ogilvie*, 1749, M. 10095, where the buyer having ordered sugars to come with convoy, and the seller having sent them by a vessel sailing without convoy, which escaped capture, but arrived with the sugar damaged by water, the Court held, not only that the seller stood to all risks on the voyage, but, in the words of Lord Kilkerran, that 'the property itself was certainly not transferred by the putting on board, as it would have been had the ship come under convoy: that was in suspense till her arrival. Till they arrived at the port of delivery, the property of the sugars was not transferred to the defender.' In all these cases the carrier is the seller's agent; and his possession, the seller's possession, till it is divested by delivery to the buyer, or some agent entitled to receive possession for him, or in his right. Any sub-agent employed by the carrier (who is himself in this case the vendor's agent) as a hand to continue his possession, will not by such employment be an agent to receive or hold possession for the vendee. His possession, like the carrier's, will be the vendor's possession. But he, as well as the carrier, may enter expressly or by implication into a new agreement, distinct from the original contract to carry or to hold as the hand of the carrier—to hold for the vendee as his agent; and such agreement will be effectual to change the possession from that of the vendor to that of the vendee, provided the vendee had right at that time and place to take possession, or to waive further carriage or custody by the vendor under the contract between the vendor and vendee. *Allan v Gripper*, 3 Cr. and Jer. 218, 2 Tyr. 217; *Foster v Frampton*, 6 B. and C. 107. Acts of the vendee, such as claiming, marking, or sampling, do not of themselves consti-

of the seller's agent, till they are taken possession of by the buyer. But if, while the goods remain in this situation, the buyer claim the goods, and mark them as his, the delivery is completed.¹

7. The exercising of any other act of ownership on goods in the above-mentioned [202] situation, such as tasting and taking samples, would seem to be sufficient to complete the transit.² But it would rather seem, that a creditor arresting the goods while under detention, would not be held to have taken actual delivery on the part of the buyer, his debtor. His right as arrester is entirely dependent on that of his debtor; and he has no power as representative, or under any conveyance, express or tacit, to take possession of his debtor's property.³ The trustee or assignee for the general creditors may, in England, take delivery for the buyer; and the courts of England have held the marking of the goods by the [203] assignee as actual delivery.⁴

8. There is another important class of cases, where goods are delivered to shipmasters and carriers for carriage to the buyer. We have already considered the case of goods transferred while in the hands of shipmasters or carriers: the point now to be considered is, how far the shipmaster or carrier to whom goods are delivered for the purpose of being transported to the buyer, or according to his order, takes delivery for the buyer? 1. Where the goods are delivered to the shipmaster of a GENERAL ship, on a bill of lading taken in name of the seller or consignor, and afterwards endorsed to the buyer; or on a bill of lading to the bearer, which is afterwards delivered to the buyer;⁵ or on a bill of lading to the

tute a change of the constructive possession in the hands of the carrier or sub-agent, and have not in themselves any effect as matter of law on the character in which the possession of the goods is held. They are no more than evidence showing the intention of the parties as to the capacity in which that possession is to be held; see *Jones v Jones*, 8 M. and W. 431; *Dixon v Yates*, 5 B. and Ad. 313; Blackb. Sale, p. 252. It is clear that the mere arrival of the goods at the spot where the purchaser meant them to be taken possession of, is not equivalent to his possession without something amounting to a delivery of actual possession to him or his appointee, or an agreement to change the character of the custody; *James v Griffin*, 2 M. and W. 623; *Crawshay v Eades*, 1 B. and C. 181; *Bolton v Lancashire and Yorkshire Railway Co.*, 35 L. J. C. P. 137.]

¹ *Ellis, etc. v Hunt*, 3 Term. Rep. 464, 470.

See also *Stoveld v Hughes*, 14 East 308.

² See the cases of *Wright v Lawes*, and the case referred to by Lord Ellenborough, as adjudged in the House of Lords, *supra*, p. 196, note 4. The inference from those cases to the point stated in the text seems to be clear. ■

³ In *Trompousky & Co. v Niesh*, 1807, Hume 693, the question was in some degree complicated, but the result rather tends to confirm this position. Niesh bought hemp from Trompousky & Co. of Riga. The goods did not arrive till after Niesh had failed, and left Arbroath. There being no person to receive them, the shipmaster lodged them in a public warehouse, where they were arrested by a creditor of Niesh's. The shippers afterwards, in the action of forthcoming, appeared by a mandatory, to whom they had endorsed the bill of lading, and pleaded that this appearance was equivalent to stoppage *in transitu*. The question lay between the seller and the arresting creditor. The Judge-Admiral preferred the arresting creditor, 'in respect the hemp in question was not attached or stopped *in transitu* by the vendors prior to the arrestment.' The Court of Session altered this judgment, and preferred the

sellers, on the ground that the buyer had left Arbroath before the goods arrived, and that there was no person to receive delivery.

Smith v Goss, 1 Camp. 282, was a similar decision in England. Scaiffe ordered from Smith of Birmingham some packages of hardware, which he directed to be forwarded to him at Newcastle; 'and if sent by London, to be addressed to the care of Goss, Bull Wharf, with directions to send them by the first vessel for Newcastle.' The goods were so sent accordingly to Goss; and, while with him, Scaiffe wrote to Smith that he was insolvent, and declined accepting the goods. On this Smith stopped the goods in Goss' hands. In the meanwhile, the goods were attached by process out of the Lord Mayor's Court, at the instance of a creditor of Scaiffe. Lord Ellenborough held Smith entitled to recover his goods, as they had been sent to Goss for the purpose of being forwarded to Newcastle, were merely at a stage upon their transit, and could not be considered as having reached their final destination when at the wharfinger's in London. He also held, that the right of the seller to stop *in transitu* could not be defeated by the process out of the Mayor's Court, at the suit of the attaching creditor, who could have no greater right in the goods than Scaiffe himself.

⁴ See the case of *Ellis v Hunt*, note 1.

⁵ [As to documents the effect of which, if valid, would be to give a floating right of action to any person who may become possessed of them, such as a bill of lading deliverable to the bearer might perhaps be considered to be, see *Dixon v Bovill*, 3 Macq. H. L. C. 1. Query, 1. Whether there is any general mercantile usage to support such a bill of lading; and, 2. Whether a bill of lading, not being a document of itself purporting to confer a title, but requiring an antecedent contract or *titulus* to support it (see *Dracachi v Anglo-Egyptian Navigation Co.*, L. R., 3 C. P. 190, note, *ante*, p. 214), is within the scope of the Lord Chancellor's observations?]

buyer by name,—the goods are effectually delivered¹ to pass the property, but are still subject to stoppage.² 2. Where goods are delivered to a common land-carrier;³ or to the wharfinger of a smack company; or on board a smack with an address to the buyer,—the goods are effectually delivered to the buyer, so as to pass the property; but while they remain in the hands of the carrier or shipmaster, they are subject to stoppage.⁴ 3. Where,

¹ This case has already been considered. See above, pp. 216, 217, with the cases in notes.

² See below, Of Stoppage *in transitu*.

³ *Dunlop v Scott & Co.* Bowie, a travelling merchant, ordered goods from Scott & Co. of Glasgow. The goods were sent in a chest to the carrier between Glasgow and Edinburgh, and the carrier's clerk gave this receipt for the chest: 'Received from Scott & Co. a chest, directed to William Bowie, Edinburgh, which we promise to deliver in good order, and which was directed to lie till called for.' On arrival, the chest was placed in the warehouse of the carrier's agent at Edinburgh, and was there arrested by a creditor of Bowie. Scott & Co. then demanded the goods as unpaid for; and the Court held them entitled to stop them as *in transitu*. 22 Feb. 1814, 17 Fac. Coll. 576.

⁴ [Delivery by a vendor to a carrier or shipmaster of goods to be conveyed to a vendee is, in the ordinary case, delivery to the vendee, whose agent the carrier or shipmaster becomes (Abbott, p. 284). *A fortiori* will delivery on board ship be *prima facie* delivery into the vendee's possession, if the vendee is owner of the ship, or even, where the vessel is not the vendee's property, if she be chartered by him under a charter-party whereby the master is not the servant of the shipowner, but the immediate servant of the vendee. *Ogle v Atkinson*, 5 Taunt. 759; *M'Taggart v Kymer*, cited 3 East 396; Blackb. Sale, 243. But, by means of a special bailment or contract with the carrier, the vendor may reserve to himself the possession while the goods are in the hands of the carrier, who in that case becomes his special agent to hold possession for him; and delivery of the goods on such terms will be effectual to continue the legal possession in the vendor, even though the ship be the vendee's property, or the master his immediate servant. The essential question is, on whose behalf the possession is received and continues to be held by the master; and in the case of a shipment, the *evidence* of that will largely, but not entirely, turn on the form of the bill of lading, and how it is dealt with, and also to some extent on the invoices, correspondence, etc., between the parties. In *Turner v The Trustees of the Liverpool Docks* (20 L. J. Ex. 393), a vendor delivering goods into the vendee's own ship was held to have restrained the effect of such delivery by taking bills of lading for the goods deliverable to his own order, or assigns, and that although they also contained the clause, 'he or they paying freight nothing,—being owner's property.' Mr. J. Pattison says: 'There was not, therefore' (*i.e.* on account of the terms of the bill of lading), 'a delivery of the cotton to the purchasers as owners, although there was a delivery on board their ship. The vendors still reserved to themselves, at the time of delivery to the captain, the *jus disponendi* of the goods, which he by signing the bill of lading acknowledged, and without which it may be assumed that the vendors would not have delivered them at all.' Then, after referring to the terms of the invoices, which stated that the cotton was shipped 'by order and for account and risk of the vendees, and ad-

dressed to order;' and to the expressions in the bill of lading as to freight, which had been relied on as showing that the delivery on board the ship was made with intention to pass the property absolutely, it is said: 'But the operative terms of the bill of lading and letter . . . show too clearly for doubt, that, notwithstanding the other terms of the bill of lading and invoices, the vendors had no intention, when they delivered the cotton on board, of parting with the dominion over it, or vesting the absolute property in the bankrupts. . . . The only effect to be attributed to the form and expression of the invoice or bill of lading would be as indicating the terms upon which the goods were delivered.' It was further held, that it made no difference on the fact of the master's possession being the vendor's, that the master, by signing a bill of lading deliverable to order or assigns, might have exceeded his authority. (It will be noticed that, this being an executory sale of the cotton, the delivery was necessary to pass the property and right of possession, and that such a case is quite available to us as a decision on the point of delivery. See Atkinson, Sale, 199.) In *Ellershaw v Magniac* (6 Ex. 570), it was held, notwithstanding various correspondence tending to show an opposite intention, that the vendors who, under an executory contract of sale, had shipped linseed on board a vessel specially sent by the vendee for it, had, by taking a bill of lading for the linseed deliverable to their own order or assigns, clearly shown the intention to preserve the right of property and possession in themselves, until they should make an assignment of the bill of lading to some other person, and that there was therefore no such delivery as to vest the right of property or possession in the vendee. So in *Waite v Baker* (17 L. J. Ex. 307), where the contract of sale was executory, and the charter-party made by the vendor in the vendee's name, but the bill of lading taken to the vendor's order or assigns, Parke, B., in delivering judgment, said: 'By the original contract, no property passed. Therefore, to deprive the original owner of the property, you must show that at some subsequent period the property passed. Now, in this case, it is said that the delivery on board ship is equivalent to a delivery to the vendee, because the ship was engaged by Lethbridge (the vendor) as agent for the defendant. But assuming that were so, the actual delivery on board was not a delivery to the defendant, but a delivery to the captain, to be carried under a bill of lading. Now the bill of lading indicates for whom the master of the vessel is to carry the goods; he agrees thereby to carry them as agent for and on account of Lethbridge, and to deliver them to Lethbridge if he does not make an assignment of the bill of lading, and to deliver to the assignee of the bill of lading if it is afterwards assigned. Then the master continues in possession of the property, not as in the case of an ordinary common carrier, but as a person carrying on behalf of Lethbridge. . . . Therefore the act of delivery did not pass the property in this case.' So in *Van Casteel v Booker* (18 L. J. Ex. 9), it was held that the taking of a bill of lading by the vendor for goods to be

for goods so delivered, a receipt is granted to the buyer by the carrier or clerk of the shipping company, with the consent or by the direction of the seller, this is effectual delivery

delivered to his own order, though shipped freight-free on board the vendee's own vessel, proved *prima facie* that the goods were shipped for the vendor, and that the possession would continue his possession till determined by his subsequent dealing with the bill of lading; but that it was a question of fact for the jury, in the whole circumstances, notwithstanding the form of the bill of lading, whether or not the goods were *put on board to be carried for, and on account of, the vendees*; and that, in case they were put on board with that intention, shipment on board the vendees' own ship would be final delivery, barring both right of stoppage by the vendor and power of rejection by the vendees. The jury found, notwithstanding the *form* of the bill of lading, that the intention had been to make a delivery vesting the property at once in the bankrupts, and the Court refused to set the verdict aside. See also *Falke v Fletcher*, 34 L. J. C. P. 146; *Schotsman v Lanc. and Yorkshire Ry. Co.*, L. R., 2 Ch. App. 332; *Shepherd v Harrison*, 38 L. J. Q. B. (Ex. Ch.) 177.

The cases seem to establish that the fact of making the bill of lading deliverable to the order of the vendor is, when not rebutted by evidence to the contrary, decisive to show his intention to preserve the *jus disponendi*, and to prevent the property from passing to the vendee (see, in addition to the above cases, *Wilmshurst v Bowker*, 2 M. and G. 792; *Jenkyns v Brown*, 19 L. J. Q. B. 286); but the *prima facie* conclusion, that the vendor reserves the *jus disponendi* when the bill of lading is to his order, may be rebutted by proof that in doing so he acted as agent for the vendee, and did not intend to retain a control over the property, and it is always a question of fact for the jury to determine what the real intention was; *Brown v Hare*, 29 L. J. Ex. 6; *Joyce v Swan*, 17 C. B. N. S. 84. In *Moakes v Nicholson* (34 L. J. C. P. 273), a sale of coals not ascertained having been made by Josse to Pope for cash, the coals were shipped by Josse, who took three bills of lading making the coal deliverable to 'Pope or order.' Of these only one was stamped, and that Josse kept in his own hands, sending on the second with invoice to Pope. Josse being unable to get the price, sent the stamped bill to his own agent, who induced the master to give delivery to himself. The Court held that no title had passed to Josse from Pope, the retention of the stamped bill of lading being a clear indication of his intention to reserve the *jus disponendi*, and that his real intention was a fact for the jury. The vendor may, by a similar use of the bill of lading, retain a *jus disponendi* over goods shipped to order, until the performance of some condition precedent on which he is entitled to make the passing of the possession and property to the vendee depend. Thus, when the goods are agreed to be paid for by the buyer's acceptance against bills of lading, and the vendor wishes to retain the possession and property till his draft is accepted, as in this case he is in virtue of his contract entitled to do, the master will be required to give bills of lading to the order of the vendor, by whom one part *unendorsed* will be forwarded to the vendee, with invoices, etc., to notify the shipment, and the other part *endorsed*, to the agent of the vendor at the place of the vendee's residence, along with the drafts for the price, and instructions to deliver up the endorsed bill

of lading to the vendee, if and when the condition of accepting the draft has been implemented; and if it is not, to receive the cargo for the vendor when the vessel arrives. *Brandt v Bowlby* (2 B. and Ad. 932) was a case of this kind. The Court held that the property did not vest in the vendee unless the bills of exchange sent to the agent with the endorsed bill of lading were accepted. In the earlier case of *Coxe v Harden* (4 East 211), the facts at first sight appear much the same, though the result was different. The property and possession of goods shipped under an executory contract on bills of lading deliverable to the vendor, were held to have passed by delivery to the vendee, notwithstanding that the *endorsed* bill of lading was sent to the vendor's agent for the purpose of securing the amount of his bill on the vendee, and only the *unendorsed* copy bill of lading went with the invoice to the vendee. The goods were actually received by the vendee's sub-purchaser, and the agent holding the endorsed bill of lading brought trover for the goods, raising the question, whether the right of property and possession had ever passed to the vendee or his sub-purchaser? The difference of this case from *Brandt v Bowlby* appears to be, that the original agreement between vendor and vendee was one which did not entitle the vendors to retain possession till the bills were honoured; that the directions to the captain not to deliver to the vendee, signified by the bill of lading being *unendorsed*, were not authorized as against the vendee, and that the actual delivery obtained from the captain, though the vendee could not have enforced it, being supported by the terms of the contract, removed any difficulty as to the terms of the bill of lading out of the way. (See Blackb. on Sale, p. 142; and also Benjamin, Sale, p. 275; Abbott, p. 293; and MacLachlan, p. 344, for other attempts at explaining *Coxe v Harden*.) It is quite possible by a distinctly suspensive condition to prevent the property of goods sold from passing, even though they are delivered; *Macartney v Macredie's Crs.*, 1799; M. Sale, No. 1. If such a condition appear on the bill of lading itself, it will of course affect all persons taking it in right of the person bound by the condition; *Barrow v Coles*, 3 Camp. 92; *Busk v Spence*, 4 Camp. 329. But it will materially affect the question of construction, whether or not a condition not entered on the bill of lading is meant to be suspensive, that, instead of sending the bill of lading to an agent to see the condition performed before the bill of lading is delivered to the vendee, the vendor sends it to the vendee himself, merely asking performance of the stipulation alleged to be suspensive. (See *Key v Cotesworth*, 22 L. J. Ex. 4.) In *Ogle v Atkinson* (5 Taunt. 759) it was held that the property had passed, the goods having been delivered on board the vendee's own ship to the captain, who received them on behalf of the vendee, and as being the vendee's own goods; and the effect of that delivery was not rescinded by the vendor afterwards, by fraudulent misrepresentations, procuring bills of lading from the captain in his own favour, which were transmitted, endorsed, to an agent, with orders to transfer to a third person, unless the vendee should accept draft, which the vendor had no right to ask him to accept. (On the subject of this note, see also Blackb. Sale, pp. 135-146; Benjamin, Sale, pp. 272-289; Abbott, 283-298, 11th ed.;

of the goods.¹ Such receipt is much the same with actual delivery to the buyer, and a subsequent embarkation of the goods by him on a receipt to himself. But such receipt or bill of lading by a shipmaster or carrier to the buyer will not transfer the property, if it shall have been granted without the seller's authority. And it has been ruled, (1.) That a restrictive receipt, in the seller's name, prevents the shipmaster from giving a bill of lading to the buyer. (2.) That even a general receipt is a bar to such a bill of lading, without assent [204] by the seller.² And, (3.) That while no receipt has been granted, though required by the vendor, a bill of lading granted to the vendee will not transfer the property.³ (4.) Receipts are seldom taken unless either there is an intermediate person, as a lighterman, between the shipper and the shipmaster, who is to be acquitted by the receipt; or where the goods are sent by a shipping company. In the former case the receipt is intermediate; in the latter, it generally stands instead of a bill of lading.⁴ The bill of lading is often settled without any previous receipt; but whether a receipt has been previously given or not, without authority, the master has no right to grant a bill of lading to any one but the shippers.⁵ What shall be deemed authority to this effect, is a question of usage or of evidence; in which it may occur to be tried, whether the seller, permitting the ship to sail, without [205] taking care to obtain a bill of lading, is not to be held as giving implied assent to the bill of lading that may have been granted by the master.

9. Where, after notice to stop, delivery has by accident been made, it is not delivery to the effect of passing the property.⁶

The various kinds of delivery now enumerated have the effect of transferring the property, wherever the vendee has not failed in observing or fulfilling any of the essential parts of his contract: the goods pass out of the estate of the vendor, and become part of the estate of the vendee: the creditors of the former cannot take them as part of his divisible estate: the creditors of the latter may *vindicate* them as the property and part of the estate of their debtor.

So far all is clear. But where the vendee has failed to observe any essential part of

Maclachlan, pp. 343-348.) As to mate's receipts operating in the same way to preserve the vendor's control over goods shipped, see, besides the cases quoted by the author, *Covasjee v Thomson*, 5 Moore P. C. C. 165; *Schuster v McKellar*, 7 E. and B. 704, 26 L. J. Q. B. 281; *Evans v Nichol*, 4 Scott N. R. 43; *Bryans v Nix*, 4 M. and W. 775; *Blackb. Sale*, p. 144.]

¹ *Fragano v Long*, 1825, 4 Barn. and Cress. 219; *Noble v Adams*, 1816, Holt 248, 2 Marshall Rep. 366. [See *Meletopulo v Banking*, 6 Jur. 1095—per Lyndhurst, L. C.; *Morton v Abercromby*, 1858, 20 D. 362.]

The doctrine which was thus fully laid down had been taken for granted in *Craven v Ryder*, 1815 and 1816, 2 Marshall 129. See note 2. [Add. Cont. 6th ed. 180.]

² *Craven v Ryder*, 1815, 1816, 2 Marsh. 126, 6 Taunt. 433, 1 Holt 100. Lord Chief Justice Gibbs said: 'Independently of the particular form of the receipt, I take it that the regular practice is, that the person who is in possession of the receipt is alone entitled to the bill of lading; and the captain, therefore, ought not to give the bill of lading except to the person who can give the receipt in exchange. Consequently, the person holding the receipt has a control over the goods till he has exchanged it for the bill of lading.' Mr. Justice Dallas: 'I think the jury determined properly. They said it was contrary to the course of business, and to the defendant's duty, to give up the bill of lading without the receipt; and

that the plaintiffs had never parted with the property, as they kept possession of the receipt.'

³ *Ruck v Hatfield*, 1822, 5 Barn. and Alder. 632, where rum was bought at 1s. 5d. free on board, invoices sent to the buyer, a bill drawn and accepted, and the rum shipped, with the tender to the mate (master not on board) of a receipt as 'shipped on account of the vendors.' This was not signed, and afterwards the master signed bills of lading to the buyer's correspondent at Hamburg. On the seller again tendering the receipt, the master refused to sign it. The question was, Whether the goods were stopped as *in transitu*? The seller had a verdict; and a new trial was refused. See also *Craven v Ryder*, 1816, preceding note.

⁴ [But, as to the endorsement and transference of such receipts and shipping notes, see *Jenkyns v Usborne*, 7 M. and G. 678; *Townley v Crump*, 4 A. and E. 58; *M'Ewan v Smith*, 6 Bell's App. C. 340; *Ackermann v Humphrey*, 1 C. and P. 53; and American cases referred to by Parsons, Contracts, 3, 488, note.]

⁵ See cases of *Craven* and *Ruck* above, notes 2 and 3.

⁶ *Litt v Cowley*, 1816. Here a carrier, after notice to stop, had, by mere mistake, delivered the goods to the buyer. Under the direction of Lord Chief Justice Gibbs, a verdict went for the sellers against the assignees of the buyer, a bankrupt; and the Court of Common Pleas refused a new trial. 7 Taunt. 169.

his bargain, stipulated or implied as a condition of the transference—where, for example, he is unable to perform his engagement by paying the price—those cases of real or supposed hardship arise to which I have already alluded, and exceptions have been contended for and admitted, which confound in no small degree the simplicity of the doctrine.

I shall, in the following section, consider the grounds of these exceptions to the general rule.

SECTION II.

OF THE SELLER'S RIGHT OF RETENTION FOR THE PRICE, AND OF STOPPAGE IN TRANSITU.

According to the settled law of *MUTUAL CONTRACT*, if either of the parties in sale be unable or refuse to perform his engagement, the other may withhold performance of his part of the contract, while still in the course of execution; and may demand, besides, damages for any loss he may sustain.¹ If the BUYER fail while the goods are still with the seller, the seller may withhold delivery, and claim the direct damage which he has suffered by the disappointment: if the goods have left the seller, but are still on their way, not yet come into the buyer's possession, the seller may follow the goods, stop them on the way, and resume possession. This privilege, then, of stopping goods *in transitu* is truly a qualified extension of that rule of mutual contract, by which either party may withhold performance, on the other becoming unable to perform his part.

SUBSECTION I.—HISTORY OF THE DOCTRINE OF STOPPAGE OF GOODS IN TRANSITU.

It is a little more than thirty years since the doctrine of stopping *in transitu* was introduced into the law of Scotland by a decision of the House of Lords. Whether on this occasion the course of our own practice should have been entirely set aside, and a rule [206] adopted from England, where different principles regulate the contract of sale, this is not the place to inquire: it is enough that the revolution thus occasioned has been confirmed by uniform practice and many decisions since; and that the doctrine of stoppage *in transitu* is now law in Scotland. At the time when this doctrine was introduced, our lawyers were little versed in English determinations, even on mercantile questions; and, in particular, they were very much at a loss for the rules and distinctions of the new doctrine which had been promulgated among us. I had soon after, while employed in the first composition of this work, much communication with Lord Thurlow, who presided in the House of Lords when the decision alluded to was made; and both in his written and oral communications on the subject, he expressed himself as very sensible of the difficulties which were to follow on this decision, and which then were felt in England. He saw the increasing danger of yielding to mercantile convenience, as affecting the purity and uniformity of legal principle; the difficulty of reconciling the doctrine (even to the length to which it had then been carried) with the settled rules of law; and the necessity of questioning and denying much that had been decided, in reducing this department of jurisprudence to a system.²

¹ 'In mutual contracts, if either party be unable to perform, the other has a double remedy: either a process for damage and interest; or, if he please, a declarator concluding that the contract should be found void in respect of non-performance, and each party restored to his place.' 1 Dict. 595. See also the authorities there relied on: *Raith v Wolmet*, 1670, M. 9154; *Maitland v Laird of Gight*, 1675, M. 13382.

Non pretium continet tantum empti iudicium, sed omne quod interest emptoris. Dig. lib. 19, tit. 1; De act. Empt. l. 43.

² In the first edition of this work, I expressed the general result of these communications; and in revising now, at the distance of more than twenty years, the statement of a doctrine not even yet reduced to perfect uniformity, I think it not unfit to restore from that early edition the passage to which I allude: 'When we come to contemplate the effects of the admission of acts of constructive delivery upon the doctrine as occurring in bankruptcy, we find it often productive of very wide deviation from principle. Instead of a

[207] Since that time the determinations both in England and in Scotland have been numerous; and although a distressing degree of uncertainty has prevailed, it may now be assumed as the general principle which rules the whole doctrine, that goods may be stopped by the seller for the unpaid price, where they are still in the hands of a middleman, and in the course of transit to the buyer, or to the destination which he has appointed for

simple doctrine, we find one so complex and inconsistent that an act which in one situation is held a good delivery and effectual transfer, is in another held to be wholly unavailing. In short, those ideas of hardship, which at first sight seem so natural, are found most deceitful and delusive, leading to arbitrary and ill-settled rules, such as should either be carried further or not indulged so far. A creditor who has lent money to his friend, or one who has bought a bill, and sees the acceptor become bankrupt before the day of payment, suffers the loss without exciting in a judge any commiseration, except that general regret which belongs to the condition of every creditor. But where a seller has parted with his goods without receiving the price, and the goods are still in existence and distinguishable; or where a buyer has paid the price, and is likely to lose the goods for which he has paid, a degree of hardship is thought to exist fit to be relieved by courts of justice. And yet between the condition of these several creditors there is truly, and in principle, no distinction to be taken. What appears in one view to be a hardship, is, when properly considered, merely the event of a risk which the parties thought it their interest to run.

Considering the doctrine under this aspect, and not in its gradual rise and establishment, the true principles would appear to be these:—In contracts relative to the transference of goods, the parties are, previous to delivery, under personal engagements to each other: they are mutually debtors and creditors, and it depends on the nature of their contract whether the one or the other is entitled to take precedence in the demand of performance. In the general case, and without speciality in the agreement, neither party can without performance or tender of his part call upon the other. But this may be differently arranged. The seller may give time for payment, or the buyer for delivery; and where they do so, the delay and the risk are compensated in the rate of the price. As the parties are, prior to payment or performance, equally debtor and creditor to each other, so, after performance or payment on one part, the right of the person so paying or performing is not a jot improved: he is a mere creditor still. The delivery of the goods to the buyer does not make the seller less a personal creditor for the price than before: it does not transmute his *jus ad rem* into a *jus in re*, entitling him to any preference for the price of his goods over the other personal creditors; nor, on the other hand, can the payment of the price to the seller bring about any alteration of the buyer's right, or convert his claim from a personal into a real right over the goods.

If principle, then, were to be adhered to in this branch of law, the real right of the buyer or of the seller ought to be judged of by the simple fact of delivery, unswayed by the circumstance of performance on the one part as altering the right of him who has performed. And the following principles may be stated as almost self-evident:—

'1st, That declaring any act to be a delivery, in case the

price is paid, which would not be adjudged a delivery in any other case, is declaring, in other words, that delivery is not an essential requisite to the transfer of property.

'2d, That declaring any act to be no delivery, in case the price is not paid, which in any other case would be adjudged delivery, equally violates that fundamental rule of law.

'3d, That not only the value of the time given for performing a contract of sale, but the risk also ensuing thereon, is considered and compensated in the terms of the contract. And,

'4th, That the event of such risk, for running which the party suffering has already received a consideration in terms of his contract, furnishes no reasonable ground for further relief.

Such seem, *à priori*, to be unquestionable principles in the general doctrine of delivery. But even in departing from them, no strict principles of exception have been followed. On the contrary, the ideas of hardship so freely admitted have occasioned deviations even from what at first appears a fair line of distinction.

(1.) The supposed hardship of not receiving goods for which the price has been paid, has led to the chief departure from the simple rule of actual delivery, by admitting constructive deliveries as equivalent to real delivery in that particular case. But the arbitrary nature of the principle on which this exception has been received, has been productive of much doubt and uncertainty with regard to the description of constructive delivery; whether it be necessary to send the goods by a carrier, or to deliver them to some intermediate person? or whether it is not sufficient to set them apart, mark them, or put them in packages for the buyer, or to do any other act denoting the settled and irrevocable purpose to deliver a particular subject? And the risk which, by a common rule of law, is laid on the buyer, even before delivery, has been brought into consideration as materially affecting the question of hardship.

(2.) The hardship of losing the price of goods delivered, has induced courts to find distinctions and pretences for allowing the seller to recall goods, even after such delivery as falls within the true and correct definition of actual delivery; such as delivery to an agent of the buyer, delivery into a ship freighted by him, etc.

(3.) The hardship of the goods being at the risk of the buyer, while the property continues untransferred, has misled some into an opinion that the question of risk forms the only true criterion of transference.

Thus the law loses its certainty and becomes a mass of decomposed principles, occasions of litigation are multiplied, new distinctions are taken, new principles of decision adopted, a continual uncertainty and wavering of judgment is encouraged, and the law becomes a disease, not a relief.

[The desire to find a natural root for stoppage *in transitu* in the principles of our law, instead of looking on it as a foreign graft, has certainly led to the difficulties the author speaks of. But the difficulties disappear, if we will only be

them. But it may still be useful to retain the statement of the progress and history of this doctrine.

The principle on which this doctrine depends is well known in the law of Scotland, but the remedy to the seller was formerly carried with us a good deal further. There formerly prevailed in Scotland, as on the Continent, a doctrine of more extensive application, which superseded almost entirely the distinctions that were found necessary in England. Restitution was allowed to the seller on the ground of presumptive fraud within three days of the bankruptcy of the buyer. It was held that the impending bankruptcy must have been known secretly to the buyer, and that he was guilty of a fraud in not communicating it. And this presumption threw the *onus probandi* on the buyer or his creditors, to show perfect fairness in the bargain. On the Continent the matter was carried still further. The influence of the doctrines of the civil law, and of certain notions of commercial expediency, led almost universally to the rule, that a seller was entitled, even after actual delivery (not merely on a presumption of fraud subject to inquiry, but in all cases), to have restitution of his goods, if unchanged in form, and distinguishable plainly from the rest of the buyer's stock.¹

content to deal with the doctrine of stoppage as a subject *per se*, and to alter *per se* into theoretical conformity with it no doctrines native to our legal system, except those which are absolutely and practically irreconcilable on any terms with its existence.]

¹ The French legislators, in constructing the Code 'de Commerce,' rejected the old law of revendication in mercantile dealings, and adopted that of stopping *in transitu*. The grounds of this change are thus explained in the Discours des Orateurs du Gouvernement: 'Les auteurs du projet du Code de Commerce avaient demandé l'abolition de la revendication, comme contraire à l'intérêt du commerce: des chambres et des tribunaux de commerce avaient applaudi à cette proposition; mais d'autres avaient voté pour le maintien de la revendication, s'appuyant principalement sur cette raison, qu'il ne fallait pas changer sans nécessité un usage anciennement établi en France, et suivi dans quelques pays étrangers. On a reconnu que l'usage de la revendication était une source de procès et un moyen de fraude; que son plus grand inconvénient était de laisser, à l'aide de ce privilège, le sort des créanciers à la merci de la volonté du failli, qui pouvait à son gré favoriser l'un et sacrifier l'autre, en maintenant ou dénaturant les signes qui peuvent constater l'identité, et en retardant ou accélérant la vente des effets qui lui auraient été livrés. C'est d'après ces considérations, que l'on s'est décidé à ne permettre la revendication que comme il est dit en notre article 577 et suivans. On a espéré, par ces moyens, rendre un service essentiel au commerce, tarir la source d'une foule de procès, et remplir le vœu de la majorité des chambres et des tribunaux de commerce dont on a consulté l'opinion.'

It is rather remarkable to find, in contrast to this passage, written to vindicate the adoption of the rule which prevailed in England, a suggestion from English jurists, that 'perhaps it would be wise to adopt a regulation similar to that which we perceive, from certain cases and authorities, to be the law of Russia and of France, viz.: That if a seller can identify the property, though it may be in the possession of the insolvent vendee, yet that he shall be entitled to have it back again.' Eden's Bankrupt Law, 295. But see Abbott on Shipping, 375.

The whole title of the Code de Commerce is comprehended
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in the following extract, in which the leading principles of the doctrine of stoppage are well and clearly given:—

'576. Le vendeur pourra, en cas de faillite, revendiquer les marchandises par lui vendues et livrées, et dont le prix ne lui a pas été payé, dans les cas et aux conditions ci-après exprimés.

'577. La revendication ne pourra avoir lieu que pendant que les marchandises expédiées seront encore en route, soit par terre soit par eau, et avant qu'elles soient entrées dans les magasins du failli, ou dans les magasins du commissionnaire chargé de les vendre pour le compte du failli.

'578. Elles ne pourront être revendiquées, si, avant leur arrivée, elles ont été vendues sans fraude, sur factures et connaissements ou lettres de voitures.

'579. En cas de revendication, le revendiquant sera tenu de rendre l'actif du failli indemne de toute avance fait pour frêt ou voitures, commission, assurance ou autres frais, et de payer les sommes dues pour mêmes causes, si elles n'ont pas été acquittées.

'580. La revendication ne pourra être exercée que sur les marchandises qui seront reconnues être identiquement les mêmes, et que lorsqu'il sera reconnu que les balles, barriques, ou enveloppes dans lesquelles elles se trouvaient lors de la vente, n'ont pas été ouvertes, que les cordes ou marques n'ont été enlevées ni changées, et que les marchandises n'ont subi en nature et quantité ni changement ni altération.

'581. Pourront étre revendiquées, aussi longtemps qu'elles existeront en nature, en tout ou en partie, les marchandises consignées au failli, à titre de dépôt, ou pour étre vendues pour le compte de l'envoyeur: dans ce dernier cas même, le prix desdites marchandises pourra étre revendiqué, s'il n'a pas été payé ou passé en compte courant entre le failli et l'acheteur.

'582. Dans tous les cas de revendication, excepté ceux de dépôt et de consignation de marchandises, les syndics des créanciers auront la faculté de retenir les marchandises revendiquées, en payant au réclamant le prix convenu entre lui et le failli.

'583. Les remises en effets de commerce, ou en tous autres effets non encore échus, ou échus et non encore payés, et qui se trouveront en nature dans le porte-feuille du failli à l'époque de sa faillite, pourront étre revendiquées, si ces remises

[208] The last case in which the rule of presumptive fraud was admitted in Scotland, was decided in 1789; but, in an appeal to the House of Lords, this doctrine was, on the authority of Lord Thurlow, rejected; and it has since been entirely abandoned.¹ The [209] law of Scotland has from that time adopted the doctrine of STOPPING IN TRANSITU as established in England. And on that footing many cases have been decided; while the practice of trade has been regulated by this principle.²

It has been much doubted what is the true principle on which this doctrine was established. While some have held the seller, in stopping his goods, to be in the exercise of his strict *legal* rights, looking on him as a proprietor, undivested, till the moment of actual delivery; others have considered the property as in law changed from the moment even of constructive delivery, and the right of the seller as an *equitable* interposition, for the purposes of justice, to prevent goods from coming into the stock of a man who cannot pay for them.³ The latter of these views seems not only to accord with the history of the doctrine, but to be more consistent with all the more minute details, and to afford a more simple and satisfactory principle for regulating the questions that have occurred in this department. And it seems now to be considered as the true doctrine in England.⁴

This doctrine was first admitted in England towards the end of the seventeenth century. At law, upon a case ordered out of Chancery, the assignees of the bankrupt purchaser had a verdict, although the goods had been stopped before the ship sailed from the port of the sellers. But Chancery gave relief on this ground, that the goods were still the proper goods of the foreign merchant; and 'therefore that the vendee, having paid no price for them, if the vendor could by any means get his goods again into his hands, or prevent their coming into the hands of the bankrupt, it was but lawful for him so to do, and very allowable in equity.'⁵

ont été faites par le propriétaire avec le simple mandat d'en faire le recouvrement et d'en garder la valeur à sa disposition, ou si elles ont reçu de sa part la destination spéciale de servir au paiement d'acceptations ou de billets tirés au domicile du failli.

'584. La revendication aura pareillement lieu pour les remises faites sans acceptation ni disposition, si elles sont entrées dans un compte courant par lequel le propriétaire ne serait que créancier; mais elle cessera d'avoir lieu, si, à l'époque des remises, il était débiteur d'une somme quelconque.

'585. Dans les cas où la loi permet la revendication, les syndics examineront les demandes; ils pourront les admettre sous l'approbation du commissaire: s'il y a contestation, le tribunal prononcera, après avoir entendu le commissaire.'

Code de Commerce, 1807, l. 3, tit. 3, De la Revendication.

¹ *Allan, Stewart, & Co. v Stein's Crs.* At the bankruptcy of Stein, part of large quantities of grain deliverable under a current contract, had been actually delivered, part stopped in the very act of unloading, and part stopped before bulk had been broken. The Court of Session decided the case on the ground of presumptive fraud, as entitling the seller to restitution even of what was delivered. Lord Chancellor Thurlow, however, laid it down, and the House of Lords adopted it in their judgment, that the notion of a presumptive fraud was untenable; that the sole question in such a case is, Whether the goods have been stopped while *in transitu*, according to the rule which had within a hundred years been introduced into England? The cause was accordingly remitted to apply this rule.

The opinion of Lord Thurlow, in so far as respects the doctrine of presumptive fraud, will find a fitter place hereafter. Of what he said on the question of stopping in

transitu, the following note was taken at the time: 'The question is, Whether the respondents (vendors) were entitled to stop certain cargoes of grain which were consigned or forwarded by them to Stein the bankrupt, before the actual delivery to him, the bankruptcy having intervened? By the law of England, and, as I conceive, by the law of Scotland also, the shipping of goods to one who commissions them, or the delivery of them to a carrier to be conveyed to him, was a completed sale. But within the last hundred years a rule has been introduced from the customs of foreign nations, that, in the case of the vendee's bankruptcy, the vendor might stop and take back the goods *in transitu*, or before they came into the hands of the vendee; and this is certainly now a part of the law of England, and I understand it to be law likewise in Scotland.' 1790, M. 4951, 3 Pat. 191.

² [In *M'Ewan v Smith*, 6 Bell 355, Lord Campbell said: 'What is the doctrine of stoppage *in transitu*? It is this: that where a vendor of goods has to send them to a vendee at another place, and has parted with his goods into the hands of the captain of a vessel or a carrier, while they remain in the hands of the captain or carrier, and before they have been delivered to the purchaser, upon the insolvency of the vendee, they may be stopped by the vendor. This is a most equitable doctrine. It has been introduced into our commercial law, and I would by no means circumscribe it.']

³ See two sketches of the history of this doctrine, delineated by the hands of masters: by Lord Rosslyn, in the case of *Lickbarrow v Mason*, 1 Henry Blackst. 364; by Mr. Justice Buller, in *Ellis v Hunt*, 3 Term. Rep. 464. [See Add. Cont. 6th ed. 200; Sm. Merc. Law, 7th ed. 548.]

⁴ Selwyn's Law of Nisi Prius, 1826, vol. ii. p. 1207. [See note on this subject, *infra*, subsection 6.]

⁵ *Wiseman v Vandeput*, 21 March 1790.

As this case shows the equitable extension of the right of property to maintain the powers of the seller, notwithstanding a constructive delivery, the next case that occurred may throw some light on the principles by which the judges thought themselves restrained from carrying it the length of a right of restitution, after delivery actually completed. The case to which I allude was decided by Lord Chancellor Hardwicke in 1743.¹ The doctrine to be collected from it, so far as concerns the present inquiry, seems to be, 1. That for goods given to a carrier to be delivered to the consignee, and which are countermanded by [210] the consignor, on hearing of the bankruptcy of the consignee, no action of trover will lie for the assignees, because the goods, while they are *in transitu*, are subject to be countermanded; and, 2. That where bills of lading are taken blank to the consignor's order, and delivered to the consignee, there being no substantial reason for refusing to a consignor the right of recovering the goods after actual delivery, unless it proceeds on the general credit gained by the possession of the goods; so, while goods are not in the consignee's hands, but still with the consignor, there can be no reason for refusing to give effect to a countermand by the consignor.

The doctrine which thus took its rise in courts of equity was soon adopted in courts of law in England, and is now daily administered by those courts as part of the established law

¹ *Snee, etc., Assignees of Tollet v Prescott, etc.*, 1743. Tollet consigned to Raguenan & Co. at Leghorn, German serges, to be sold or bartered for Italian goods. R. & Co. made agreements for Italian goods, half to be paid in Tollet's goods, half in money; and they put on shipboard the goods (silks), and sent Tollet one of the three bills of lading for twelve bales. The bills of lading were taken to the order of R. & Co., endorsed by them in blank, and thus transmitted to Tollet. Tollet had borrowed money from Julian & Le Blon, and in security assigned the bill of lading, and failed. R. & Co. were in advance for Tollet, on these transactions, £2757. Prescott, their correspondent in London, hearing of Tollet's failure, wrote to R. & Co. to take measures for preventing the silk coming into his hands; and they sent the two parts of the bill of lading which they held, and an order on the shipmaster to deliver to Prescott. The ship having arrived, Julian & Le Blon, to whom the bill of lading was assigned, demanded the goods; the shipmaster refused to deliver them. The question arose among the three parties: 1. Prescott for R. & Co. claimed the goods as still in R. & Co., untransferred, and subject to stoppage; 2. Snee, etc., claimed the goods as transferred to Tollet, and now the fund of his general creditors, subject to the claim of those who held the bills of lading in security; and, 3. Julian, etc., claimed payment of their loans out of the subjects of the bill of lading. Lord Chancellor Hardwicke viewed the case in this way: 1. That it was a harsh demand by the bankrupt's creditors against Raguenan & Co. to seek these goods without reimbursing them for their advance upon them, but leaving them to come in as creditors for half-a-crown in the pound; that R. & Co. have now the goods in their custody, under a specific lien, for such advance; and that a court of equity will lay hold of anything to save this advantage to them. 2. That as R. & Co. would have had a specific lien for their advance had the goods not been consigned, so the consignment makes no difference in the case; for, 'suppose goods are actually delivered to a carrier, to be delivered to A, and while the carrier is upon the road, and before actual delivery to A by the carrier, the consignor hears that A, his consignee, is likely to become bankrupt, or is actually one, and countermands the delivery, and gets them

back into his own possession again, I am of opinion that no action of trover would lie for the assignees of A, because the goods, while they were *in transitu*, might be so countermanded.' He then argues that here there was no consignment to a particular person, but the bills of lading were rather in the nature of an authority; and in stating the evidence on the custom of merchants as to the effect of bills of lading endorsed, he holds the strongest proofs to be with the consignor's having in them a sufficient power to countermand. 3. That 'though goods are even delivered to the principal, he could never see any substantial reason why the original proprietor, who had never received a farthing, should be obliged to quit all claim to them, and come in as a creditor, only for a shilling perhaps in the pound, unless the law goes upon the general credit the bankrupt has gained by having them in his custody. But while goods remain in the hands of the original proprietor, I see no reason why he should not be said to have a lien upon them till he is paid, and reimbursed what he so advanced; and therefore I am of opinion the defendant Prescott had a right to retain for himself and Company.' 4. That if the bankrupt's assignees had, by strictness of law, recovered in an action of trover, the courts of law would not have suffered execution on the whole goods; and the Chancery would, on a writ of inquiry, have ordered the half-price paid by R. & Co. for the silks to be deducted—*à fortiori*, this ought to be done in a court of equity. 5. 'If the defendant Prescott had got the goods back again by any means, provided he did not steal them, I would not blame him; and I am of opinion, that to take them from him would be extremely inequitable.' The judgment was for the master to take account of the money received by Prescott on the sale of the silks, and to charge him and his partners with it: that the produce of the bales over which the pledge extended was to be applied, in the first place, to pay the share of R. & Co.'s advance upon those bales, and next to the persons holding the pledge: that the pawnors, if they were not fully paid, should come in as creditors under the commission; and if a surplus, it should go first to pay costs, and next to the assignees of Tollet. 1 Atk. 245, 251.

of England in the sale of commodities.¹ As such, it had for a century been established, when it was adopted into the jurisprudence of Scotland.

[211] It has already been observed, that the principle on which it rests was not unknown to the law of Scotland, though the doctrine of restitution superseded its application, and probably prevented a series of distinctions in making out the detail of its application to practice, similar to that which has taken place in England. There are cases to be found in our books which seem to point to some such train of decisions, had it been necessary to have recourse to them. Thus it was decided, that a person who, having sold land, had delivered to the buyer a precept of infeftment, which, without any further act of the seller, enabled the buyer to complete his real right, was entitled to process for stopping the infeftment, when the buyer became unable to perform his part.² And, on the same principle, where the purchaser of a house had got into possession, but had not received sasine, which alone is effectual tradition of heritable property, the seller was held entitled to have the sale annulled, on the purchaser becoming insolvent.³ But whatever might have been the progress of the Scottish jurisprudence on this point, had it been left to its natural course, there can be no doubt that the doctrine of stoppage, as established in England, with all its modifications, so far as they are consistent with sound principle, is now to be held as the law of Scotland. And in what remains to be discussed of this subject, the cases and authorities in the English law, with such distinctions as necessarily arise from difference in the system on which this doctrine was grafted, are to be relied on, as of the same efficacy in this country as in England. The Court of Session has repeatedly acknowledged their authority, and permitted them to be quoted as precedents before them.

The great difficulty has been, to distinguish the cases in which the privilege of stopping *in transitu* is to be exercised; or rather, to find a rule according to which the cases may be arranged in which it is to be admitted or rejected.

The first principle of classification adopted was that by which delivery is distinguishable as ACTUAL or CONSTRUCTIVE. And this had the sanction of those eminent judges in England whose determinations were in greatest credit at the time the doctrine was introduced into

¹ The principles on which this adoption is to be justified are thus explained by Mr. Justice Buller in the case of *Tooke v Hollingworth*: 'I have always thought it highly injurious to the public that different rules should prevail in the different courts on the same mercantile case. My opinion has been uniform on that subject. It sometimes indeed happens, that in questions of real property, courts of law find themselves fettered with rules from which they cannot depart, because they are fixed and established rules, though equity may interpose, not to contradict, but to correct the strict and rigid rules of the law. But in mercantile questions no distinction ought to prevail. The mercantile law of this country is founded on principles of equity; and when once a rule is established in that court as a rule of property, it ought to be established in a court of law. For this reason, courts of law of late years have said that, even where the action is founded on a tort, they would discover some mode of defeating the plaintiff, unless his action were also founded on equity; and that, though the property might on legal grounds be with the plaintiff, if there were any claim or charge by the defendant, they would consider the retaining of the goods as a conversion.'

In the concise and excellent treatise of Mr. Cullen, the following passage contains, in one proposition, the general result of the determinations on this subject: 'When goods are not delivered immediately to the vendee, but sent or consigned from a distant place, and delivered in the first instance

to a third person, as a carrier or master of a vessel, to be carried and delivered to the consignee; in that case, if the goods have not been paid for beforehand, and the consignee becomes insolvent or a bankrupt before the arrival and delivery into his possession, it has been determined in a multitude of cases (*Wiseman and Vandeput*, 2 Vern. 203; *Exp. Clare*, Cook's B. L. 405; *Exp. Frank*, cited 1 Atk. 250; *Snee and Prescott*, *ib.* 245; *Exp. Walker*, Cook's B. L. 419; *Exp. Wilkins*, Ambl. 400; *D'Aquila and Lambert*, *ib.* 399; *Birkins and Jenkins*, Cowp. 296) that the consignor may stop them while they are yet *in transitu*; and if he can obtain possession of them again by any means short of violence or fraud before actual delivery, he will be entitled to retain them against the consignee or his assignees. This is perfectly settled as between consignor and consignee.' Cullen's Principles of Bankrupt Law, 260.

² 'If, in consequence of a mutual obligation (contract), one dispose with procuratory and precept, process is competent to stop infeftment and draw back the disposition when the other party becomes insolvent without power to implement the mutual cause.' *Selkirk v Selkirk*, 1721, M. 9167.

³ *Sandieman v Stewart*, in 1771. [These decisions present no analogy to cases of stoppage *in transitu*. In them there has been no sasine, which is delivery in heritable subjects. The peculiarity of stoppage is resuming possession after delivery. See Brodie's note, *Stair*, App. 863.]

Scottish jurisprudence; particularly Lord Mansfield, the father of the mercantile law of England, and Mr. Justice Buller.

But further experience demonstrated the necessity of discriminating a little more correctly; for cases occurred which it was impossible to doubt came under the description of constructive delivery, and yet where the privilege of stopping *in transitu* was justly denied: as where goods were in a warehouse, and notice of sale was given to the warehouse-keeper to change the custody; or goods in the bond warehouse were transferred by a dock warrant; or a transference was made in the books of the warehouse-keeper. And so of constructive deliveries, those which carried the goods at once to the buyer or his servants or special agents, were distinguished from those which left the goods still in the hands of a middleman, and in the course of their transit.

The result seems to be, 1. That in no case of actual delivery is it competent for [212] the seller to reclaim possession of the goods for security of his price; 2. That in certain cases even of constructive delivery, the privilege of stopping is not to be exercised; 3. That wherever the constructive delivery goes no further than to forward the goods on their course towards the buyer in the charge of a middleman, they may be stopped for the price.¹

¹ [It will conduce greatly to a clear understanding of the doctrine of stoppage *in transitu*, and to avoiding the misconceptions into which the author is apt to lead the student, if it be distinctly kept in view throughout the following sections: 1. That non-delivery or imperfect delivery of the goods is not what gives the right to stop *in transitu* (see text, p. 230). The question is not, and never can be, whether the goods are undelivered, or not yet perfectly delivered: it is not a question of delivery at all; it is simply this, Whether they are, at the time when the seller stops them, *in a state of transitus*? If the goods in course of fulfilment of a sale have left the actual possession of the seller, or the actual possession of those who are his agents to retain or keep possession for him (which is his constructive possession), they are delivered. 2. The possession into which they pass may be the actual possession of the buyer, or the actual possession of some one who is his agent to receive and hold possession for him, which is his constructive possession. The *purpose* of the possession held for the buyer by such agent may be custody and disposal under the orders of the buyer; or it may be solely and exclusively that of carrying the goods, or doing something to render complete a contract for their carriage. And this carriage, again, may be intended to convey the goods immediately from the possession, actual or constructive, of the seller TO OR TOWARD the buyer; or it may be intended to convey them *away FROM the buyer* to some foreign destination, without their being meant ever to come to his hands. In all these cases the goods are delivered; and whether the possession acquired by the buyer be actual possession by himself or the actual possession of an agent to receive for him, which is his constructive possession, the goods are equally delivered,—delivery being just as complete and perfect in the one case as the other. There is no such thing as imperfect delivery: goods are either delivered or they are not. 3. That no question of stoppage *in transitu* can arise except the goods are stopped while in a state of *transitus*; and the state of *transitus* to which the remedy applies is nothing but an *actual state of transit or conveyance from the seller to or toward the buyer* (not *away from him*). It is not of any importance whether the goods are actually on a journey or not: if held *for the purpose of being forwarded from seller to buyer*, they

are as much *in transitu* as if they were actually moving; though in general there is more difficulty in ascertaining, as a fact, in what capacity goods are held by an intermediate depositary, than in what capacity a carrier holds them when they are actually in his waggon or his vessel. The privilege of stoppage only applies to goods which—having left the actual and constructive possession of the seller, and not yet having reached the possession of the buyer, or of any agent for him other than an agent for carriage to or towards him—are at the time of stoppage either in the hands of a carrier or of some person, such as a wharfinger, who is doing something to complete a contract of carriage intended to convey them immediately *from the seller*, or from some forwarding agent of the buyer (not from any previous *non-forwarding* agent for the buyer), *to or towards the buyer*. The whole question whether such goods are in a state of *transitus* turns on this: Whether the person in whose hands as agent for the buyer they are, has them solely as an agent to forward them to or toward the buyer, or as an agent to hold or keep them for the buyer in some other capacity than as a mere agent so to forward them; and it is only in the hands of an agent for the buyer whose agency is to forward them immediately from the seller, or from some mere forwarding agent for the buyer in their progress to or toward the buyer, that stoppage *in transitu* is competent. 4. That as goods can only be stopped while in a state of *transitus*, and as the state of *transitus* only arises after they have left the possession, actual or constructive, of the seller, the goods must in every proper case of stoppage *in transitu* have already been delivered; and that if they have not been delivered—if they have not left the seller's possession, actual and constructive—the unpaid seller's remedy is *not* stoppage *in transitu*, but in Scotland RETENTION (the assertion of his right of property in them as yet undivested by any delivery), and in England an exercise of the *seller's right of LIEN*, which rests on the possession being still held actually or constructively by the seller. Both of these remedies are quite distinct from stoppage *in transitu*, and from each other. And as we have seen (*ante*, p. 220, note), goods may even in England be held by a carrier as the special agent of the seller, by a contract of bailment through which the seller has sought to reserve the *jus disponendi* or property and possession of the

SUBSECTION II.—RULES OF RETAINING GOODS, OR STOPPING IN TRANSITU.

CIRCUMSTANCES IN WHICH GOODS MAY BE STOPPED.—In explaining more particularly the cases which fall under the general rule now stated, the circumstances in which goods may be stopped first demand attention.

I. It is a general rule, that where goods sold have been actually delivered into the possession of the buyer, or his clerks or servants,¹ there is no longer any right to the seller over those goods: the property is passed beyond recall. And they are held so to be delivered, although within the premises of the seller, if they are locked up, and the key given to the buyer.²

To this rule, however, two exceptions have been admitted: One in the case of a sale made under the express condition that the price shall be paid in cash and no credit given, or that good discountable bills shall be exchanged for the goods, and the vendee has, without fulfilling this condition, and without any waiver or consent to depart from it on the part of the seller, obtained possession of the goods. The other exception is, where the buyer, conscious of insolvency, takes the goods into his warehouse *custodiæ causa*, but without intending to complete the transference. These exceptions, however, will demand attention hereafter; the former in considering restitution after delivery, the latter in treating of the vendor's rejection of goods.

II. Where, on the other hand, the actual possession continues with the seller, there is stoppage for the price on the buyer's insolvency. But it is not a continuance of such possession if the goods, though in the seller's premises, are locked up and the key delivered.³

In England, exceptions have been admitted to this rule which do not seem to be recognised in Scotland. Where goods have been sold, and lodged in the seller's hovel for the purpose of the vendee taking them away; or where they are to remain in the vendor's warehouse till it shall be convenient for the buyer to remove them; we have already seen, that in England the bare lodging of the goods in the hovel, or the payment of warehouse rent, or the marking of the goods for the vendee, are held good delivery, not only to pass the property, the price being paid, but also to divest the vendor of his lien:⁴ the only limitation of this doctrine being, that the goods shall be in a place where it may be understood that goods of others than the proprietor may be found.⁵ In Scotland, the only case which gives the least countenance to such a doctrine is that of *Broughton*,⁶ which was much doubted at the time, and in regard to which it may be observed, 1. That the price was paid, and there was no question of stoppage; and, 2. That if doubts were to be entertained in such a case, they ought to be doubly strong in a question of stoppage or retention.

III. The above form the extreme points, between which are to be found the difficult [213] cases under this doctrine. It is not enough, generally speaking, to give the right to stop, that the delivery is of the kind called constructive; but, on the other hand, there are

goods. These cases must be carefully distinguished from stoppage *in transitu*. 5. The points therefore are: (a) Have the goods left the actual and constructive possession of the seller? (b) Have they never been in the hands of the buyer, or of any previous agent for the buyer, other than a forwarding agent; and are they at the time of stoppage on their way from the seller or some previous forwarding agent of the buyer to or toward the buyer, and in the hands of some one solely for the purpose of being so forwarded? Or (c) are they, though under contract for carriage, in course of conveyance away from the buyer, and never meant to come nearer him, or into his hands? or have they arrived at a point on their journey towards the buyer, where the original impetus given to them by the seller has ceased, and into hands where, for the time, they are not held under any contract of carriage? It will be

found that the chief difficulties of the subject resolve into that of ascertaining, as matter of fact, in what capacity—for what purpose—the agent for the buyer held possession at the time of stoppage. See the general observations of Lord President (Ingليس) in *Black v Rowan*, 40 Sc. Jur. 79, and Blackb. Sale, pp. 244, 248.]

¹ See above, pp. 215, 216. [*Schuermans & Son v Goldie*, 1828, 6 S. 1110.]

² See above, p. 186.

³ See above, and p. 186.

⁴ See above, p. 190, *Goodall v Skelton*, *Hurry v Mangles*, and *Stoveld v Hughes*, notes 2 and 4. [*Sm. Merc. L.* 7th ed. 554.]

⁵ *Ibid.* note 3.

⁶ See above, p. 191, note 1.

constructive deliveries which take away the privilege. The distinctions, so far as they are yet settled, seem to be the following:—

1. Where goods are delivered into a warehouse, whether of a public warehouseman or a bond warehouse, for the buyer, and entered there in his name, not merely as in the course of their journey, but to abide the market or the order of the buyer, the delivery is good not only to pass the property,¹ but to deprive the seller of his right to stop.²

¹ See above, p. 184. [*Hammond v Anderson*, 4 Bos. and Pul. 69; *Hawes v Watson*, 2 B. and Cr. 540; contrast *Tucker v Humphrey*, 4 Bing. 516.]

² [Goods are liable to stoppage as long as they remain in the possession of the carrier from the seller, *quâ* carrier, and 'before they are actually delivered to the vendee, or some one whom he means to be his agent to take possession of and keep the goods for him' (per Parke, B., in *James v Griffin*, 1 M. and W. 20, 2 M. and W. 633). When goods are delivered into a warehouse to which they have been sent by the vendor on the purchaser's orders, they may still be *in transitu*. The sole question is, In what capacity the warehouseman holds the goods? Is it as the buyer's agent to keep the goods? or as the buyer's agent to forward them to that destination on their passage from seller to buyer intended at the time the goods were put in transit by the seller? If a merchant in New York order goods from Manchester, and they are stopped in a warehouse at Liverpool, the warehouseman may be the buyer's general agent in this country to sell goods, or export to different markets abroad, as well as to forward goods to the buyer. If the buyer ordered the seller to send them to the warehouseman at Liverpool to be forwarded to himself at New York, and they be there awaiting shipment to New York in pursuance of the buyer's original order to the seller, they are still *in transitu*,—the warehouseman being merely an instrument to expedite the goods on their way—an agent to assist in the forwarding on their intended destination. But if the New York merchant order the goods to Liverpool only, and the warehouseman receive them to await the buyer's instructions as to what is to be done with them, they are no longer in transit after delivery at the warehouse. When goods are delivered at a warehouse, wharf, or inn, without any statement whether they are to be received as a step on their progress to the buyer by force of the original delivery to the carrier, or in order to be kept till the buyer gives fresh orders, and the innkeeper or wharfinger accepts the goods with the intention of acting in that capacity in which he shall discover they were meant to be delivered to him, the capacity in which he holds the goods will apparently depend on what was the place of destination originally contemplated by the purchaser; and if the purchaser send him directions to forward the goods, the question whether he is acting under the control of the purchaser, as in *Dixon v Baldwin*, or merely as an agent to forward, would probably depend on what was the original destination. But though this is material to explain the capacity in which an agent holds possession where it is ambiguous, it is not material otherwise (*Blackb. Sale*, p. 253). It is only the place to which by the terms of the contract the goods are intended originally to be carried that is of importance: any unknown or ulterior destination to be given at some future time, according to circumstances, does not form matter for consideration, but only the place contemplated as the stopping place of the goods for the present,

and as far as regards the original contract of sale (*Story on Sale*, p. 396, and cases there). The question as to the capacity in which the goods are held becomes very difficult where the holder acts in two capacities, *e.g.* both as a carrier and as a warehouseman, and may therefore have goods in his warehouse either as a place of deposit connected with the carriage, or as a place of deposit subject to the orders of the buyer; or where he is a wharfinger, who sometimes receives goods as agent for the shipowner who has brought them so far on their way, and sometimes as agent of the buyer to whom they are addressed. In such cases the fact of possession is ambiguous, unless explained by minor facts throwing light on the intention of parties with regard to the purpose for which the goods are held. The intention is often not clearly known to the parties themselves, and the acts done are often equivocal. The carrier himself, and *à fortiori* any depositary in the course of the completion of the carriage, may certainly agree with the buyer to change the capacity in which he holds as a mere expeditor into that of a special agent to hold for the buyer, and that without abandoning his lien as carrier. But it seems that *both* the depositary and the buyer must assent to a common *placitum* that the goods are to be held for some purpose or in some capacity distinct from those connected with the completion of the contract of carriage, before the agency for mere carriage can be converted into an agency of a kind which shall terminate the transit, although there may be an exception where the buyer has demanded delivery from the carrier, who refuses delivery without any right whatsoever as carrier to retain possession against the buyer, and so becomes involuntarily a mere warehouseman for the buyer. (See *Blackb. Sale*, pp. 248–250; *Benj. Sale*, p. 640; *James v Griffin*, 2 M. and W. 623; *Jackson v Nichol*, 5 Bing. N. C. 508; *Whitehead v Anderson*, 9 M. & W. 518; *Lackington v Atherton*, 8 Scott N. S. 38; *Bolton v Lancashire & Yorkshire Railway Co.*, 35 L. J. C. P. 137; cf. *Bentall v Burn*, 3 B. and C. 423; and see note, *ante*, p. 218.) The cases are nearly all dependent on their respective specialties, which go to indicate the intention with which the goods were held by the agent, whether as a mere stage and instrument to forward them from the seller to the buyer, in pursuance of the common intention of seller and buyer at the time the seller put them in transit, or as agent to keep the goods, subject to the orders of the buyer. See, where the transit was held to be ended, and the goods held for other purposes than in the mere way of completing the original contract of carriage, *Leeds v Wright*, 3 B. and P. 320; *Scott v Pettit*, *id.* 469; *Valpy v Gibson*, 4 C. B. 837; *Wentworth v Outhwaite*, 10 M. and W. 436; *Dodson v Wentworth*, 4 M. and Gr. 1080; *Cooper v Bill*, 34 L. J. Ex. 161; *Smith v Hudson*, 34 L. J. Q. B. 145; *Rowe v Pickford*, 8 Taunt. 83; *Richardson v Goss*, 3 B. and P. 119; *Dixon v Baldwin*, 5 East 175. The following are cases where the *transitus* was considered not at an end, though the goods had been delivered to an agent for the buyer, that agent's duty

2. Where goods are delivered to the buyer's own shipmaster, or into a ship hired by him on time, or for the voyage, it has been held that the property passes, and the right to stop is discharged.¹

being merely to forward them :—*Smith v Goss*, 1 Camp. 282 ; *Coates v Railton*, 6 B. and C. 422 ; *Jackson v Nichol*, 5 Bingh. N. C. 508 ; *Tucker v Humphrey*, 4 Bingh. 516 ; *Hunt v Ward*, cited 3 T. R. 467 ; *Rodger v The Comptoir d'Escompte de Paris*, Law Rep. 2 P. C. 393. And see Paley on Principal and Agent (Lloyd's ed.), pp. 347–357.]

¹ *Fowler v M'Taggart*, 7 T. R. 442 ; and *Bohtlingk v Inglis*, 3 East 381, *supra*, p. 185. [So held, even where the shipment was made in a *general ship* known to belong to the purchaser (*Schotsmans v Lancashire and Yorkshire Railway Co.*, L. R., 2 Ch. App. 332), by Lord Chelmsford, reversing judgment of Lord Romilly, M. R. See also authorities in Tudor's Merc. Ca. pp. 660 sqq. Add. Cont. 6th ed. 201 ; Sm. Merc. L. 553.]

Even where the goods are delivered on board the buyer's own ship (and *à fortiori* in the case of another ship), the master may nevertheless, by signing bills of lading to the order of the seller, prevent the property from passing, and hold the goods in the capacity of agent for the seller, and not as the buyer's servant, even though in doing so he may be guilty of a breach of his duty to the buyer. See *ante*, note, p. 220. Where the buyer does not send his own vessel, but employs a ship belonging to a third party to fetch the goods, and the form of the bill of lading does not decide the matter, the point is to ascertain the character of the captain, whether he acts as a carrier or as the special servant of the buyer ; and how this may be, seems to depend on the nature of the contract between the shipowner and the charterer for the employment of the vessel. 'In the majority of cases the shipowner does not part with the possession of the vessel : he does no more than contract to employ the vessel and the services of the master and crew for a time, exclusively for the benefit of the charterer ; so that the master remains *the servant of the shipowner, and not of the charterer*, and his possession is the possession of the shipowner and not of the charterer, in any case in which their rights come in question. But though this is the usual contract between the shipowner and the charterer, they may in law, and in practice sometimes do, agree that *the charterer shall during the voyage have the possession of the vessel, and that the master shall during that time be the servant of the charterer*. In other words, though a charter-party usually is a contract on the part of the shipowner to use the ship and services of the crew in a particular manner, it may amount to a demise of the vessel, and of the services of the master and crew.' Blackb. Sale, 242. It is now regarded as a question about the intention of the parties to the charter-party, whether or not the possession of the ship is thereby transferred to the charterer, and whether the contract is a *locatio operis vehendarum mercium* by the merchant, or a *locatio navis et operarum magistri* by the shipowner. See Maclachlan, Shipping, 307–315 ; Maude and Pollok, pp. 296–8 ; and Sandemann v Scurr, 36 L. J. Q. B. 58 ; Abbott, pp. 240–250. When, therefore, goods are put on shipboard, where the shipowner remains in possession through the master, the master is the shipowner's servant, and the possession of the goods is a possession by him as a carrier on behalf of the buyer, under a contract of carriage with the buyer ; and the goods are, while in his hands

in this capacity, in a state of *transitus*. But where the master is not the servant of the shipowner, but the immediate servant of the buyer as *conductor* of the vessel and of the master's services, the goods, by being put into the hands of the master, are put in the possession of the buyer as completely as if he had sent his cart for them ; so completely, that even the shipowner's lien for the freight cannot exist, except indeed by special agreement. See Maclachlan, pp. 308 and 437. The master being the buyer's servant, the goods are held by him not merely as a carrier or agent to forward under contract of carriage, but as a mere hand to receive, hold, and deal with them at the orders of the buyer. The buyer, as charterer under such a charter-party, is considered *owner pro hac vice* (Abbott, Maclachlan, and M. and Pol. *ut supra*), and the case as to delivery of goods on board a vessel during such ownership is the same as if the ship were his own permanent property. Then the whole case, whether *transitus* is or is not competent after delivery of goods on shipboard to be carried towards the vendee, in cases where the vendor has not specially reserved the *jus disponendi*, 'turns,' as Wood, V. C., expressed it in *Berndtson v Strang* (L. R. 4, Eq. 481, 36 L. J. Ch. 879), 'upon whether or not it is the man's own ship that receives the goods, or whether he has *contracted with some one else quâ carrier to deliver the goods* ; so that, according to the ordinary rule as laid down in *Bohtlingk v Inglis*, and continually referred to as settled law on the subject, the *transitus* is only at an end when the carrier has arrived at the place of destination, and has delivered the goods.'

There are, however, other circumstances that may terminate the *transitus* with delivery on board, even though the buyer be not in possession of the ship, and though the master remain the shipowner's servant, and act *quâ carrier* in receiving and holding the goods. 1. Where the goods are taken on board, not for the purpose of transmission to the vendee, but for the purpose of transmission away from the vendee, as *e.g.* to a foreign market. Where goods are shipped on board a vessel for transmission to the vendee, a subsequent and actual possession by the vendee is provided for ; but if they are to be carried on a mercantile adventure, and not to the vendee, no other possession than that created by delivery on shipboard is contemplated or can be made under the circumstances, and such a reception of them is the only reception of them which is contemplated by the buyer. In such a case the transit is ended by delivery on shipboard : the captain is not a middleman between the vendor and vendee. *Fowler v M'Taggart & Kymer*, 7 T. R. 442, note, 1 East 522, note ; and observations of Lawrence, J., in *Bohtlingk v Inglis*, 3 East 381. See per Parke, B., in *Van Casteel v Booker*, 18 L. J. Ex. 9 ; Paley, Prin. and Agent, 352, 354, Lloyd's ed. ; observations of Wood, V. C., in *Berndtson v Strong* ; Brodie, Stair, App. 881 ; Story on Sale, pp. 396–399–401, 402 ; Kent, Comm. ii. 545 ; Parsons on Contracts, i. pp. 604, 606, notes (j) and (n), where see judgment of Parsons, C. J., in *Stubbs v Lund*, 7 Mass. 453, and the other American cases, *ib. cit.* 2. Where the seller, in contracting for the carriage of the goods, which he does as agent for the vendee (see note, *ante*, p. 220), takes a receipt or bill of lading for them, as not merely deliverable to,

3. Where the goods are in the hands of a warehouseman for sale, or a manufacturer for some operation of his art, notice to the warehouse-keeper or manufacturer, transference in their books, payment of warehouse rent or of the hire of the workman's labour, or marking of the goods for the buyer, are sufficient acts of final and conclusive delivery to deprive the vendor of his right to stop.¹ *

4. Where goods are in the bonded warehouse, entry of the transfer in the officer's books, where the seller of the goods is proprietor of the warehouse;² or notice to the warehouse-keeper; or marking the goods for the buyer, paying of warehouse rent, and such other acts of ownership as give notice of the transfer,—are effectual to pass the property, and take away the right of stopping.³ *

5. Goods in dock warehouses are effectually transferred by transfer and endorsement of the dock warrants, so as to prevent stoppage by the original seller.⁴ But in such cases the right of stoppage will not be destroyed, unless the endorsee be in *bona fide*, and give a valuable consideration for the transference.⁵

6. Where goods are on their passage from the seller to the buyer, in the hands of a middleman, that is the proper case for the exercise of the right of stopping. But even this proposition involves many doubtful cases. The law is fixed in favour of the right to stop, where goods are either in the hands of the vendor's shipmaster, carter,⁶ etc., or in the hands of a common carrier by land or water, including shipping companies. Masters of ships on general freight, lightermen, waggoners, and all those who hold themselves out as carriers for the public, are properly middlemen, who hold a neutral character, and receive goods for the preservation of the seller's lien on the one hand, and of the buyer's right of property on the other.⁷ Wharfingers and warehousemen, porters, and all necessary auxiliaries of the carrying trade, are classed also as middlemen. But it

but shipped by the vendee. The master carrying under such a bill of lading is obviously not carrying from the vendor to the vendee, but from the vendee to the vendee's order, or to some specified consignee. *Noble v Adams*, 2 Marsh. 366; *Fragano v Long*, 4 B. and C. 219; *Meletopulo v Banking*, 6 Jur. 1095; *Morton v Abercromby & Co.*, 1858, 20 D. 362, as to both this and preceding head. The case of *Baxter v Pearson*, 8 July 1807, F. C. and Hume 688, where the Court upheld stoppage, though the mate's receipt bore that the wheat was received from the buyer, and the bill of lading that it was shipped by him, is an unsound decision. 3. Where the contract of sale amounts to an agreement that delivery is to be held as having been actually made to the vendee on board a particular vessel, or at the port of shipment. By the custom of merchants in London, when goods are sold 'free on board' a ship named, it is the seller's duty to ship at his own cost, but the buyer is considered as the shipper. The *transitus* was held to cease on shipment. *Cowasjee v Thompson*, 5 Moore P. C. 165. The ratio of this case seems to be the same as that of the cases under the preceding head. But there were, besides this, the fact that the voyage was away from the vendees in London to new vendees in Bombay, and a point that, when the sellers had the option, they preferred to be paid by bills instead of cash, which was absolute and not conditional payment. The weight of the judgment seems laid on the evidence that, by the custom of trade, when goods are sold 'free on board,' the buyer is considered as the shipper, or as having received actual delivery at the ship's side, and then shipped them himself.]

¹ See above, pp. 194–197.

² See above, p. 204.

³ See above, p. 208 sqq.

⁴ *Keyser v Suse*, 1 Gow, N. P. Cases 58. See the cases quoted p. 206 et seq. [It does not appear to be yet determined whether, in the inland trade, receipts or delivery orders for goods may be endorsed to the same effect with dock warrants and bills of lading. See *Bryant v Nix*, 4 M. and W. 775; *Jenkins v Usborne*, 7 M. and Gr. 678; *Kingsford v Merry*, 1856, 11 Exch. 577, 1 H. and N. 503; *Tudor's L. Ca.* p. 724.]

* [These are not cases of stoppage, but questions of delivery or no delivery, as to which, see *ante*.]

⁵ See below, those qualifications of the endorsee's right in the case of bills of lading, p. 237. [If the constructive possession of the goods is changed by intimating the transfer of the documents, retention in Scotland and the seller's lien in England are gone; and the goods not being *in transitu*, there is no room for the equitable remedy of stoppage. The mere endorsement and delivery of the document will not, however, change the possession, as in the case of a bill of lading. (See note, *ante*, p. 206.) In Scotland (we do not know how the matter would stand in England), if the endorsee knew ever so clearly that the price was not paid, and himself took delivery as a donation, still he would not be liable to any claim at the instance of the original seller, unless the seller should make out that he was *particeps criminis* in an attempt to swindle, or should proceed on the ground of the nullity of a gratuitous right granted by an insolvent *in fraudem creditoris*. But neither of these remedies is stoppage *in transitu*, or analogous to the qualifications of the endorsee's right in favour of the unpaid vendor in the case of bills of lading here referred to.]

⁶ [This is a case of retention in Scotland. See note 2, p. 217; also note 1, p. 229.]

⁷ [See note, p. 218, *ante*.]

is important to observe the limitations and exceptions under which this general rule must be received.

(1.) Goods in the hands of a shipmaster may be excepted from the common rule of stoppage, by the terms of the RECEIPT, if expressly taken to the vendee;¹ or under the terms of the BILL of LADING, where it is taken deliverable to endorsees, the right to stop may be discharged, if the bill have in consequence been endorsed to a third party, buying in *bona fide* on the faith of it.

In a question with the buyer and his general creditors, indeed, the price not being paid, the delivery of a bill of lading will not bar stoppage *in transitu*. Whether the bill of [214] lading be taken to the consignor, and endorsed by him to the buyer;² or taken to the buyer³ by name; or taken to the consignors, and transmitted to the buyer with a blank endorsement;⁴ whatever, in short, may be the form in which a bill of lading is expressed,⁵ the seller is not thereby deprived of his right to stop *in transitu*, where the question is with the buyer, or his general creditors alone. But it is of great importance to trade that a merchant shall have it in his power, while goods are in the course of their voyage, to dispose of them and carry on his trade as if they were actually arrived. The rapidity of commercial operations is thus most beneficially increased, and the purchaser of goods is enabled to provide a fund for answering the bills for the price of those very goods, when their arrival happens to be long delayed. Such sales while goods are at sea are accomplished by transferable bills of lading; and the object cannot in its full extent be attained, unless those bills of lading give a power of unconditional disposal, untrammelled by the particular state of accounts [215] between the original seller and buyer, and in every respect as complete as if the holder of the bill had the goods themselves to deliver over. It has always been understood accordingly by merchants, that such documents are negotiable like bills of ex-

¹ See above, p. 219, [and note 1, p. 232.]

² Hall of Salisbury had written to Askell & Co. of Malaga to send him 20 butts of olive oil. Askell accordingly bought them, and shipped them on three bills of lading to his own order. He sent an invoice, and one of the bills endorsed to Hall; and to Jones, his correspondent in England, he sent a bill for the price, with another of the bills of lading endorsed. Hall not having paid his bill, Jones applied to the shipmaster, who promised to deliver the oils to him. The ship not having been reported to the custom-house, the oils could not instantly be delivered; and before they were delivered, Hall borrowed £200 on the faith of an endorsement to his bill of lading, and the endorsee applied for the goods. The shipmaster, however, delivered them to Jones. 'The jury were directed by the Chief Justice to find a verdict for the defendant, which they accordingly did.' The defendant was the shipmaster. *Fearon v Bowers*, 28 March 1753, 1 H. Blackst. 364, note.

The case in which the doctrine of stopping *in transitu* was first applied in Scotland, was also a case of a bill of lading taken to the consignor, and endorsed to the vendee. Allan & Stewart had, in execution of an agreement with Stein, purchased and shipped grain on bills of lading to their own order: they endorsed the bills to Stein. The goods were stopped; but all inquiry into the particular situation in which they were in respect of actual delivery having been suspended in the Court of Session, by the particular view taken of the case as involving a question of fraud, the House of Lords sent it back to ascertain the facts, as with relation to the point of stopping *in transitu*. *Allan & Stewart v Jeffrey and other Crs. of Stein*, 1788, 23 Dec. 1790, M. 4951, 3 Pat. 191.

³ Burghal in London had given an order to Bromley at Liverpool to send him a quantity of cheese. Bromley accordingly shipped a ton of cheese on a bill of lading, deliverable to Burghal in London. Burghal having become bankrupt before the ship arrived, the shipmaster was ordered, on the behalf of Bromley, not to deliver the goods; and accordingly refused, though the freight was tendered. The action was on the case upon the custom of the realm against the shipmaster as a carrier. 'Lord Mansfield was of opinion that the plaintiffs (the assignees of Burghal, the vendee) had no foundation to recover; and said he had known it several times ruled in Chancery, that where the consignee became bankrupt, and no part of the price had been paid, it was lawful for the consignor to seize the goods before they came to the hands of the consignee or his assignees; and that this was ruled, not upon the principles of equity only, but upon the laws of property.' *Coram* Lord Mansfield, 1 Hy. Blackst. 365, note, *Ass. of Burghal v Howard*.

⁴ In the great case of *Lickbarrow v Mason*, it was held that there is no distinction between a bill of lading blank endorsed, and an endorsement to a particular person. 2 Term. Rep. 63. See below, p. 235. [Add. Cont. 6th ed. 205; Tudor, Merc. Ca. 2d ed. 661.]

⁵ [This very general expression must be understood as being confined to bills of lading *ejusdem generis* with those specially described, e.g. a bill of lading making the seller shipper, and the vendee the person entitled to receive delivery; but not such a bill of lading as makes the vendee shipper, or contains a contract to carry the goods not to, but from him. See *ante*, p. 232, note 1.]

change; and while the necessities of trade require such unlimited powers in the holders of the bills of lading, the original seller, who transmits the bill of lading, if he has not sufficient confidence in the buyer's credit, may insert some qualification in the bill, or make the goods deliverable in such a way as to form an exception from the common rule, and carry notice to every person who may be desired to deal on the credit of that bill of lading.

On this question very different doctrines have been delivered by two of the greatest commercial lawyers of Europe. VALIN has maintained that although, by the law of France, a ship cannot be effectually sold at sea to the prejudice of the creditors of the seller, the law is different with respect to a cargo or merchandise on board; and that bills of lading are negotiable like bills of exchange. EMERIGON, on the other hand, maintains, in opposition to Valin's doctrine, that there can be no sale of commodities at sea, so as to prejudice the claim of the seller for the price; and that bills of lading are not negotiable instruments. The reasonings of such men, and their enlightened and liberal views of mercantile jurisprudence, cannot be too much recommended to the perusal of the profession.¹

In England it would appear that an unconditional bill of lading has always been considered in mercantile practice as negotiable, unclogged with any power of stoppage against the stranger endorsee. The question was, however, held to be very doubtful in point of law. Judges of great name differed in opinion—even the Courts of King's Bench and Exchequer Chamber were at variance; and two very opposite views were taken, both of the principle of the right of stoppage *in transitu*, and of the nature and effect of a bill of lading.²

In the Court of King's Bench, the right of stopping was found to be ineffectual against the endorsee of a bill of lading for value, and without notice of non-payment. The Court proceeded upon these grounds: 1. That by the transmission of a bill of lading, in which the goods are made deliverable to the consignee by name, or to the shipper's order, with an endorsation either in blank or to the consignee expressly, the property is legally vested in the consignee. 2. That the bill of lading is a negotiable instrument, and the property vested by it may be as effectually transferred by endorsation and delivery, as the right to the sum in a bill of exchange may be transferred to an endorsee. And, 3. That the privilege of stopping *in transitu* having been introduced merely as an equitable exception on the buyer's failing to pay the price, it cannot operate against his endorsee, who has given a valuable consideration, trusting to the endorsement of the negotiable instrument, as he would have advanced money on an endorsation to a bill of exchange; and against whom, therefore, no claim of equity can lie, available to a person who, by his own act, has enabled the consignee to deceive him.

In the Exchequer Chamber, the judges of the Common Pleas and Exchequer sitting in review reversed this judgment, after a very elaborate argument of Lord Rosslyn, who delivered the opinion of the Court. It was held that a bill of lading is merely the evidence of a contract for the carriage and delivery of goods; the shipmaster having a special property to support his possession as in right of another, and to enable him to perform his undertaking; and the general property remaining with the shipper until he is divested by some act [216] sufficient to transfer property: that bills of lading are not negotiable like bills of exchange, but merely assignable; the endorsation being an assignment of the goods themselves simply, or rather a direction of the delivery of the goods, entitling the endorsee to discharge the shipmaster; but only such an assignment as that of goods in pawn, or of goods bought and not delivered, which transmits no right, without its attendant burden: that such assignment differs from an endorsement of a bill of exchange, which passes the whole interest so completely as to leave the endorsee unaffected even by the creditors of the endorser: that bills

¹ Valin, *Nouveau Comment. sur l'Ordonnance de la Marine*, vol. i. pp. 572-6; Emerigon, *Tr. des Assurances et des Contrats à la Grosse*, vol. i. pp. 319, 320.

² This discussion took place in the great case of *Lickbarrow*

v *Mason*, which came first into the King's Bench on a demurrer, was afterwards decided in the Exchequer Chamber, and finally in the House of Lords.

of lading may be endorsed for many purposes, and therefore always imply an inquiry before credit can be given to them implicitly; while bills of exchange never are endorsed but for the unqualified transfer of the debt; and that, consequently, the endorsee of a bill of lading must inquire under what title it is held by the endorser, and can acquire no better right than the endorser had: that it is a begging of the question to say, that the consignor gives a power to the consignee to deceive third parties; for that power depends entirely on the legal effect of a bill of lading, and the extent of the right of the holder. But from the oldest times the payment of the price is a condition precedent in sale, the sale not being executed before delivery, and delivery not being complete, entirely to divest the seller, till the goods have come into the buyer's possession: and this was held to be not an equitable exception, but a right, proceeding upon the legal title as owner not divested; to show which, Lord Loughborough took an elaborate review of the judgments hitherto pronounced.¹ This judgment, in its turn, was reversed in the House of Lords on a point of form, and a new trial was ordered after the judges had delivered their opinions. In this new trial a special verdict was found of the same facts which had been formerly set forth, with this addition: 'That by the custom of merchants, bills of lading expressing goods or merchandises to have been shipped by any person or persons, to be delivered to order and assigns, have been, and are, at any time after such goods have been shipped, and before the voyage performed for which they have been or are shipped, negotiable and transferable by the shipper or shippers of such goods, to any other person or persons, by such shipper or shippers endorsing such bill with his, her, or their name or names, and delivering or transmitting the same so endorsed, or causing the same to be so delivered or transmitted to such other person or persons; and that by such endorsement and delivery or transmission, the property in such goods hath been and is transferred and passed to such other person or persons; and that by the custom of merchants, endorsements of bills of lading in blank, that is to say, by the shipper or shippers, with their names only, have been, and are, and may be filled up by the person or persons to whom they are so delivered or transmitted as aforesaid, with words ordering the delivery of the goods or contents of such bills of lading to be made to such person or persons; and according to the practice of merchants, the same, when filled up, have the same operation and effect as if the same had been made or done by such shipper or shippers, when he, she, or they endorsed the same bills of lading with their names as aforesaid.'² The judges of the Court of King's Bench, saying only that they retained their former opinion, gave judgment as at first. The case was again brought into the House of Lords, but the writ of error was afterwards abandoned; and it is now the admitted doctrine, that the consignee may, by endorsement of his bill of lading for value, and without notice, confer an absolute right on the endorsee, indefeasible by the consignor attempting to stop *in transitu*.³

[217] Strictly speaking, this was not a final determination, establishing any clear distinct proposition, the case having gone off upon what is technically called a *Venire de novo*. But it is understood to have established that the consignee of goods, by the assignment of the bill of lading to a third person for valuable consideration, confers an absolute property upon such assignee, indefeasible by any claim on the part of the consignor.

The doctrine thus understood to be settled in England, has not been established by any express decision in Scotland;⁴ but the law has been considered here, as well as in England,

¹ 1 H. Blackst. 357. [See *Pennell v Alexander*, 3 Ell. and Bl. 283; *Gurney v Behrend*, 3 Ell. and Bl. 622; *Pease v Gloahac*, 1 Law Rep. P. C. 219; *The Tigress*, 32 L. J. Ad. 97.]

² 5 Term. Rep. K. B. 683. Lord Kenyon had in the meanwhile been promoted to this Court, and in another case (*Salomons v Nissen*, 2 Term. Rep. 674) had expressed his approbation of the first judgment pronounced, as grounded on principles of policy and common honesty.

³ Abbott 373.

⁴ In the case of *Bogle and Dunmore*, the question was not, Whether the consignor could stop *in transitu* for the price against an onerous endorsee of the bill of lading? but, Whether a creditor of the consignor, and who had possession of the goods, could stop them as the property of the consignor, and as in his possession, subject to a right of retention on the consignor becoming bankrupt, for all debts due to the person holding the possession? 1787, M. 14216.

Again, the question may at first sight seem to have been

to be conclusively fixed, and cases have been determined in which it has been so assumed and reasoned upon, both at the bar and on the bench.¹

(2.) It is important, however, to mark the LIMITATION under which the right of the endorsee is admitted to control the vendor's right of stopping *in transitu*; and, 1. It is to be observed, that the whole weight of the decision in the case of *Lickbarrow* rests upon the understood negotiability of bills of lading, and on the implied conclusion which the endorsee is entitled to draw, that he will be exposed to no latent claims by persons in the right of the seller as against the buyer. But it seems to follow, from the very necessity of admitting an implication in the transaction, that the endorsee of a foreign bill of lading must lay his account with such right as the foreign vendor may have to seize the goods while under the jurisdiction of the foreign country. Now it was formerly the general rule of law in foreign states, that a seller may, even after actual delivery, seize his goods for the price, on the bankruptcy of the buyer. And this rule was in some countries strengthened by special regulations. In Holland, under the former jurisprudence, before the French conquest, the courts interposed while goods were still on shipboard, not having left the country, and ordered them either to be unshipped, or new bills of lading to be made to a consignee of the shippers, where the buyer became a bankrupt without payment of the price; and to that jurisprudence it is now to be presumed they have returned.² In Russia, a country with which we have a very close intercourse in trade, the same rule is observed, and [218]

implicated in the case of *L. Arbuthnot v Bisset's Crs.*, 1798, M. 14220. But the judges were anxious to prevent the possibility of their being understood to have decided that point. The tenants in that case were bound to deliver grain to Lord Arbuthnot, and he gave to Bisset an order on the tenants, which they accepted. In considering whether this was sufficient to bar the right of stopping *in transitu*, as in a question with the creditors of Bisset, it was natural incidentally to consider the question as it would have stood with a purchaser from Bisset, had he carried his documents to market. But although a very high authority rather seemed to intimate that in such a case he would have thought the sale effectual, and Lord Arbuthnot divested of his right to stop *in transitu*, he wished, and the rest of the judges concurred with him, that the judgment of the Court should be understood as not in any shape including a decision on that point. [The case of *Morton v Abercromby*, 1858, 20 D. 362, was very similar, though not identical in its circumstances, with *Lickbarrow v Mason*. The purchasers took the bills of lading in their own names, and afterwards endorsed them for value to a third party. It was held that delivery was complete, and that the seller was not entitled to interdict to prevent the goods from being forwarded to their destination.]

¹ Lord Woodhouselee, in his Dictionary of Decisions, at the suggestion of Lord President Campbell, entered the case of *Lickbarrow v Mason* as settling this question. 4 Diet. 252. And in the case of *Tod v Rattray*, 1 Feb. 1809 (see above, p. 208, note 2), the great question was, Whether an order of delivery of goods in the king's cellar was a negotiable document, to be disposed of according to the rule of *Lickbarrow's* case, taking the rule of that case to be law. 15 F. C. 132. [The doctrine is also recognised in the U. K. statute 18 and 19 Vict. c. 111.]

² Lord Rosslyn, in *Lickbarrow's* case, thus reports a case before him at Guildhall, Trinity Term, 1789: 'It appeared in evidence that one Bowering had bought a cask of indigo of Verrulez & Co. at Amsterdam, which was sent from the

warehouse of the seller, and shipped on board a vessel commanded by one Tulloch, by the appointment of Bowering. The bills of lading were made out and signed by Tulloch, to deliver to Bowering or order, who immediately endorsed one of them to his correspondent in London, and sent it by the post. Verrulez having information of Bowering's insolvency before the ship sailed from the Texel, summoned Tulloch, the shipmaster, before the Court at Amsterdam, who ordered him to sign other bills of lading, to the order of Verrulez. Upon the arrival of the ship in London the shipmaster delivered the goods, according to the last bills, to the order of Verrulez. This case, as to the practice of merchants, deserves,' says his Lordship, 'particular attention; for the judges of the Court at Amsterdam are merchants of the most extensive dealings, and they are assisted by very eminent lawyers.' 1 Henry Blackst. 364.

The following case was laid before two advocates (*Juris Utriusque Doctores*) of the city of Amsterdam:—'A, at Amsterdam, upon the written order of B, empowered by C at Glasgow, purchased and sent to Rotterdam, for the purpose of being expedited to Leith in Scotland, 50 bales of Phernambuck cotton, for the amount of which A, in conformity to the orders he received, drew upon D at London, who accepted the draft. The foresaid cotton having arrived at Rotterdam, was there loaded on board the ship the Magnet, Captain John Moyes, destined to Leith. This being accomplished, the captain signed the bills of lading drawn out to the order of B. Then, before the vessel could sail, A was informed by B that the house of C at Glasgow had failed. B, in the meantime, put into the hands of A, which was endorsed by B to A, the bill of lading of this cotton (he, B, having already transmitted to the foresaid house at Glasgow one of the other bills of lading), upon which bill of lading A made the cotton be unshipped against payment to the captain of three-fourths of the freight, free-keeping him of all after demands in regard to the bill of lading which had been transmitted to Glasgow, and which unshipping A conjectured he might do with the more safety, as he was not paid for the cotton; and also, that

is indeed laid down expressly in the code of mercantile and navigation laws of the empire.¹ Wherever these rules are established in foreign countries, it would appear that the purchaser of a bill of lading from that country should be held to lay his account with an interruption.² 2. What has hitherto been said applies only to the case of a purchase of goods on a bill of lading for a fair price, and in the course of the market, and without notice of any circumstances which render the bill of lading not fairly and honestly assignable. But if the bill [219] of lading be endorsed upon a confidential footing; and especially if there be an agreement to participate in the right of the consignee; or with notice that the price, stipulated to be in ready money, is not paid; or that the stipulated security is not given; the endorsee is entitled to no privilege, but comes into the place of the original holder.³ It is not sufficient that the endorsee should know, at the time when the bill of lading was

the house in London upon which A had drawn had happened to fail. The captain having arrived at Leith with his ship, was, however, required to deliver the cotton, conform to the bill of lading sent to Glasgow, which had been *hypothecated*, or put in pawn, by the house at Glasgow.

‘It is therefore asked,—

“If A, according to the laws and usages of this country, could not, or might not, in this case, so conduct himself as he has done? and if the captain also was not bound and obliged, upon presenting, and in consequence of the overgiving and endorsement of the bill of lading by B to A, to redeliver the foresaid cotton to the said A?”

‘Answer.—“29th Sept. 1803.—Seen by us undersigned, J. U. Doctores and Advocates, residing within the city of Amsterdam, the before case; and in answer to the questions therein proposed, we think (under correction) that A, according to the laws and usages of this country, so could and might have conducted himself as he has done; and that the captain was bound and obliged, in consequence of the overgiving and endorsement of the bill of lading by B to A, to redeliver the cotton mentioned in the before-written case to the said A.”’

¹ The following attestation by three judges of the Custom-house Court of St. Petersburg, delivered in consequence of an imperial ukaas, is good evidence of this law: ‘By his Majesty’s imperial ukaas, and resolution of the Custom-house Court of St. Petersburg, this attestation is given to the St. Petersburg merchants of the first class, Bohtlingk & Co., upon their request; that concerning a suit at law, having in London, with the London merchant, T. Crane, they wanted an attestation of the 138th section in the mercantile navigation laws, and that this law is generally received and acted upon; wherefore they demanded a testimony of this tenor, that the seller or shipper of merchandise, if he have reason to suspect the circumstances of the purchaser or consignee, and being not yet paid for his merchandise, has a right, by virtue of the said law, to reclaim and take back this merchandise out of the ship in which it may be loaded, although the bills of lading were already transmitted, and without regarding that the ship has been chartered abroad, or here, or out of the house, warehouse, or other place belonging to the purchaser; and that the merchandise must be given back to the seller or shipper, and is not brought in *concur*s. And whereas it is ordered, in the above-mentioned mercantile navigation laws, published the 25th June 1781, in the 138th section: If, in the case of unpaid debts or bankruptcies, anybody has reason to suspect that the debtor or bankrupt has any thought

of making the creditor lose, and therefore loadeth on board of ship or vessel goods or cargo; in such a case the creditor is to give notice, in town to the head judge of the court, in districts to the chief, that the ship or vessel, or goods, or the whole cargo, should be retained time enough, until the full payment is made to whom due. In consequence whereof, and by virtue of this law, if the seller or shipper, in case of bankruptcies, can identify that this merchandise belonging to him, is here in ship, warehouse, or wherever they may be; in such a case the goods must be given back to the seller or shipper, being his property, and cannot be brought in *concur*s. In consideration, this attestation is given to them, Bohtlingk & Co. Underwritten by the preceding judges, and sealed by the seal of St. Petersburg Custom-house Court, the 25th September 1800.’ *Bohtlingk v Inglis*, 3 East Reports 386.

² There may be some doubt whether a *shipmaster*, who has signed bills of lading, deliverable at a particular place, will be liberated, by delivering the goods before the voyage is completed or begun; at least where he delivers the goods voluntarily, knowing the rule of the country, and takes indemnity from the foreign merchant. But it would appear, 1st, That a bill of lading must be taken in all cases, with the qualification attached to it by the law of the country where it is made; and 2dly, That, on the principles of international law, effect must in our courts be given to the rules of law and decisions of courts of foreign countries. Perhaps the law of bills of exchange may be taken as furnishing analogies for illustrating the doctrine of bills of lading. The acceptor is bound to pay against a particular day; if he pay before that time, he exposes himself to a second demand. (*Chitty on Bills of Exchange*, p. 125.) But if, by the laws of a foreign state where the acceptance was made, the obligation is by any means vacated, it will no longer have any obligatory force in this country. *Ib.* p. 83.

³ *Salomons v Nissen*. Hagues bought 705 pigs of lead for £1000 from Nissen & Co. in Liverpool, and ordered it to be shipped to Rouen. It was shipped in the *Jane*, the bill of lading endorsed blank, and sent to Hagues. Salomons on 16th March gave Hagues an acceptance for £700, and in return Hagues delivered the bill of lading to them, with an obligation: ‘In case the lead is not remitted for by the time these bills fall due, they shall be renewed for two months longer.’ The acceptances were paid when due. On 21st March, Hagues and Salomons agreed to a partnership concern in the lead, which was to be accounted for to Salomons, the profits divided, etc. The vessel was forced back to port by a storm, and the Nissens stopped the goods as not paid for. The

endorsed and delivered to him, that the consignor had not received payment in cash for his goods, but had only taken the consignee's acceptances, payable at a future day not then arrived;¹ for that suggests nothing which makes it unfair in the consignee to assign, or in an endorsee to accept the assignment of the bill of lading. But if he also knew at the same time that the consignee was insolvent, and could not pay his bills, then his taking the right to the goods is palpably to disappoint the just rights and expectations of the seller, and amounts to a fraud on the right to stop.² On this point some confusion arose formerly from the use of the word notice, 'If the indorsee shall not have notice.' But this has been clearly expressed to mean, 'notice of such circumstances as rendered the bill of lading not fairly and correctly assignable.'³ 3. Questions have arisen on this matter in relation to factors. And, (1.) If a bill of lading has been endorsed to the buyer's factor, who in conse- [220] quence comes under acceptance to the buyer, or even receives it as a security for acceptances already undertaken, the factor will be entitled, as any third party would be, to have the goods in opposition to the vendor, as fully transferred by the endorsed bill of lading.⁴ (2.) If such endorsement be made as a consignment on general account, and where the factor

question was, whether Salomons were entitled to prevent the exercise of this right of stoppage.

The distinction taken by the judges between this case and Lickbarrow's was, that by the contract of 21st March Salomons not only made themselves partners with Hagues *quoad* this transaction, but also became paymasters, and must take the bill of lading, subject to the same rights with the original consignee, especially since, though Hagues acted as the visible owner, it appeared on the agreement that he had not paid for the goods. 2 Term. Rep. 674. [See *Stoppel & Son v M'Laren & Co.*, 1849, 11 D. 676, and 1850, 13 D. 61.]

¹ It is laid down by Cullen, 'that if an assignee purchase, with notice of the goods *not being paid for*, he must stand in the same situation with the consignee himself, and that the consignor may stop *in transitu*, and retain possession as against such assignee.' Cullen's Principles of Bankrupt Law, 266, 267.

This doctrine I questioned in my former edition, but I was not then aware of a case in which my doubts are confirmed (*Cuming v Brown*, 1808, 9 East 506). Here the original seller stipulated on the invoice, 'Payable by bill on London at three months.' The bill was drawn and accepted. The buyer afterwards endorsed the bill of lading to another for a full and valuable consideration, and in two months afterwards absconded, leaving his acceptance unpaid. It was admitted by the endorsee of the bill of lading, that he had taken this endorsement as a security for £500 already due to him, and of a further advance of £1300; and that he was aware the goods had not been actually paid for, but that he believed them to have been acquired in the course of trade, and that they would be paid for. The question turned on this, whether notice that the goods had not been paid for in money was notice which ought to have prevented the endorsee from taking the endorsement? The Court held the assignment unexceptionable; and Lord Ellenborough, in pronouncing judgment, observed these points: 1. That against the assignee of the bill of lading it should have been shown that the consignor had bargained for payment before assignment of the bill of lading; or, 2. That he had assisted in contravening the terms of the bargain, or had reasonable expectations or rights connected therewith, as by knowledge of insolvency, and the want of likelihood that the bill should be retired or the price paid.

² [In the course of the argument before the Privy Council in *Rodger v Comptoir d'Escompte de Paris*, Law Rep. 2 P. C. 393, also separately reported by Mr. R. C. Fisher (Stevens, London, 1869), Lord Chelmsford said: 'It is curious to remark that the right to stop *in transitu* only exists where there is an insolvent vendee. Then a person, knowing of the insolvency of the vendee, takes an assignment of the bill of lading. By that very act he prevents the right of stoppage *in transitu*. It would seem, therefore, as if the knowledge of insolvency alone ought to be sufficient' (Fisher's Rep. p. 15). In *Vertue v Jewell*, 4 Campb. 32, Lord Ellenborough distinctly laid down the same doctrine, that a transfer of a bill of lading, with notice of insolvency, would have been insufficient to defeat the vendor's right of stoppage. It thus seems that a proposed endorsee of a bill of lading, who is aware of his endorser's insolvency, and that the *transitus* of the goods is still undetermined, is bound to assume, from the very fact of insolvency, the probability of there being an unpaid vendor with a right to stop *in transitu*. The insolvency should put him on inquiry, the neglect of which it seems will, if it afterwards turn out that there is an unpaid vendor who stops, amount to notice of such circumstances as render the bill of lading not fairly and honestly assignable. Compare, as to the obligation to inquire, and consequences of neglecting it in operating constructive notice of everything to which it is afterwards found that inquiry might have led, *Whitbread v Jordan*, 1 Y. and Coll. 328; *Newcome v Thornton*, per Lawrence, J., 6 East 43; *Evans v Trueman*, per Lord Tenterden, 1 Moody and Ryan 10; *May v Chapman*, per Parke, B., 16 M. and W. 355; *Kennedy v Green*, per cur., 3 Bingh. and Lee 719; and see Mr. Fisher's preface to his report of Rodger's case, *infra*. Although in Rodger's case there are other points, still it appears strongly to countenance the doctrine, that if the endorsees know of facts which would raise a presumption in the minds of reasonable men that the vendors of the goods represented by the bill of lading were unpaid, that should put them on inquiry; and no inquiry being made, the endorsement is not *bona fide*, and will not defeat the right to stop.

³ Cuming's case, above. [See *Rodger v Comptoir d'Escompte de Paris*, Law Rep. 2 P. C. 393; *Bateman v Green*, 2 Ir. R. Q. B. 166; *Pease v Gloahec*, L. R. 1 P. C. 219.]

⁴ *Vertue v Jewell*, 4 Camp. 31. [This case has never been

takes only in his relation as factor, and nothing beyond that character, it would seem that the factor has not, for any balance of debt already in account with his principal, a right to consider the transfer as complete. And, (3.) Where such endorsement, though not made as a specific pledge for advances, is in the course of a continued practice of acceptance, and the factor comes under new acceptances accordingly on general account, the vendor has, even in such a case, been held entitled to stop the goods as still *in transitu*. These two points are illustrated in the cases quoted below.¹ Where, in cases of this description, the endorsee to the bill of lading is himself a bankrupt, and incapable of performing the engagements undertaken as the consideration for the endorsement, it does not appear that he or his creditors can interfere to alter the rights of vendor and vendee, as they would have stood independently of that endorsement.²

overruled, but, if correctly reported, is very questionable law. See Blackb. Sale, p. 220; Benjamin, Sale, p. 632. See 5 and 6 Vict. c. 39. Where the buyer transfers the goods in security of debt, the seller's right is not thereby defeated, though he must exercise it subject to the security. *Westzynthius v La Page & Co.*, 5 B. and Adolph. 817; Smith, Merc. Law, 7th ed. 556.]

¹ *Haile v Smith*, 1 Bos. and Pull. 563.

Patten v Thomson, 1816, 5 Maule and Selw. 351. Wheat was sold by Patten to Hickman & Co., put on shipboard, bills of lading taken, deliverable to Hickman & Co.'s assigns, which were transmitted, and bills drawn and accepted at three months for the price. Hickman & Co. sent the bill of lading to their Liverpool correspondents endorsed. The Liverpool house were in the course of receiving consignments, bills, etc. from Hickman & Co., and of accepting their drafts, and about this time accepted very extensive drafts for Hickman & Co. They both failed while the wheat was on shipboard, and the provisional assignee of the Liverpool house went on board and claimed it, and afterward succeeded in getting possession of it on the one hand, while the creditors gave notice to stop on the other. The Court of King's Bench (Lord Ellenborough, and Abbot, Bayley, and Holroyd, J.) were clear that there was still a right to stop. The action was by the vendors against the assignee of the Liverpool house, to recover the value of the wheat. Lord Ellenborough said: 'If it is to be taken that the cargo was consigned to the Liverpool house as a security for advances made by them, this may afford a ground for their claim to detain the same until such time as they are indemnified against these advances, or the responsibility they have contracted in respect of the cargo. But the case, as it now stands, seems to me to go further, and that the defendant, in order to succeed in his claim, must make out this position, that wherever a principal consigns goods to his factor for sale, and is at the same time in a course of drawing on the factor upon account, this single circumstance of there being mutual credits between them, does of itself give to the factor a right not merely to detain such consignments as shall come to his hands, but to anticipate the possession, and keep it against the unpaid seller. If there had been any specific pledge of this cargo in the course of the transaction—if bills had been accepted by the Liverpool house on the credit of this particular consignment, or if it had been so stipulated—this would have been a different case. But it appears from the whole transaction that this is a mere naked case of a factor, to whom a quantity of wheat is consigned for the purpose of being sold by him, and who is to account for

the sale, and render the proceeds to his principal. In such a case, if the factor has received the proceeds, he will be entitled to his lien upon them, to the extent of his indemnity; but he can have no rights antecedently to possession, in respect of the consignment, but such as he has in his representative character of factor, in order to effectuate the object of the consignment.' He adds: 'It seems to me, that this is neither the case of a pledge by way of security for advances made, nor of an assignment of the bill of lading, except for the purpose of enabling the factor to receive the property, and carry it to the account of his principal; that here the unpaid vendor is not deprived of his right, in consequence of the failure of the vendee to stop *in transitu*. And therefore these plaintiffs are entitled to judgment, they having done all in their power to stop the cargo by laying claim to it, which was frustrated only by the messenger under the commission of Hodgson & Co. seizing the cargo in spite of the captain's undertaking to hold it for the plaintiffs; and I am not aware of any authority which clashes with this case thus considered.'

Mr. Justice Abbot (now Lord Chief Justice) observed a peculiarity which may deserve attention in other cases, and expressed some doubt on the general point. 'I am not,' he said, 'prepared to say that, upon the facts here stated, it might not be fairly argued that the Liverpool house accepted the drafts enclosed to them, in the letter of the 8th June, upon the faith of this very cargo, the bill of lading for which they received by the same letter. This, perhaps, was a question of fact for the jury. But, taking this case as one between principal and factor, who were engaged in a general course of dealing, the principal consigning to his factor from time to time cargoes to be sold for his account, and remitting bills, and drawing upon him in such manner as to form a general account between them, I should have required further time, as I have already stated, to consider whether, if the factor might have retained this cargo had it come to his possession, he would not also have had a right to insist upon taking possession, in order that he might retain. *Kinloch v Craig* differs in this respect, that there the bill of lading was unendorsed. Perhaps, however, my doubt might, upon consideration, turn out to be not well founded; and it is not material upon the present occasion, because here not only did the factors not take possession of the cargo, but they were not in a condition to do so, or to perform the trust upon which it was sent to them, they having become bankrupts.' Mr. Justice Bayley and Mr. Justice Holroyd unqualifiedly agreed with Lord Ellenborough.

² *Patten v Thomson*, *supra*, note 1.

(3.) A middleman may, by the agreement of the parties, be converted into a SPECIAL AGENT of the buyer; so that the goods in his hands, or ship, or warehouse, in that character, will not longer be subject to stoppage. One example of this has already been referred to in the case of a shipmaster granting his receipt or bill of lading, with consent of the vendor, to the buyer himself.¹ So, where a wharfinger's warehouse is made the final repository of the goods for the buyer, in which they are either to abide the market or wait for further orders from the buyer, the wharfinger is considered no longer as a middleman, but as special agent or custodier for the buyer; and stoppage is not competent.²

Whether the converse holds, viz. that a special agent may be converted into a middleman, by the act which he is directed to perform being only in furtherance of the passage of the goods to the buyer? is a question which seems doubtful. Not only in such a case is the special agent of the buyer not selected by the seller, or entrusted with the preservation of any right of his; but he seems to be as exclusively the representative of the buyer as when a middleman is converted into a special agent of the buyer. Yet the cases leave this matter undetermined, and indeed seem rather to tend towards the establishment of some such distinction as this: That where there is any interval between the delivery of the goods and their progress farther, during which the person receiving them is in suspense till a new direction or order is given by the buyer, they are to be considered as still in their transit, and liable, on the buyer's insolvency, to be stopped.³ Such a rule would dispose [222]

¹ See above, p. 219.

² Such are the cases already quoted, p. 216 et seq., note 3. [So, when goods in the hands of a carrier had been directed by the buyer to be kept by the carrier for his accommodation, the *transitus* is at an end. *Foster v Frampton*, 6 Barn. and Cress. 107, 2 Car. and P. 469. An opposite decision in Scotland, *Black v Cassels*, 1828, 6 S. 894, seems to be questionable.]

³ [*Jackson v Nichol*, 5 Bing. N. C. 508.] Also *Stokes v La Riviere*, 3 Term. Rep. 466. A fuller report of this case is in 3 East 397. Stokes being a ribbon weaver, Messrs. Duhems of Lisle, who had just arrived in London, applied to him for a quantity of ribbons. He made up the bale, value £186, and delivered it to La Riviere & Co. to be forwarded to Lisle. The goods were accordingly, with other goods from one Twigge, forwarded to Bine & Overman, La Riviere's correspondents at Ostend, with directions to send them to the order of Duhems. On the receipt of the goods, Bine & Overman wrote to Duhems an acknowledgment, and that they waited their directions. On 12th June Duhems stopped, and consented by instrument to Twigge's taking back his goods; but not having fulfilled some engagement to La Riviere & Co., and being in debt to them, they had (31st May) countermanded the orders to Bine & Overman as to the delivery of the goods, and directed them to alter the marks, and deliver them to their order, which was accordingly done. La Riviere & Co. contended that, on delivery of the goods by Stokes to them, the property vested in Duhems, so as to entitle La Riviere & Co. to retain it as theirs. At the trial of the cause Lord Mansfield said: 'The fact I take to be this: The Duhems bought goods of the plaintiff, which were ordered to be delivered to La Riviere to be shipped to Duhems, who are since become insolvent, after the goods were sent to a factor at Ostend. The defendants, who have got them back again, stand as they originally did. No point is more clear than that, if the goods are sold, and the price not paid, the seller may stop them *in transitu*,—I mean in every sort of passage to the hands of the buyers. There have been a hundred cases of this

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sort. Ships in harbour, carriers, bills, have been stopped. In short, where the goods are *in transitu*, the seller has that proprietary lien. The goods are in the hands of the defendants to be conveyed: the owner may get them back again.' 18 Dec. 1784, Sit. at Guildhall before Lord Mansfield.

Hunter, etc., Assignees of Blanchard & Lewis, v Beal. Steers & Co. of Wakefield sent to Beal, an innkeeper, a bale of cloth directed for Blanchard & Lewis. Beal's bookkeeper gave immediate notice to Blanchard & Lewis that a bale was arrived for them; and at the same time Steers & Co. sent them a bill of parcels by post, the receipt of which they acknowledged, and wrote that they had placed the amount to the credit of Steers & Co. Blanchard & Lewis then gave orders to the bookkeeper at Beal's to send the bale down to the galley quay, in order to ship it on board the Union for Boston. This was accordingly done; but the ship being loaded, the bale was carried back to Beal's. Within ten days afterwards, a clerk of Blanchard & Lewis went to Beal's warehouse, when Beal asked him what should be done with the bale. He was ordered by the clerk to keep it in his custody till another ship sailed, which would happen in a few days. Blanchard & Lewis soon after became bankrupt, and Steers & Co. sent orders to Beal not to let the bale out of his hands. Accordingly, when the bankrupts applied for it, he refused to deliver it. Lord Mansfield was clearly of opinion that the goods in question might be legally delivered to the buyer for many purposes; yet as for this purpose (of an entire divestment of the seller) there must be an absolute and actual possession by the bankrupt, the goods must have come to the corporal touch of the buyer, otherwise they might be stopped *in transitu*, delivery to a third person to convey them not being sufficient. Sittings before Lord Mansfield, Trin. Term 1785, 3 Term. Rep. 466.

Of this case, however, Lord Ellenborough has said: 'I cannot but consider the transit as having been once completely at an end, in the direct course of the goods to the vendee, i. e. when they had arrived at the innkeeper's, and were afterwards, under the immediate orders of the vendee,

differently of goods, which the buyer desires the seller 'to deliver to his agent A B, to be forwarded to him,' and of goods which the seller is desired 'to deliver to his agent A B,' such agent being subject to the buyer's order to send the goods to him; and yet a distinction like this seems to rest on no intelligible or useful principle.

7. As the right of stopping *in transitu* subsists only for the purpose of enforcing payment of the price, or securing the seller in the performance of the engagements which make the counterpart of the delivery of the goods, two things are necessary to entitle the seller to exercise this right. The price must be still unpaid, and the buyer must be unable to perform his engagement. 1. Although there can be no stoppage where the price has been paid, the payment of a PART OF THE PRICE is not sufficient to take away the right of stopping. A question of this kind was in England raised on the ground that there can be no stoppage of that part of the goods the value whereof has been paid; and that as the contract is entire, there can be no apportionment, but the partial payment must attach to the whole. But this plea, though it had the effect at first to induce the Court of King's Bench to order the question to be solemnly argued, was finally rejected, as not in any degree sufficient to raise an exception to the general rule.¹ 2. As to the circumstances of the buyer which entitle [223] the seller to stop *in transitu* (although the first act of stoppage must be permitted *periculo petentis*), the point of true importance in the inquiry is, What degree of INSOLVENCY on the part of the buyer will entitle the seller to proceed in his remedy? And to this it may be answered, (1.) That absolute bankruptcy is the proper and legitimate justification; for the inability to proceed with the contract is then complete, so far as the buyer is concerned; and the only possibility of going on with it must arise from the new proposal from the creditors to pay the price, or find security for it. But, (2.) Insolvency, or such an alteration of circumstances as shall throw the buyer into gross suspicion of inability to

thence actually launched, in a course of conveyance *from him*, in their way to Boston, being in a new direction, prescribed and communicated by himself. And if the transit be once at an end, the delivery is complete; and the *transitus* for this purpose cannot commence *de novo*, merely because the goods are again sent upon their travels towards a new and ulterior destination.' See *Dixon v Baldwin*, 5 East 184.

Hodgson v Loy. - E. Ward, a butter merchant in Cumberland, purchased 60 firkins of butter from Couper, and paid him one halfpenny by way of earnest. It was agreed that on a certain day Ward should pay £40 in part. He on that day got 44½ firkins of butter, and paid £30, which, with a debt due to him by Couper, made £50, and he gave a bill for the balance, being £100. He purchased also 34 firkins from Wilson; and both Couper and Wilson agreed to deliver the butter to Golding, a carrier, and to mark it 'C. W.,' being the initials of the name of the buyer's brother, to whom it was to be sent to London, to be sold for the buyer. The butter so marked was delivered to Golding, who was desired by Ward to forward it (as usual) to Wilkinson, the wharfinger usually employed by Ward at Stockton, to be by him shipped for London. Golding swore on the trial that he carried it to E. Ward's account, and that he entered it in his book and waybill in E. Ward's name, the sellers telling him that E. Ward was to pay the carriage. Golding delivered the butter at Bowes to Savage, another carrier, who received no other instructions than from the waybill. He proceeded with it to Stockton, and delivered it to Wilkinson the wharfinger, who had general directions to send such butter to C. Ward in London. Wilkinson received the butter as on E. Ward's

account, and immediately wrote to him, acknowledging the receipt of it. And he wrote also to C. Ward, acquainting him with his having received it, and telling him the name of the ship by which it was to be forwarded to London. Before the butter reached London, both the Wards stopped payment, and the agent for Couper & Wilson got possession of the butter on its arrival in the river. The question was, whether the delivery was still merely constructive, so as to sanction this stoppage *in transitu*? Lord Kenyon said, 'that on the general question respecting the right of the vendors to stop these goods *in transitu*, no doubt could be entertained; for that this case could not be distinguished from those cited, in which that doctrine had been established and recognised, and that the case of *Hunter v Beal* was much stronger than the present.' 7 Term. Rep. 440.

See also *Ellis v Hunt*, 3 Term. Rep. 464. [Add. Cont. 6th ed. 202; Sm. Merc. Law, 7th ed. 553.]

¹ In *Hodgson v Loy* this doubt was moved. 7 Term. Rep. 440. Lord Kenyon, in delivering the judgment of the Court, said the rule was of too much importance to be disturbed by trivial circumstances. 'We would not have it supposed,' said he, 'that there is any doubt on this question.' The verdict went for the plaintiff, he repaying what had been paid by the bankrupt. See above, p. 241, note 3.

Feise v Wray, 3 East 93. A bill had been accepted, and was endorsed, and of course, in the endorsee's hands, might and would be ranked on the vendee's estate. This was said to amount just to a partial payment, which by the above case did not prevent the stoppage. [*Van Casteel v Booker*, 2 Exch. 702; *Edwards v Brewer*, 2 M. and W. 375; Add. Contr. 200.]

proceed with the contract, will also justify stoppage.¹ In running over all the cases, this will appear a point taken for granted and admitted. The criterion to which the question is to be brought would appear to be the same with that which is applicable to an arrestment in security. In circumstances where such arrestment would be loosed without caution, a court would probably refuse to sanction stopping *in transitu*.

8. Although an act of ownership, or even of virtual possession, exercised on the goods when the sale is unconditional, and after the goods have got to the end of their journey, has been held sufficient to put an end to the *transitus*; as, for example, the vendee placing his mark on the goods after the completion of their voyage or journey,² or claiming³ them at the close of the journey;⁴ it is, notwithstanding, to be observed that these acts of possession will have no such effect if done conditionally or before the voyage is completed.

(1.) In England, if delivery of the goods be made conditionally and not absolutely, the seller has still the privilege of stopping.

Thus, if, before delivery, the seller annex the condition that security shall be given before taking possession, or that the price shall be paid in ready money, or that a bill shall be delivered, the property will not pass by the mere act of the buyer's attaining the possession.⁵ No case or authority is to be found in the Scottish law to this effect. But if the

¹ [*Sed quære*, where the vendor, on a general accounting, is indebted to the purchaser. Sm. Merc. L. 6th ed. 557. The election by the vendor to take a bill instead of cash held a waiver of the right of stoppage. *Cowasjee v Thompson*, 5 Mor. P. C. C. 165. See Benjamin on Sale, p. 541.]

² *Ellis v Hunt*, 3 Term. Rep. 464.

³ *Holst v Pownall*, 1 Esp. N. P. Cases 240.

⁴ *Northey v Field*, 1 Esp. 613. [As to stoppage after partial delivery, see *Townley v Crump*, 4 Ad. and El. 58, and authorities cited in Tudor's Mercantile Cases, 2d ed. 655 sqq.]

⁵ It appears from the case of *Bohtlingk v Schneider*, 3 Esp. 58, that this is the doctrine of English law. Goods were there ordered from Russia, and shipped in a vessel ordered by the consignor. This was held good delivery (erroneously; see above, p. 185); but another point arose. The plaintiff's counsel gave in evidence a letter, dated 19th October, from the plaintiff, requiring the vendee to give security to their correspondent in London before the goods were delivered. Lord Kenyon said: The whole question is, Whether there was a delivery to Crowe of the goods before this letter was written or not? Before the delivery the party may annex any condition to it, but not after.

[As to the effect of a sale of goods on credit, Mr. Smith states the law to be, that 'where by special agreement between the parties the day of payment is to be subsequent to that of delivery—in other words, where the goods are sold on credit—the vendor may be obliged to deliver up the goods without payment or tender of the price.' But he adds: 'Yet even in such a case, though the vendee has a right to possession without payment or tender of the price, that right is not indefeasible, and will be defeated if he become insolvent before he has actually taken possession.' Smith, Merc. Law, p. 507; *Inglis v Usherwood*; *Bohtlingk v Inglis*, *supra*, p. 185. See *Milne v Gorton*, 2 C. and M. 504, where a bill had been granted by the buyer, and part of the goods was delivered to a sub-vendee, but the buyer became bankrupt before the bill fell due; the seller was held entitled to retain the residue of the goods. See also *New v Swain*, 1 Dan. and Lloyd 193; *Patten v Thompson*, 5 Mau. and Selw. 350; *Edwards v Brewer*, 2 M. and W. 375. *Idem*, if the bills granted for the price have

been refused acceptance or dishonoured, *Dixon v Yates*, 5 B. and Ad. 345. In the Scotch case of *Dryden & Co. v Hamelin & Co.*, July 1853, a question touching this point arose which is not reported. It was heard in presence of the whole Court, and the following is a statement of it, so far as relates to the point of law:—*Hamelin & Co.* of Greenock, in March 1845, agreed to sell 200 tons of guano, then in their possession, to *Langdale & Sons*, Stockton, for £1400, by bills at four months. *H. & Co.* sent 100 tons, and got a bill for £700 from *Langdale & Sons*, who thereafter, in expectation of the remaining 100 tons being forwarded to their agents, *Dryden and Co.* of Glasgow (in order to be shipped to them by these agents), sent to *Hamelin & Co.* another bill for £700. Before the bills fell due *Langdale & Co.* became bankrupt, and the remaining 100 tons being still with *Hamelin & Co.*, they refused to deliver to *Dryden & Co.*, to whom *Langdale & Sons* were owing a large balance. A special question arose, Whether *Hamelin & Co.* had not come under an obligation to deliver to *Dryden & Co.*; but the Court held these agents to be identified with *Langdale & Sons*, their employers, and so could not claim the guano, the bills being unpaid. On the general point the following opinions were delivered:—The Lord Justice-Clerk: 'On the merits, the case of the defenders does not seem to be opposed by any difficulties, if the principles of the law of Scotland are attended to. Some recent cases, *e.g.* *Melrose v Hastie*, have cleared away some loose notions originating of late in the inaccurate application of the term lien, and much increased from a frequent reference to English cases, notwithstanding the important and valuable distinction between our law as to the contract of sale of moveables, and the less simple rule of the law of England. The seller retains the article in Scotland if the price is not paid, because the right of property remains in him until the price is paid; and if called on to deliver, the buyer or party in his right must be ready to pay the price for it. This is clear law. A seller, however, may come under an obligation to deliver, although the price is not paid, and may so word such obligation that he is prevented from founding on his right to retain. But such obligation must be express and distinct, and must have been granted with that intention, and taken and relied on as con-

buyer, foreseeing his bankruptcy, reject the goods, he may receive them into his own warehouse, *custodiæ causa*;¹ or his clerks may place them in a warehouse conditionally for custody, so as to prevent the transit from being concluded.²

(2.) Acts of virtual possession or ownership are held insufficient to destroy the right of stopping *in transitu*, where the voyage and proper transit of the goods has not been terminated, but the buyer has by anticipation marked the goods for his, though still detained on the voyage; or where a creditor has attached them while the transit is not over. But it would appear that the doctrine in questions of this description must be limited to cases in which no actual delivery has been taken by the buyer, but only such equivalent acts have passed as at the end of the voyage might have stood for delivery, had it been impossible to get the goods actually into the buyer's custody. If the doctrine be carried so far as to deny to the buyer the power of taking actual delivery during the transit, it seems to be destitute of any sound principle.³ The right of stopping *in transitu* is not stipulated between the parties, so that such anticipation cannot be considered as a breach of contract. The transit is meant merely to convey the goods to the buyer; and if he should meet them on the way, there seems to be no rational impediment to his abridging their voyage, and taking them into his custody. If he has happened to sell them to one residing at a point of the journey nearer to the original seller, shall he be prevented from taking them out of the carrier's possession there, instead of allowing them to make a useless journey, to be immediately sent back?⁴ If, indeed, the circumstances should amount to a fraud in thus

stituting such an undertaking, and such a renunciation of the seller's undivested right of property.' Lords Murray and Wood concurred in this opinion. Lord Curriehill, with concurrence of Lord Anderson, observed: 'It is indisputable that Langdale & Son themselves, or their general creditors, could not then have demanded delivery of the goods from the defenders without paying the price. In a question with them, the defenders might even have stopped the guano *in transitu*, if the shipment had taken place before the bankruptcy; *à fortiori*, they might have retained it, since it still remained in their own possession, and subject to their *jus domini*.' Lord Deas said: 'It is true the sale was on credit. The vendees may have been anxious to get delivery, and it may have been merely accidental that they had not got delivery. But the vendors were nevertheless entitled, upon the emerging bankruptcy of the vendees, to avail themselves of the accident—if it was one—of the guano being still in their own possession, to retain it against the vendees and their general creditors for the unpaid price, just as they would have been entitled to stop it *in transitu* had it happened to be in the hands of a shipmaster or common carrier to whom they had entrusted it for delivery.' Lord Ivory considered that the sale being on credit, and bills actually got, Hamelin & Co. could not retain the guano. The Court assoilzied Hamelin & Co.]

¹ See below, Of the Vendor's Rejection of goods. *Stein v Hutchison*, 16 Nov. 1810, F. C.

² *Gowans v Phin*, 12 July 1813, n. r.

³ [*Mills v Ball*, 2 Bos. and P. 457; *Wright v Lawes*, 4 Esp. 82; *Jackson v Nichol*, 5 Bing. N. C. 508.] Accordingly, in all the cases of this sort which appear in the books, it is only where the goods have been marked as delivered, but not actually taken away, that the seller has still had his privilege preserved. Thus, an attachment by a creditor of the buyer, used at Ostend while the goods were in the course of their voyage, was found unavailable against the seller stopping *in transitu*. *Stokes v La Riviere*, 3 Term. Rep. 466.

Again, in *Holst v Pownal*, the assignees under a commission of bankruptcy issued against the buyer went on board a vessel which was ordered to quarantine, and opened the packages, etc., and, as far as they could, took delivery. But Lord Kenyon, at Nisi Prius, is reported to have found this insufficient to make an actual delivery; and the Court of King's Bench is also said to have confirmed the opinion on a motion for a new trial. 1 Espinasse, Cases at N. P. 240.

⁴ In *Mills v Ball*: Goods having been carried part of the way by water, were delivered to a wharfinger to be forwarded by land to the buyer, and placed to his account. The buyer having failed, refused to receive the goods; and the question was, Whether the transfer was not completed by actual delivery, so as to preclude the buyer from renouncing them? Lord Alvanley took occasion to say: 'If, in the course of the conveyance of the goods from the vendor to the vendee, the latter be allowed to exercise any act of ownership over them, he thereby reduces the goods into possession, and puts an end to the vendor's right to stop them. So, though it has been said that the right of stoppage continues until the goods have arrived at their journey's end, yet if the vendee meet them upon the road, and take them into his own possession, the goods will then have arrived at their journey's end with reference to the right of stoppage.' 2 Pull. and Bos. 461.

Here the latter part of the opinion seems quite sound; but it is doubtful whether it be correctly extended to any other act of ownership short of actually taking possession of the goods.

And in conformity with this opinion of Lord Alvanley, Chambre, J., in his judgment in the case of *Oppenheim v Russell*, 3 Bos. and Pull. 42, says: 'Perhaps the consignee himself may intercept the goods in their passage; and, indeed, I have little doubt but that if he do intercept them in their passage, before the consignor has exercised his right of stopping *in transitu*, and do take an actual delivery from the

anticipating the natural time of delivery, such fraud would not be permitted to defeat the seller's equitable remedy.¹

SUBSECTION III.—BY WHOM THE RIGHT OF STOPPING MAY BE EXERCISED.

In determining who may stop goods *in transitu*, the general rule is, that the right of stoppage exists only as between seller and buyer. And so, between principal and factor this right does not exist.² Neither does it subsist between one having a lien, and the [225] owner of the goods.³ Nor has a surety for the price of goods any right to stop them *in transitu*.⁴

But it is sufficient that he who stops the goods shall stand substantially in the relation of seller to the insolvent.⁵ And so, in the sense of this rule, a consignor who buys goods by order of the consignee, and transmits them, charging a commission on the price,⁶ is held to be a

carrier before the goods get to the end of their journey, such a delivery to him will be complete.⁷

¹ [See *The London and North-Western Railway Co. v Bartlett*, 7 H. and N. 400; 31 L. J. Ex. 92, and cases there.]

² In *Kinloch v Craig*, the general state of the fact was, that Sandeman & Graham acted as factors for Stein; that they were under very large acceptances for them on the credit of consignments to be made; that, while one consignment was on the way, Sandeman & Graham, by want of remittances from Stein, failed; that, when the vessel arrived, they did not take delivery; and that Stein also having failed, the trustee on his estate got the consignment and sold it. The action was for restitution of the price to Sandeman & Graham's estate. Here the right of property remained in the consignors: the only right to which the consignee could lay claim was a lien by agreement. But lien requires 'possession, and the goods had never reached the consignee's possession. Lord Chief Baron Eyre, in delivering the opinion of the judges in the House of Lords, said 'that the transaction between the parties with respect to the consignments was as between principal and factor, and not as between vendor and vendee; that, therefore, Sandeman & Graham could have no property in the cargo; and the right of stopping *in transitu* was out of the question, that never occurring but between vendor and vendee; and for this he relied on *Wright v Campbell*, 4 Burr. 2047, 3 Term. Rep. 119 and 783.

[See *Sm. Merc. Law*, 7th ed. 552; *Add. Contr.* 6th ed. 200.]

³ *Gard*, a clothier, employed *Pym*, a fuller. He was indebted to him for work a large general balance, and by the custom of the trade *Pym* had a lien. *Pym* had cloth in his possession to be fulled, and on finishing he shipped them to *Gard*; and soon after the vessel sailed, hearing of *Gard*'s bankruptcy, *Pym* overtook the goods, and got possession. Lord Eldon, at the Exeter Assizes, held that the lien expired with the possession, and that *Pym* could not stop *in transitu*, so as to revive the lien. The Court of King's Bench refused to grant a rule, on the ground that a delivery to the shipmaster was equivalent, as between such parties, to actual delivery to *Gard*. [*Sweet v Pym*, 1 East 4; *Leuckhart v Cooper*, 3 Bing. N. C. 99; *Morley v Hay*, 3 M. and Ry. 696; *Freeman v Birch*, 3 Q. B. 492, note.]

⁴ *Skiffen*, Assignee of *Browne*, v *Wray*. Here *Browne* of London ordered *Dubois & Co.* of *Dantzic* to ship for him 200 lasts of wheat, in addition to 200 already ordered, and to

value for them one-third on him, one-third on *Fritzing*, his agent at *Hamburgh*, and one-third on *Wilson* of *London*, his corn factor. The wheat was sent, and bills drawn accordingly. *Dubois & Co.* sent to *Fritzing* two bills of lading, endorsed in blank; and *Fritzing* sent them forward to *Browne*, and they arrived after his bankruptcy. On this he delivered the bills of lading to *Wray* as agent for *Fritzing*, and he got possession of the wheat, and sold it; the proceeds to abide the decision. The question was, Whether *Browne*'s assignees were entitled to recover? The Court held they were. Lord Ellenborough said: 'Wray had no authority from *Fritzing*, for *Fritzing* himself had no right to stop the goods *in transitu*. His situation in this transaction was very different from that in *Feise* and *Wray*. There he was liable in the first instance for the price of the goods, and therefore the Court considered him as a vendor *quoad* the bankrupt, to whom he had shipped them.' 6 East 371. [See *Lowson v Craik*, 1842, 4 D. 1452; *Gurney v Behrend*, 3 E. & B. 622; *Pennell v Alexander*, 3 E. & B. 283, as to the operation of the 5th section of the Mercantile Law Amendment Act (England), 19 & 20 Vict. c. 97, on the question of the surety's right to stop. *Benjamin on Sale*, p. 629. And consider whether a surety in Scotland would not have the same rights at common law.]

⁵ [The right of stoppage may be exercised by an agent acting under sufficient authority. See the leading case of *Whitehead v Anderson*, 9 M. and W. 518, *Tudor Merc. Ca.* 632; *Nicholls v Le Feuvre*, 2 Bing. N. C. 81. And a stoppage by a general agent of the vendor acting without instructions is valid if the act is afterwards ratified by his principal. *Hutchins v Nunes*, 1 Moore P. C. N. S. 243. But the vendor's ratification after actual delivery to the vendee will be unavailing where the stoppage has been made by a person acting without any previous authority. *Bird v Brown*, 4 Exch. 786.]

⁶ *Feise v Wray*. In June 1801 an order was given by *Browne* to *Fritzing*, his correspondent abroad, to purchase wax for him. *F* bought it accordingly of persons strangers to *B*, there being no privity between *B* and those who sold to *F*. *F* shipped the wax for *B*, and drew for the price, and sent the invoice and bill of lading. *Browne* becoming bankrupt, *Aitkens* on the part of *F* obtained the goods, and the bills finally were not paid. [The Court held *F* to be essentially the seller. Mr. Justice Grose said: 'If this were the case of factor and principal merely, I should find great difficulty in saying that it did. But here *Fritzing* may in reality be considered as the vendor, for the name of the

[226] seller of those goods. A person sending goods to be sold, on the joint account of himself and the consignee, is also held entitled to stop *in transitu*.¹

SUBSECTION IV.—UPON WHAT CONDITIONS THE SELLER IS OBLIGED TO ALLOW THE GOODS TO PROCEED.

The buyer may really be solvent, while, as we have seen, there may be circumstances of suspicion strong enough to authorize the seller to stop *in transitu*. His friends may come forward to support him: even his creditors may choose, upon his bankruptcy, to take the goods, and go on with the transaction. How, then, are the goods to be relieved?

1. If the bills for the price have not yet been accepted (as it is sometimes the practice not to sign the bills till the goods arrive), the seller may insist that good bills shall be given at the terms stipulated. He is not obliged to content himself with the bankrupt's bills, and a bond of caution, or other unmarketable security; but he is entitled to have, according to the spirit of his original bargain, bills which he may use in the market, as he could have done the buyer's, if in full credit.

2. If bills have been accepted, and are not yet due, the goods must be relieved, on security being given for payment when the bills fall due. The stoppage *in transitu* operates with an effect similar in this respect to that of the common arrestment in security, which may be loosed on caution if the debt be future or contingent.

3. If the price be already payable; if the bills, for instance, drawn from abroad, have fallen due before the goods arrive, the buyer or his creditors must pay before they can demand the goods. The vendor is not bound to take security in place of payment. Just as in the case of an arrestment in execution, the goods may be kept under the attachment till payment be offered; and it is not permitted to loose the arrestment on caution.

But, 4. Objections may be stated to the price on account of deficiency, etc., in the cargo.

original owner was never made known to the bankrupt. There was no privity between them; but the goods were purchased and the bills drawn in Fritzing's own name, and therefore he stands in the situation of vendor as to Browne. The defendant, acting under an authority from Fritzing, applied, upon the bankruptcy of Browne, for the purpose of getting security for the goods, and received the bill of lading from the bankrupt's brother, as he honestly might, and which the other acted honestly in giving up to him.' And afterwards he adds: 'I am not satisfied that there is any distinction in law between the case of a vendor and a factor consigning goods; but if there be any such difference, Fritzing was, in regard to the bankrupt, the vendor in this case, particularly as the bills were drawn payable to himself.'

Lawrence, J., said: 'I am of the same opinion, that the plaintiffs have no right to recover. It has been contended that the right of stopping *in transitu* does not attach between these parties; that Browne must be considered as the principal for whom the goods were originally purchased, and that Fritzing was no more than his factor or agent, purchasing them on his account; and that the right of stopping *in transitu* does, in point of law, apply solely to the case of vendor and vendee. If that were so, it would nearly put an end to the application of that law in this country; for I believe it happens, for the most part, that orders come to the merchants here from their correspondents abroad to purchase and ship certain merchandise to them; the merchants here, upon the authority of those orders, obtain the goods from those whom they deal with; and they charge a commission to their cor-

respondents abroad upon the price of the commodity thus obtained. It never was doubted but that the merchant here, if he heard of the failure of his correspondent abroad, might stop the goods *in transitu*. But at any rate, this is a case between vendor and vendee: for there was no privity between the original owner of the wax and the bankrupt; but the property may be considered as having been first purchased by Fritzing, and again sold to Browne at the first price, with the addition of his commission upon it. He then became the vendor as to Browne, and consequently had a right to stop the goods *in transitu*.'

Lord Ellenborough, Ch.-J., then said, 'that having been engaged in the cause (though he did not recollect on which side), he had not taken part in the discussion, but that he entirely concurred in the opinions delivered by the other judges. It was substantially the case of a vendor, only adding to the original price of the goods the amount of his commission. And the case of *Hodgson v Loy* showed that a part payment did not destroy the vendor's right of stopping *in transitu*; it only reduced his equitable lien *pro tanto*, when he got the goods into his possession.' 3 East 93. [*Hawkes v Dunn*, 1 Tyr. 413; *Oakford v Drake*, 2 Fos. and Fin. 493.]

¹ *Newsom v Thornton*, 6 East 17. See also *Fenton v Pearson*, 15 East 419. [A person to whom a transfer of a bill of lading has been made *bona fide* by the vendor has been held entitled to stop the goods *in transitu*. *Morison v Gray*, 2 Bing. 260, 9 Moo. 484. And the right has been conceded to a person who has merely an interest in the goods under a contract to deliver to him. *Jenkyns v Osborne*, 8 Scott, N. S. 505, 522.]

If there be such a ground of objection as will justify a judicial suspension of the seller's demand for payment, there seems to be little question that, although bills have been signed for the price, yet, to the extent of the sum included in the objection, the seller will be obliged to accept of security instead of payment.

SUBSECTION V.—OF THE MANNER OF STOPPING GOODS IN TRANSITU.

In England it is now held, though not without expressions of great regret on the part of the judges as well as of the bar, that the bankruptcy of the buyer is not equivalent to a stoppage *in transitu*; that the buyer's warehouse continues open, notwithstanding, for the reception of goods; and that even the assignees under the commission, or provisional assignees named for the purpose, may take goods from a carrier or shipmaster, leaving the seller to rank as a creditor.¹

¹ *Haswell v Hunt*, 1772. 'Lacey came to Haswell and bought a parcel of tobacco, to be paid for in ready money. This was in the morning. He left orders at his house for receiving the tobacco, and the same day went to France, to absent himself from his creditors. After he was gone, Haswell's servant brought the tobacco to Lacey's house; but he had no orders to make any demand of the money, but only to deliver the goods. The question was, whether this was a complete sale, so as to vest the property in Lacey? or whether his bankruptcy, between the sale and delivery, was such fraud as voided the sale by non-payment of the money? Lord Chief Justice Eyre held that the sale was made complete by the act of the plaintiff Haswell, who, by delivery of the goods without demand of the money, vested the property in Lacey, by his own assent, as a complete sale *ab initio*, without ready money.' 5 T. Rep. King's Bench 231.

In *Ellis v Hunt* (see above, p. 219), where the provisional assignee took delivery, both Lord Kenyon and Mr. Justice Buller said 'that bankruptcy is not of itself a countermand, and that no case to that effect had ever been decided.' 3 Term. Rep. 467.

In *Tooke v Hollingsworth* the question came incidentally to be considered. Lord Kenyon said: 'It never yet has been decided whether or not a person who, acting under a previous agreement, sends goods to another against whom a commission of bankruptcy has been issued at the time, and who is not only an insolvent person, but disabled by the laws of his country from dealing at all, can recover these goods again, under an idea that the situation of that other with whom he meant to deal was so altered, that it could not be considered to be a contract with him. If the purchaser were dead at the time when the goods arrived, must they go to the executor? And other cases of the same kind might be put, which would considerably distress the argument in the affirmative of the proposition, that the assignees should take these goods, although the vendee were a bankrupt when they were sent. It may be proper to discuss these questions when they arise; but I will now forbear entering into a discussion of that which appears to be an arduous task, because it is not necessary for the determination of the present case.' Mr. Justice Buller, in the same case, said: 'The next point to be considered is the effect of bankruptcy, and I think that some points have been made by the defendant's counsel which have not been answered. They contended that, when these goods came to the hands of the assignees, the property was vested in them;

and if so, that nothing has happened since to divest it. This is an important part of the case, and therefore it is material to consider whether or not this property was vested in the assignees. It has been held that bankruptcy does not put an end to the contract. That was so stated by Lord Kenyon and myself in *Ellis v Hunt*; and that doctrine was not then new, for in *Haswell and others v Hunt and others*, assignees of Lacey, the same point was ruled. (Here Mr. Justice Buller read the above note of that case.) It seems, then (continued Mr. Justice Buller), that bankruptcy does not in all events put an end to the contracts of the bankrupt. After the bankruptcy several contracts have been binding on the bankrupt, though the creditors could not prove their debts under the commission.' 5 Term. Rep. 226 and 230.

In *Scott v Pettit*, Lord Alvanley, who tried the case at Guildhall, suggested that, as the goods were not sent from Manchester till after the bankruptcy of Barclay, that event might be deemed a revocation of the previous order, so as to prevent any right from vesting in Barclay's creditors. But this point was abandoned by Mr. Sergeant Best when the cause came to be argued on a motion for a new trial. He said 'that, though suggested by the Lord Chief Justice, before whom the cause was tried, yet he felt it too late, after so many decided cases in which a similar circumstance had occurred, without effecting any alteration in the right of the assignees of the bankrupt to claim goods on their arrival, to make this objection, however desirable it might be to establish a different rule from that which had hitherto prevailed.' Lord Alvanley said: 'At the trial I could not help forming a wish that the question, how far the bankruptcy of Barclay had operated as a countermand of his previous orders to the pursuers, Walters, should be considered by the Court; but on looking into the cases, I find that question to be completely closed in Westminster Hall, and that we therefore are bound to hold that, though a bankrupt has altogether ceased to be a trader, yet that his warehouse continues open for the purpose of receiving goods; and that the assignees have a right to take possession of everything that may come into their hands, without paying a single farthing, even though the consignors of the goods are not entitled to come in under the commission. In *Ellis v Hunt*, Lord Kenyon says that it never had been decided that bankruptcy was of itself a countermand of an order; and in *Bohtlingk v Inglis*, 3 East 381, the goods in question were not delivered on board the ship which was to bring them from Russia to the consignee in London, until

[227] It can scarcely be said, that in Scotland this point has been directly or authoritatively decided; but the opinion of the Court has been uniformly inclined in the opposite direction from that of the English determination on this point. And this opinion seems to be growing stronger.¹

[228] Without presuming to determine what ought to be the decision on this question, it may be allowable to suggest, that if a feeling of hardship attend the application of the English rule, it seems, on the other hand, to be doubtful whether, laying aside the expediency of having opposite rules in England and in Scotland, there be any clear principle for supporting a determination opposite to that which has been followed in England. Bankruptcy does not annul a previous contract. If the seller choose, he may insist on the bankrupt or the creditors taking the goods, and allowing him to claim under the contract. If the creditors choose, they may pay the price and take the goods. The contract, then, being in force, and the order to deliver the goods effectual unless recalled, the question comes to be, Whether the bankruptcy is a countermand of the order to deliver, so as to annul the delivery, as made without authority? or, Whether there be a fraud entitling the seller to restitution? But, 1. The bankruptcy cannot be a countermand otherwise than by presumption—that if the seller had known of this event, he would have recalled the goods,—an inference which is far from being unavoidable; for the vendor may have chosen to act differently; and, 2. As to restitution, supposing the delivery once made, there seems to be no ground for it in this more than in a hundred other cases which occur in bankruptcy. By the civil law and the jurisprudence of the Continent, restitution was given of goods, not only where the *contract* of sale was induced by fraud, but where undue concealment or deceit led the seller at the time of delivery into a false credit for the price. In the law of Scotland, restitution is given only where some act of fraud attaching to the original consent to transfer taints the whole contract; and subsequent occurrences are accounted misfortunes, which equally may attach to all the creditors. The property which by constructive delivery has passed at law, may be resumed if the seller entitle himself in equity to do so; but if not resumed, the transference becomes irrevocable.

In cases where this difficulty has no place, there does not appear to be any specific form or solemnity necessary for stopping goods *in transitu*.

1. Where goods are sent by sea, the bill of lading is taken in various forms, according to the views of the parties; and the shipmaster is discharged, by delivery to any one holding

after the consignee had committed an act of bankruptcy. No doubt, therefore, for the purpose of receiving goods, the assignees stand in the place of the bankrupt.' 3 Bos. and Pul. 471. [Gibson v Carruthers, 8 M. and W. 321, 343.]

¹ In the case of *Cave's Crs.*, in 1736, a claim for restitution of goods delivered was made on the ground of fraud. The Court first found that in the contract itself there was no fraud. It was then contended that the date of the delivery is the only period to be considered as to this question; for, supposing the contract fair, yet if, at the time of the delivery by which the property is transferred, the bankrupt is designing *cedere foro*, and to give up his effects to his creditors, it is fraudulent in him to receive the subject sold, when he has no prospect of doing justice by paying the price. The Lords found the time of delivery must be the rule. *Inglis v The Royal Bank*, 1736, M. 4937.

In the subsequent case of *Stein's Crs.* with *Allan & Stewart*, this doctrine was very much questioned both at the bar and on the bench. But there was no occasion to decide the question, or to fix any point as to the effect of bankruptcy in putting an end to the contract, or as a countermand of delivery. M. 4951, 3 Pat. 191.

In the case of *Robertson & Aiken v More* (trustees on *Sinclair & Williamson's estate*), 1801, M. App. Sale, No. 3, the vendees were bankrupt at the time when part of the goods were taken possession of by them. It was not necessary to decide the case on this ground, as it was held that the goods had been legitimately stopped before delivery. But it was observed on the bench, 'that *Sinclair & Williamson*, by taking possession of the grain after their avowed insolvency, were guilty of a wrong, by which neither they nor their creditors ought to profit.'

In *Collins v Marquis' Crs.*, it was incidentally said on the bench, that though bankruptcy be no stoppage by the law of England, it is so by the Scottish law, delivery taken after actual bankruptcy being fraudulent and ineffectual. This opinion was not necessary to the decision of the case, and is therefore to be taken, not as a judgment on the question, but merely as indicative of the bias of opinion in our courts. In the case, as reported in the F. C., 23 November 1804, this incidental opinion is not taken notice of.

Lord President Blair took occasion, in the case of *Steins v Hutchison*, 16 Nov. 1810, to deliver an opinion to the same effect.

a bill of lading legitimately transferred. The presentment by the seller's agent of one of the bills of lading will complete the stoppage. Where a bill of lading is not at hand, the most unquestionable stoppage is by the warrant of a judge.¹ But that is not precisely [229] necessary; a private countermand is sufficient, even though verbal.² It is right, however, in order to avoid disputes, that the countermand should be in writing. The seller has been held effectually to stop his goods, by entering them at the custom-house in order to pay the duties for them, although the bankrupt or his assignees had, at landing the goods, forcibly got possession of them.³

2. Where goods are not sent by sea, but by a land carrier, or other person entrusted to transport them, and where, of course, there is no written and transferable document like a bill of lading, but a verbal engagement, or an understood obligation to deliver according to the address; it is still less necessary for the seller on the one hand to proceed by warrant of a judge, or on the other to attain the actual possession of the goods. A bare countermand has been held sufficient. The carrier is to be considered as the middleman or trustee between the parties; and, as on the footing of a verbal undertaking, accountable to either of them for the due execution of his engagement, he is in some degree subject to the orders of them both,—so far at least, that he is not entitled to disregard the directions of him who put the goods into his hands, although differing from the original directions, in consequence of circumstances unforeseen at the time of sending away the goods.⁴

3. Where the stoppage is made, not by the seller himself, nor by the holder of a bill of lading, or of other legal authority for interfering, but by the usual agent of the seller interposing as *negotiorum gestor*, the stoppage should be accomplished by judicial authority. An application from such a person to a judge will be entertained. It is most salutary, and quite consistent with the principle of *negotiorum gestio*, that the person who in general acts for a foreign merchant, though he hold no special commission, should be allowed, on the sudden bankruptcy of a buyer, to apply for and obtain the necessary warrant to stop. This is very frequently done; and although it is generally objected to, the judge never refuses, under proper precautions, to sanction an act which is necessary for the protection of the foreign merchant.

4. If it be not sufficient to entitle the seller to restitution of his goods, that the buyer has become a bankrupt before delivery, neither will it avail him that he has given notice to *the buyer's creditors*, that he intends to stop the goods, or that he is in the course of obtaining a judicial warrant for so doing. The bankruptcy brings everything to a fair question of competition, depending upon the legal completion of the real right; and whoever is most vigilant in making his right finally and completely effectual, will, according to the common rules of competition, be preferred. A creditor who has received from the bankrupt an assignation long before bankruptcy, but who has not taken the due means of completing his right before the completion of that of the trustee under the bankrupt's conveyance, is

¹ [In *Stoppel & Co. v. Stoddart*, 1850, 13 D. 61, it was held that 'an application for interdict was an effectual exercise of the right of stoppage *in transitu*, although the buyer at that time had not been sequestered, and although the ground of action ultimately sustained had not been founded on in the application.']

² In the case of *Sinclair and Williamson's Crs. v. Robertson and Aiken*, 1801, the seller had verbally intimated to the shipmaster that he meant to stop the cargo, desiring him not to deliver to the buyer or the creditors, and told him that he was about to apply for a warrant to obtain possession of it. In the meanwhile, application for delivery was made on behalf of the buyers' creditors, and they received delivery accordingly. The Court held that the verbal countermand was sufficient. *M. App. Sale*, No. 3. [See *Sm. Merc. Law*, 7th ed. 557.]

³ *Ex parte Walker and Woodbridge*, 1756, Cooke 419. ['To make a notice effective as a stoppage *in transitu*, it must be given to the person who has the immediate custody of the goods; or if given to the principal, whose servant has the custody, it must be given, as it was in the case of *Litt v. Cowley* (7 Taunt. 169), at such a time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant in time to prevent the delivery to the consignee.' Per Parke, B., in *Whitehead v. Anderson*, 9 M. and W. 518.]

⁴ In *Ellis and Hunt's case* (3 Term. Rep. 467) it was not questioned that the letter from the seller would have been a good stoppage of the commodity, had not the provisional assignee already taken delivery.

cut out. And so, in the same way, must the seller be cut out from that security which is still in his power, if he do not take the legal way of getting those goods again into his possession. It will not do to interdict the other creditors, who are in the fair pursuit of the very same legitimate object which the seller is seeking, viz. the securing of themselves from the loss which the credit given to the bankrupt threatens to bring on them.

5. But what if the seller interdict the bankrupt himself? Suppose, for example, that the seller, meaning to stop *in transitu*, gives notice to the bankrupt that he has applied for [230] a judicial warrant, and in the meanwhile the bankrupt takes delivery;—it would appear that in this case also the delivery is unobjectionable.¹

6. As the privilege of stopping *in transitu* is an equitable power to resume that possession which in strict law has passed from the seller, the seller must take some active step for resuming the possession.² In the preceding section it has been stated that the attachment of goods deposited in a public warehouse to be delivered does not appear to be sufficient as actual delivery.³ Perhaps this should be stated more as a matter of doubt, because the property which *at law* must be held as transferred by even a constructive delivery, may well be considered as sufficient to support the diligence of the buyer's creditors; and accordingly, in the case quoted in the above note, one very eminent judge held the arrestments as effectual against the right of the seller.

SUBSECTION VI.—EFFECT OF STOPPING IN TRANSITU.

It is a question which has not hitherto been determined, whether the seller who stops *in transitu* is entitled both to resume possession of his goods, and to claim against the divisible estate for damages? And it is not easy to find a clear principle of decision, where the doctrine itself, of which it forms a part, presents so many anomalous and incongruous propositions.

1. In such questions it is natural to recur to the analogy of retention by the seller, while yet the goods are in his own hands undelivered; in which case it is generally held that the seller may take the full benefit of his lien, and at the same time claim as a personal creditor on his contract for the balance. And certainly, if the right of the seller to stop *in transitu* be precisely of the same kind with the right of withholding goods while in his own warehouse undelivered, there should be no difference in the decision. But the distinction seems to lie here, that the property at law has passed in the former case, while in the other it remains still in the person of the seller undivested, and under lien. Where the goods are

¹ In the case of *Sinclair and Williamson's Crs. v Robertson and Aiken*, 1801, the sellers intimated to the bankrupts that they had applied for a warrant to stop *in transitu*. But this would not have been deemed sufficient, had it not been accompanied by a notice also to the shipmaster, which of itself, without any judicial warrant, was a sufficient stoppage. The only judge who took notice of the intimation to the bankrupts said: 'This notification was nothing; the bankrupts could not interfere. They could have no right to refuse the goods, had they been brought to them for delivery.' M. App. Sale, No. 3.

² This was held in the case of *Fotheringham v Somerville & Co.*, 26 May 1809, F. C., in the Second Division of the Court of Session. The case was somewhat complicated; and, in particular, there were circumstances of fraud which were held sufficient to annul the sale, and so to supersede the question of stoppage. But the question was argued, and opinions delivered upon these facts:—The goods had been sent from Leith, addressed to Omand at Stromness. On landing, they were placed in a seller of the shipowner's, and there arrested by

certain creditors of the buyer. On this, they were by the competing creditors removed to a public warehouse, and an action of multiplepoinding brought into Court for settling the claims of the several arrestors, and the general creditors. While the goods lay in this situation, the sellers appeared, and claimed as stoppers *in transitu*. On the bench it was said by Lord Meadowbank that here there was no stoppage. Delivery, whether actual or constructive, he held to transmit the property as by tradition; while stoppage *in transitu* is a resumption of the possession, entitling the seller, after having recovered the goods, to a defence in equity against a demand for the goods till the price shall be paid. To make his right effectual, therefore, and give place for the equity he must rely on, it is necessary for him to follow the property without delay: he must give no faith to the buyer further by raising diligence, etc.; he must get hold of the goods. But here the seller was not vigilant: he did not get the goods into his possession; he suffered creditors to arrest, and the goods to come into public custody for the benefit of the arresting creditors.

³ See p. 219.

still with the seller undelivered, the decision is to be regulated by the common rule of mutual contract, whereby the party able to perform withholds on account of the other's incapacity; and being bound only by a personal obligation, the condition of which is [231] implement by the other party, he may retain his property without any destruction of the contract itself, but, on the contrary, with full reservation of his right to claim damages for non-performance. Where goods have been constructively delivered, the real right of property is gone from the seller; his consent to transfer has been given by the legal token of tradition; and, without the interposition of equity to annul this legal consequence of the contract, the property must remain with the buyer. But in permitting the interference of equity to annul this transfer, and deprive the general creditors of the buyer of property which in strict law has passed to their debtor, it has been considered as equitable, on the other hand, that it should be accompanied by a rescinding of the whole contract, and a renunciation of any further claim; since it would be a great hardship to give a preference to the seller over the other creditors, and subject the divisible funds, which have derived no benefit from the contract, to a further claim of indemnification.

2. Another analogy naturally occurs in considering the question. Not only may the seller stop his goods while not actually delivered, but the buyer, foreseeing his failure, or having failed, may reject the goods; in which case it seems impossible to say that the seller shall be obliged to take them back, without having his claim reserved for the loss, which, by the imprudence of the speculation and fall in the market, may arise on them. But the answer to this is, that the seller is not obliged to take his goods. He may insist on their being kept for the estate, and his claim for the price admitted.

3. Although there are many difficulties either way, it appears, on the whole, most consistent with the great lines of this doctrine of stoppage *in transitu*, that the extension of the seller's security over the goods sold, though perhaps in a large sense of the nature of a lien,¹ is given by equity originally, on the condition that the seller shall take back the goods

¹ The right was spoken of as in the nature of a lien in the case of *Fiese v Wray* (see above, p. 245, note 5). The buyer had accepted bills which, having been endorsed, might, it was said, be proved against his estate, and so draw a dividend; and therefore it was contended that the seller could not stop *in transitu*, without relieving the estate of those bills. Sir S. Lawrence said: 'If the vendor have a right to stop the goods *in transitu*, and have stopped them, he has a lien on the goods till the whole price be paid.' Again, he said: 'Having lawfully possessed himself of the goods, the vendor has a lien on them till the whole price be paid, which cannot therefore be satisfied by showing a part-payment only.' Le Blanc, J., thought 'that the vendor had a right to stop the goods *in transitu*, unless the acceptance of his bills by the vendee made any difference. But if the full price of the goods be not paid to the vendor, it does not take away his right to stop *in transitu*.' Lord Ellenborough assented, and said 'that a part-payment does not destroy the vendor's right of stopping *in transitu*; it only reduces his equitable lien *pro tanto* when he gets the goods into his possession.' 3 East Rep. 93.

The same expression had been used by Lord Mansfield, incidentally, in the case of *Vale v Beale*: 'A vendor, in a question with the general creditors of the vendee, who becomes a bankrupt, has, before actual possession by the vendee, a lien upon the goods he sends; and if he can get them *in transitu*, to be sure he has the benefit of that lien.' Cowper 296.

This expression of a lien is not altogether unexceptionable. 1. Because a person cannot have a lien over his own property, its proper application being to property in the hands of

another than the proprietor, and which, by the implied condition of his holding it, the custodier is entitled to keep in security of the proprietor's engagement to him; and, 2. Because lien expires with possession, delivery to a carrier putting an end to it. It may, however, be in some measure justified by a sort of fiction, that the goods having been recovered before reaching the buyer, may be held as never having effectually left the seller.

[In the law of England a distinction is recognised in the sale of goods between the effect of the contract in transferring the right of property and that of possession. The right of property is by the personal contract, and without any delivery, absolutely transferred to the buyer; and, as a general proposition, the person who has the property has *prima facie*, but not necessarily, the legal right to the possession of them. And, in general, he who has the property and legal right to the possession has, in contemplation of law, the control over them, though in point of fact the actual holder may wrongfully refuse to obey his directions; i.e. he has all the legal rights and remedies which actual possession would give, i.e. he is in technical language possessed of the goods. But the right of possession does not necessarily pass by the sale along with the property: it is a matter of agreement. Parties may agree that, though the property vest immediately by the sale, the right of possession shall remain with the seller until fulfilment of any conditions they please. Where nothing is said about delivery or payment, the law presumes that payment and delivery are to be contemporaneous, in which case the right of possession does not pass till payment is made;

as if the contract were *ab initio* recalled. The expressions made use of by Lord Thurlow in Allan and Stewart's case, when the House of Lords introduced into the Scottish law the doctrine of stoppage *in transitu*, although perhaps (as delivered to us) not guarded with all the care with which so great a judge may be supposed to have expressed himself, indicates what appears, on the whole, to be the true principle for the determination of such questions.

that is, the seller has a lien or right to retain actual possession. This is the proper lien of the seller, depending on the untransferred right of possession, which by the agreement of parties was not to pass till payment of the price. But if credit is given for the price, and nothing said about delivery, this lien is waived and gone, or rather it never existed: the buyer has right to possession before payment, *i.e.* he has the legal possession in the sense before explained; but still his right of possession, as in a question with the vendor, is not indefeasible. It only becomes an indefeasible right of possession by payment of the price, or by obtaining actual possession. Till then it remains defeasible, on his insolvency, by the seller; notwithstanding his waiver of his original lien, for a new right springs up in the seller out of the buyer's insolvency, which interferes with the buyer's right of possession. This also, since the seller has retained the actual possession, is generally denominated the seller's lien, because it confers on the seller the right of using his actual possession to prevent the buyer's right of possession from operating till payment of the price. But it seems to be an anomalous kind of right springing out of insolvency, of a nature akin to stoppage *in transitu*. It is divested by delivery to a carrier for conveyance to the vendee, and therein differs from stoppage *in transitu*, and also by other modes of 'delivery;' but Mr. Benjamin (Sale, p. 566) suggests that it is a right that might be termed 'a stoppage *ante transitum*.' Or it may be considered a *revival* of the seller's original lien, on the view that the waiver of that lien implied in the giving of credit was a waiver conditional on the buyer's good credit continuing,—an implied condition of credit given familiar to our own law. The exercise of this right, whatever it be, depends on the vendor's having retained the actual possession, though he has given up the right of possession to the vendee; nay, he may have agreed to hold the actual possession as bailee for the vendee, and in his right, and still, on the insolvency of the vendee, he will acquire the right to refuse him possession. In *Griffiths v Perry* (28 L. J. Q. B. 204), Crompton, J., said that where bills had been taken—*i.e.* credit given—for the price, 'there is no *lien* in the strict sense of the word; but if afterwards an insolvency happens, and the bill is dishonoured, the party has a *right analogous to that which a vendor who exercises the right of stoppage in transitu has*. . . . No right to a strict lien has ever existed: . . . the *transitus* has not commenced. . . . Yet where goods remain in the party's hand, and insolvency occurs, and the bill is dishonoured, there a *right analogous to that of stoppage in transitu arises*, and there is a right to withhold delivery of the goods.' An unpaid vendor in actual possession (*i.e.* by transit, or a custodian holding for him) of the goods sold, acquires, by the insolvency of the vendee, with the price unpaid, and in spite of his having originally given by the contract the right of possession to the vendee, the power of refusing to give up the possession, where he holds himself, till the price is paid,—the power of countermanding his own delivery order on his

bailee where he holds through another, before the bailee has attorned to the buyer; and the power of so refusing or countermanding, not only as against the buyer or his creditors, but as against a sub-vendee, unless where he has, when informed of the sub-sale, so acted as to assent expressly or by implication thereto, and estop himself from pleading his lien or right of retention against the sub-vendee. But this lien extends only to the price: it does not even cover warehouse charges incurred on the goods while detained. It is, however, more than a mere lien: it is a special property, analogous to that of a pledge. But the vendor has no right, in a question with the vendee, to re-sell, notwithstanding the vendee's default in payment, unless he has expressly reserved that power by agreement, in which case the sale is rescinded. But in no other case is the sale rescinded by the exercise of the right of lien. In no other case does it amount to a resumption by the vendor of the right of property, but simply of the right of possession. See Blackburn on Sale, pp. 197–202, 221–2, 308–337; Benjamin, Sale, pp. 565–624. The analogy of this peculiar right to that of stoppage *in transitu* explains how naturally the English lawyers come to look on stoppage as merely a revival of this *ante transitum* lien, after it has ceased by delivery to a carrier. It also throws a strong light on the question whether the effect of stoppage *in transitu* is to rescind the contract, and divest the vendee of the property, or merely to replace the vendor in the position of exercising his lien for the price in the same way as he would have been able to do before parting with the actual possession. This question in regard to stoppage has not been directly decided, but there seems to be no longer any doubt that at common law it does not rescind the contract; and that must now be taken as settled doctrine in equity, because on the theory of a rescission the equity courts could have no power to exercise the jurisdiction in stoppage which they now continually assert. See Lord Cairns in *Schotsmans v Lanc. & Yorkshire Railway Co.*, L. R. 2 Ch. App. 332. Certainly, if the stoppage be wrongful, it does not effect a rescission, or deprive the vendor of his action for the price; *Re Humberston*, 1 De Gex 262; *Gillard v Brittan*, 8 M. and W. 575. See, as to the general nature of the right and the question of rescission, the opinions in *Wentworth v Outhwaite*, 10 M. and W. 451; *Martindale v Smith*, 1 Q. B. 389, and authorities in Tudor, Merc. Ca. 2d ed. p. 670. See also Blackburn, Sale, pp. 339–344; and Benjamin, Sale, pp. 660–2. And as to Scotland, see *Stoppel v Stoddart*, 1850, 13 D. 61, where it was held not to rescind the contract. The question in Scotland is, whether the resumption of the possession is resumption of all the ceding of possession transferred, *i.e.* the *dominium*; or whether it is a resumption of possession only to the special effect of giving a lien for the price, leaving the transference of the *dominium* untouched, as in England. Mr. Brodie has some valuable observations, which throw much light upon the conditions of the question, in his Supplement to Stair, though his conclusions are wrong.]

He said: 'The view taken in the Court of Session excluded all attention to this point,—that, as the title to stop *in transitu* arises from a avoidance of the contract, and the act [232] of stopping puts things into the same situation between the vendor and vendee, or factor and principal, as if there never had been any transaction between them relative to the goods so stopped, the stopper certainly can raise no charge against the bankrupt's estate, as for freight, insurance, damage, or anything else, respecting such goods, though the contract had in part been fulfilled by carrying them so far, or insuring them.'¹

This doctrine was not embodied, it is true, in any judgment pronounced on that occasion, the cause having been extrajudicially settled on the footing of Lord Thurlow's opinion. But in a subsequent case it was adopted in the Court of Session, first by Lord Justice-Clerk M'Queen, and afterwards by the whole Court.² This case was, however, a good deal involved in circumstances; and from its having been withdrawn from the House of Lords before having been heard, it may be considered as not having settled the question.³

SUBSECTION VII.—OF THE BUYER'S REJECTION OF GOODS SOLD, FOR WHICH HE IS UNABLE TO PAY.

The counterpart of the seller's *right* to stop *in transitu*, is the buyer's *duty* to reject the proffered delivery, if unable to pay the price.

The doctrine laid down in the English cases on this subject is: 1. That it is the part of an honest man, when he finds himself unable as buyer to pay the price, but is not yet a bankrupt, to reject goods proffered to him for delivery by a carrier, or other person to whom they have constructively been delivered for him;⁴ and that this act of honesty, when [233]

¹ This note was taken at the time, and was founded on in the case of *Kincaid v Murray & Henderson* in 1799 (see next note), and there held as correct. See 3 Pat. 196.

² *Kincaid v Murray & Henderson*, 1798. Without going into a very minute statement of this case, it may be sufficient to say that Howden & Co. shipped grain by agreement for Leslie & Kincaid, and drew bills for the price on Murray & Henderson, the bankers of the buyers; and that in the meanwhile, the buyers having failed, an agent of the seller stopped the grain on its arrival, Murray & Henderson having approved of what he had done. The bills were paid to the seller by Murray & Henderson, and one of the buyers had made partial remittances to Murray & Henderson, but still a large sum was unprovided for. The sellers afterwards gave a power of attorney to Murray & Henderson, who, having first applied the remittances, claimed indemnification for the balance of the bills, and all the additional expense of insurance, etc., out of the grain as stopped *in transitu*. At first Lord Justice-Clerk M'Queen held 'that the stopping of goods *in transitu* was not an acquittal to the vendee of any further claim of damages.' But in his subsequent judgment, he found 'that, agreeably to the decision of the House of Lords in the case of *Messrs. Allan & Stewart v Stein's Crs.*, the contract was rendered null.' And this judgment was twice adhered to by the Court.

An appeal was taken to the House of Lords, but the circumstances of the parties prevented it from being tried.

³ *Arnot v Boyter* is a case which may at first sight appear to decide this question. Moens & Son, of Rotterdam, shipped goods by order of Boyter; but having some suspicions, they sent them consigned to their own agents in Scotland. Boyter was at the arrival of the goods insolvent. The agents tendered the goods, and protested for damages, if it should be necessary to sell them by auction. Boyter refused to give

security for payment; and on application to the Judge-Admiral, a warrant was granted to sell the goods, and decree pronounced finding Boyter liable for any deficiency that should arise. And the Court of Session affirmed this judgment. 1803, M. 14204.

But it is proper to observe: 1. That the Court held this not to be a case of stopping *in transitu*, but one in which the goods never had left the seller's hands; and, 2. That care was taken (by Lord Meadowbank particularly) to make it be understood that 'this decision left the question open and undetermined whether a vendor, in a proper case of stoppage *in transitu*, is entitled to claim for damages.' [See *Stoppel & Co. v Stoddart*, 1850, 13 D. 61, where it was held that 'the seller, even although he had exercised the right of stoppage, had not thereby rescinded the contract of sale, but was a creditor for the price, and entitled to use all the remedies of a creditor.' In England the question seems to be still undecided. *Tudor, Merc. Ca.* 670. And as to the right of the assignees of the bankrupt to enforce the contract, see *Gibson v Carruthers*, 8 M. & W. 321.]

⁴ *Atkins v Barwick*, 4 Burr. 2239, Cowp. 125. Cripps and Quorum in Cornwall received goods from Barwick in London, which, on finding their affairs declining, they sent to a third person, with orders to redeliver them to Barwick; and soon after becoming bankrupt, they wrote to London to inform Barwick of their bankruptcy, and of the fate of his goods. Barwick was found entitled to the goods. *Atkins v Barwick*, 1 Strange 165. Lord Mansfield, in subsequent cases, said that the reasons given for the judgment turned on a subtilty: the true ground was the honesty of the case, and that the trader very honestly refused to accept the goods, and returned them. He added, the Court of Chancery would have interposed, and said the assignees should not have the goods without paying the price.

Salte v Field, 5 Term. Rep. 211. Dewhurst resided as a

performed, is to be held by courts as effectual, provided the seller assents to the rescinding of the contract.¹ 2. That this power in the buyer, of rejecting the goods and rescinding the bargain, subsists only while the goods are *in transitu*:² after actual delivery they become identified with his stock, and cannot, in contemplation of bankruptcy, be restored to the sellers in preference to the other creditors.³ 3. That after an act of bankruptcy committed, [234] the buyer has no power to return goods to the seller, this being necessarily a pre-

trader in New York, and had also a house in London under J. Hill, his clerk. Salte sold to Hill, for Dewhurst, 176 pieces of calico, and they were (3d May) delivered at his house to Hill, who sent them to Field, a packer, to be shipped for Dewhurst at New York. In April, Dewhurst had written a letter to Hill, which arrived after the goods were so delivered to Hill, desiring him to buy no more goods, to countermand all orders, and give back such goods as might be furnished. Hill immediately informed Salte of this, who agreed to take back the goods. The goods were in Field's hands as packer, and several attachments were used in his hands by creditors of Dewhurst. A meeting of the creditors was called; and on a demand by Salte against Field for the goods, which were refused, an action was raised. The Court of King's Bench held that the principal was entitled to disavow and rescind the contract, if that proposition was assented to by the buyer; and that though the goods remained with the packer, it was not for the original purpose, but after the rescinding of the contract the property reverted in the seller, and the buyer's creditors were not entitled to attach the goods. [*Bartram v Farebrother*, 4 Bing. 579.]

¹ It was held in the several cases cited in the last note, that his assent would be *intended*, unless he should actually dissent.

² [*James v Griffin*, 2 M. and W. 623; and *Parke, B.*, in *Van Casteel v Booker*, 2 Exch. 691, 18 L. J. Ex. 14.]

³ *Smith v Field*, 5 Term. Rep. 402. This was a case similar to *Salte v Field* (see above, p. 253, note 4); and the circumstance of the seller having, instead of acceding to the buyer's rejection of the goods, attached the goods as for a debt (*viz.* the price), was held to pass the property so absolutely, that there could be no subsequent rescinding of the contract. The case arose out of the very same circumstances, and the same bankruptcy; but Smith, the seller, thinking it impossible that Hill could deliver back the goods, made affidavit of the price, and attached the goods in Field the packer's hand. The Court drew the distinction here, that the renunciation proposed was not assented to. It was held, that when the offer was made to the sellers by Dewhurst, they might have rescinded the contract, but that they declined doing it; for the instant they made affidavit that Dewhurst was indebted to them for their goods, it operated like a positive declaration by them that they did not rescind the contract. But now the interests of other parties intervene—the general mass of Dewhurst's creditors.

Barnes v Freeland, 6 Term. Rep. 80. Freeland sold to Lloyd 44 tons of iron, and delivered it. Lloyd accepted a bill at nine months for the price. Four months afterwards, Caldwell & Co., the bankers of Lloyd, failed, and this made Lloyd insolvent. Lloyd called on Freeland and told him this, and offered him back the iron, which still lay in the warehouse where it was at the time of the sale. Freeland agreed to take it back. The transaction was managed by Lloyd delivering to Freeland a bill of parcels, dated two days before this

conversation, for 50 tons, including the above and another parcel in a similar situation, and giving him the key of the warehouse. It was entered in the books as a sale of 16th March. Lloyd, on the day of the above transaction, wrote circular letters; he did no more business, and three days after committed an act of bankruptcy. The Court of King's Bench held the circumstance of the goods having been actually delivered, and the property of the bankrupt until he became insolvent, as decisive against his renunciation of the bargain. The goods here were originally sold and delivered to the buyer, said Lord Kenyon, and they were locked up in his warehouse: therefore there was a complete transfer of the property from the seller to the bankrupt at the time; and the question is, Whether, when the latter became insolvent, he could redeliver it to the seller in specie? It was held, that the contract being complete, and the property transferred, it could not be rescinded by any subsequent act of the parties, so as to affect the interests of third persons.

In the subsequent case of *Dixon v Baldwin* (see above, p. 216, note 4), where the goods were in the possession of the sellers, upon a claim of right to stop them *in transitu*, it was held that a fair and *bona fide* renunciation by the buyers, on consulting with some of their creditors, was effectual. The Battiers, while the right of the sellers to stop was undecided, called a meeting of their creditors, and a case was laid before counsel, who advised the goods to be given up, and they were given up accordingly. Lord Ellenborough on this point thought that the bankrupts were competent to rescind, and had in fact rescinded, the contract for the sale of these goods. The circumstance of deliberation, consent of creditors, advice of counsel, and the publicity which attended the whole of the measure, exempted it from being considered as a fraudulent preference in contemplation of bankruptcy. That the Battiers must have considered themselves in a state of insolvency and impending bankruptcy at the time, cannot be doubted; but until an act of bankruptcy, the *jus disponendi* over goods remains by law with the trader, unless he exercise it by way of a voluntary and fraudulent preference of a particular creditor in contemplation of bankruptcy. But here the goods were given up, if not from a threat of litigation, at least under an idea of the right being probably adverse to the claim of the bankrupts and their creditors; and voluntary favour towards the defendants did not operate as any inducement with the bankrupts to recede from their rights on this occasion. From this opinion Mr. Justice Lawrence dissented, holding the communication from the bankrupts not to amount to a consent to rescind the contract, but merely to notice of the meeting, and of an apparent disposition of the creditors who had met to the giving up of the goods. The other judges (Grose and Le Blanc) concurred with Lord Ellenborough in thinking this a question fit for the jury, who had affirmed the bankrupts to have acted *bona fide*, and who had negated any voluntary preference. 5 East 175.

ference given to a particular creditor.¹ 4. That after bankruptcy the buyer cannot interfere to reject goods which, being *in transitu*, are tendered for actual delivery. This has been held with expressions of regret. The distinction between this case and that of an insolvent, first above taken notice of, is extremely nice; though it may certainly in the subtilty of law be contended, that the contract of sale being completed by the consent of parties, they are from that moment creditors of each other, the buyer for delivery of the goods, the seller for the price; that by the delivery of goods to a carrier, etc., the property is passed to the buyer and to his creditors, subject to resumption by the seller, if he shall be vigilant enough to take them before reaching the buyer's stock; that if the buyer refuses to receive the goods after his bankruptcy, he may be said actively to interfere with the rights of his creditors, and to take from them property which has already by tradition been vested in him for their behoof, conferring thereby on the seller a preference; and that under the statutes of bankruptcy he is chargeable with having alienated, in favour of one who at the moment is merely a creditor, property which would otherwise go as part of his divisible estate.²

In Scotland the doctrine is fully established on the sound principles of justice, untrammelled by distinctions so nice as the English judges have permitted to interfere with the dictates of honesty.

1. In an old case it was held, that where goods have been actually delivered, the buyer, being a bankrupt, cannot return the goods, so as to give a preference to the seller.³

2. In another case, decided about the same time, a person on the eve of bankruptcy was held entitled to reject the goods when not finally delivered.⁴ And in a later case, the English doctrine on this subject was pleaded, and sustained, to the effect of supporting a rejection of goods sold and constructively delivered, the buyer finding himself unable to implement his contract.⁵

¹ This proposition, however, is not settled by any determination; it is the result only of *dicta* in the cases quoted in the preceding note.

² [See Benjamin on Sale, p. 375; Parsons, Contr. i. 609; *Siffken v Wray*, 6 East 371; *Heinekey v Earle*, 28 L. J. Q. B. 79; *Bolton v Lancashire and Yorkshire Railway Co.*, 35 L. J. C. P. 137; *Whitehead v Anderson*, 9 M. and W. 518, 529; *De Tastet v Carroll*, 1 Stark. 89, and Selwyn N.P. 200; *Richardson v Goss*, 3 B. and P. 119; *Neate v Ball*, 2 East 124; *Fidgeon v Sharpe*, 5 Taunt. 539; *Brown on Sale*, p. 543 et seq.; and a copious commentary on the earlier English cases, in Brodie, St. App. 888-93, notes.]

³ *Hamilton v Barrow & Reynolds*, 5 Dec. 1767, n. r. Smith bought from Hamilton, a cabinetmaker, furniture to fit up his house for receiving lodgers. The furniture was delivered, and some time afterwards Smith was imprisoned. From prison he wrote to Hamilton, declaring his inability to fulfil his contract, and desiring him to take back his furniture. Hamilton accordingly received back his goods. A creditor afterwards arrested those goods in Hamilton's possession as the property of Smith. The Sheriff of Edinburgh held the property to have been vested in Smith, and that he had no power to prefer the seller. Lord Pitfour confirmed this judgment; and a petition drawn up by Crosby against the interlocutor was refused.

⁴ *Wallace, Gardyn, & Co. v Miller*, 1766, M. 8475. A person on the eve of bankruptcy was allowed to reject a proffered bargain in the very last act necessary for perfecting it. An offer was made by him to buy goods which were in his own possession as a bleacher. It was agreed to, and bills desired to be sent. At that moment the insolvency appeared, and the buyer said he should keep the goods only to manufacture

them, not to the effect of completing the sale. Found he could do so, to the effect of excluding pouncing by his creditors. [The case as given in the note, and as decided by the Court, turned on the incompleteness of the proposed sale; it is not a case of incomplete delivery. See Brodie's note, Stair, p. 895.]

⁵ *M'Millan v Drake*, 1807, Hume 691. Maccoul, a timber merchant, commissioned two cargoes of timber from Drake. One of them was delivered to Maccoul; the other was on board of a ship to be carried to him, the invoice and bill of lading endorsed being in his hands. Finding his bankruptcy inevitable, he took the opinion of counsel, and was advised not to take delivery of this latter cargo. He accordingly wrote to his law agent, M'Millan, and endorsed the bill of lading to him, as trustee for all concerned: 'I enclose the invoice and bill of lading, concerning which I am very much perplexed, because, finding that I am no longer able to keep my credit, and that I must be under the necessity of immediately applying for a sequestration, I am at a loss to know whether I should take delivery of this cargo, which will bring in Mr. Drake among my other creditors, or allow it to remain, subject to the order of him or his agent.' He then stated the necessity of landing the cargo, to prevent demurrage; and that he thought it right to endorse to him, the agent, as trustee for all concerned,—'for behoof of my creditors in general, or Mr. Drake in particular, whichever of them shall afterwards be found to have the best right thereto.' Five days afterwards, Maccoul's estate was sequestrated. About a month after sequestration, the agents of the seller took a protest against M'Millan, requiring delivery of the cargo. M'Millan deferred answering this question till the creditors should be consulted. The question in the sequestration was, whether the seller was entitled to the proceeds of this cargo. The

[235] 3. But it is not actual delivery in this question, if goods have been brought from a distance, and are still on the carts at the cellar-door of the buyer. Nay, the buyer may even take the goods into his warehouse *custodiæ causa*, and still the goods will be sufficiently rejected by writing to the seller that they have been so taken for his behoof.¹

4. Goods may be rejected even after they have been taken into the custody of a clerk or warehouseman, acting without express authority from the buyer. And,

5. It has been said in several Scottish cases, that it amounts to a fraud by the bankrupt and the creditors to take delivery of goods which are still subject to stoppage.²

SECTION III.

OF RESTITUTION OF GOODS AFTER DELIVERY.³

The seller may be entitled to claim restitution of his goods even after delivery, either in consequence of certain conditions in the contract, or as a remedy against fraud.

SUBSECTION I.—OF CONDITIONS IN SALE.

[236] Such conditions are reduced to two classes—suspensive conditions, and dissolving conditions; the former suspending the transfer till the condition be fulfilled, the latter annulling the transfer after it is completed.

By the Roman law, both those conditions were held real. Delivery of the thing sold did not transfer the property, unless the price was paid or credit given for it: a condition was implied suspensive of the transference.⁴ And even where credit was given, it was

trustee in the sequestration (who happened to be the same person, M'Millan, that had been made endorsee of the bill of lading, though this made no difference on the case) rejected the seller's claim, on the ground that the cargo was not *in transitu* at the time of the bankruptcy. Lord Robertson found, that the estate of Maccoul was sequestrated on 25th January 1804; that no claim was made by Drake for the cargo till 21st February; that the letter from Maccoul, and the endorser of the bill of lading, cannot be considered as a renunciation of the contract, as it was in trust, not for behoof of Drake, but of all concerned; that there was no stoppage *in transitu* by Drake, the property having been vested in the trustee for the creditors in general, by the act of sequestration, before any claim by Drake; and therefore he repelled his claim for the proceeds of the cargo. The Court unanimously altered this judgment, and found Drake, the seller, entitled to the proceeds of the cargo. [Mr. Brodie thinks Lord Robertson's judgment was right in this case (Stair, pp. 895, 884, notes); and on comparing it with *Heincke v Earle*, 28 L. J. Q. B. 79, it may be doubted whether there was any sufficient rejection. See *Schuurmans & Sons v Goldie*, 1828, 6 S. 1110.]

¹ *Steins v Hutchison*, 16 Nov. 1810, 16 Fac. Coll. 33. Adams ordered two casks of spirits from Steins: they were sent, and arrived at Adams' cellar-door about nine o'clock in the morning. About an hour afterwards, Adams got letters which decided him in applying for sequestration; and he then took advice what to do with the goods, which could not be left in the street. He was advised to take them into his cellar *cus-*

todiæ causa, and did so, writing to the seller to that effect. The question was between the sellers and the general creditors of the buyer. The Court held the goods to have been sufficiently rejected to prevent the passing of the property. [*Inglis v Port Eglinton Spinning Co.*, 1842, 4 D. 478; *Brown v Watson*, Hume 709.]

² In *Steins v Hutchison*, 16 Nov. 1810, Lord President Blair intimated his opinion that a bankrupt might reject goods, and even that it was very questionable whether it were not a fraud to take them; and whether, on that ground, restitution would not be given.

See what Lord Mansfield says in *Atkins v Barwick*, above, p. 253, note 4, *in fin.* [In *Watt v Findlay*, 1846, 8 D. 532, Lord Mackenzie said: 'I should not wish to be held as adopting Professor Bell's view of President Blair's opinion in the case of *Steins v Hutchison*, that if a bankrupt were to take delivery of goods bought as a solvent man, this would be a fraud, which would entitle the seller to redress. I do not think the opinion went so far. Mr. Bell does not agree with it.]

³ In the first edition of this work, while the doctrine of stopping *in transitu* was recently introduced, and was only in the course of supplanting the remedy which by our own law was given to vendors on the principle of restitution on account of fraud, actual or presumed, this chapter had an importance which it does not now possess. I think myself entitled, therefore, to abridge the discussion, and dispense with many of the authorities.

⁴ Inst. De Rer. Div. lib. 2, tit. 1, sec. 41; Dig. lib. 18, tit.

lawful to stipulate that the contract should become void, if the price was not paid against a day certain.¹

In the application of these rules to mercantile practice, some controversy was maintained on the question, Whether the seller was to be held as giving credit for the price, from the mere fact of delivering the goods without receiving the price?² The result seems to have been, that in order to transfer the property without payment of the price, it was in the Roman law enough if the seller agreed to the appointment of a future day of payment, and delivered the subject in the meantime, without any condition of eventual dissolution; but that delivery alone did not infer an unconditional transference; passing the property only if the price was paid.³

This doctrine is found prevailing as the former law of the Continent, with such particular exceptions as in various states appeared expedient or necessary.⁴

But in Great Britain there is no hypothec or right of restitution for security of the price after actual delivery. The moment the goods are actually in possession of the buyer, by the vendor's authority, as sold to him, the transference is completed, and the price becomes matter of personal credit merely.

1. In England this rule is settled as applicable to chattels, and consequently to mercantile concerns. It is indeed laid down in the older books,⁵ that payment of the price, day not being given, is a condition precedent implied in the contract of sale; so that the buyer cannot take the goods, nor sue for them, without tender of the price. But day is held to be given by delivery of the subject unconditionally.⁶ And although an express condition annexed to the transference of chattels is effectual,⁷ it is not held a valid condition that, on the buyer being unable to pay the price, the seller shall take back the property as under a lien for the price.⁸

2. The Scottish law rejects hypothecs of moveables as destructive to commerce, [237] except in a few special and well-ascertained cases, to be afterwards discussed.⁹ It gives no sanction to the idea that a seller continues proprietor of a subject which he has delivered over to the buyer on the title of sale.—‘Sale being perfected,’ says Lord Stair, ‘and the thing delivered, the property thereof becomes the buyer’s, if it was the seller’s; and there is no dependence of it till the price be paid or secured, as was in the civil law; neither hypothecation of it for the price.’¹⁰ And although it may have been intended that the sale

1. De Contrah. emp. l. 19. See also Ulpian’s rule, Dig. lib. 14, tit. 4, l. 5, secs. 17 and 18. De Tribut. Act.

¹ ‘Lex Commissoria est ea, quæ inter venditorem et emptorem convenit, ut si intra præfinitum diem pretium solutum non sit, res sit inempta.’ Pothier, Pandect. lib. 18, tit. 3, sec. 1. And it is proper to mark the spirit of this rule, as delivered by Ulpian in the first law of this title: ‘Si fundus, commissoria lege, venierit, magis est ut sub conditione resolvi emptio quam sub conditione contrahi videtur.’

² Casaregi (Disc. 38, sec. 28) says: ‘Traditio non sola sufficit ad probandum venditorem habuisse fidem de pretio.’ See also secs. 29 and 30.

Vinnius, Com. in Inst. lib. 2, tit. 1, sec. 41, p. 181.

³ Pothier, Tr. du droit de Propriété, No. 239. See above, p. 242.

⁴ Van Leewin Censura Forensis, lib. 4, c. 19, sec. 20. Bynkershoek Quaestiones, Jur. Priv. c. 15. Pothier, Cont. de Vente, No. 324, vol. i. p. 389.

⁵ Hobart’s Reports, p. 41, and the authorities there referred to.

⁶ See, as an authority for this, the case of *Haswell v Hunt*, quoted above, p. 247, note 1.

A different rule is held as to land: the seller seems to be considered as having given only a conditional right to the

land till payment of the price, the purchaser being considered as trustee for the seller. 1 Vernon 267.

⁷ See below, p. 258.

⁸ *Holroyd v Gwynne*, 2 Taunt. 176. Gwynne sold some growing timber to Lee at public auction. A contract was executed by which Lee had ingress to the lands to cut down and carry away the timber, and to hold it as his own proper chattels to his own use. But a condition was introduced, that if Lee should fail to pay the purchase-money at the day, or should become bankrupt previously, it should be lawful for Gwynne to secure, distrain, take away, and convert to his own use all the timber and trees, growing or cut, and to sell them, and with the money pay the price, rendering the overplus to Lee. Lee entered, and cut and converted the timber. He failed before paying the price; and Gwynne repossessed himself of what was not sold, and disposed of it by auction. The action was trover for the value by the assignees under a commission against Lee. The Court held Lee to have had the disposition of the goods, and, on the statute of James, that the assignees were entitled to the price.

⁹ See below, in Book IV.

¹⁰ Stair i. 14. 2.

‘The Lords found in vendition, that *venditor postquam*

should be a ready money bargain, yet if the subject is delivered by the seller himself, or by his express order, unconditionally, without receiving the price, the property is altered, and the claim for the price is merely personal.¹

The same effect would not, however, follow if the goods were delivered by mistake; as, if the vendor's servant, misapprehending his orders, were to deliver goods which it was agreed should be paid for in cash at delivery, without demanding the money, the property would not pass by such delivery.²

But although the law rejects, both in England and Scotland, any implied condition or hypothec for the price, it admits express conditions; and an important question arises on the effect of such conditions as against third parties. As already said, they are either suspensive or dissolving conditions; and the effect of these is very different.

1. SUSPENSIVE CONDITIONS are such as suspend the sale and stay the transfer till something be done. These are admitted to the effect of preventing the delivery from passing the property; although, perhaps, it is to be regretted that sanction should have been given to any latent real right controlling the apparent ownership which arises from possession.

The effect of such suspensive conditions as real rights has the support of our institutional writers, and has been taken for granted in practice. Lord Stair, while he holds all personal and ineffectual against the real right, where third parties are concerned, lays it down, that a condition *suspensive* prevents the right of the buyer from being completed by delivery.³ And Mr. Erskine delivers the same doctrine in nearly the same terms which [238] Lord Stair has used.⁴ According to these doctrines, the vendee, previously to the existence of the condition, will be held to possess as a mere depositary, or in whatever character the contract will authorize;⁵ there being till then no consent to transfer, and two things being necessary to transmit property—consent and tradition.

In England, 'where an agreement is conditional, it shall not be completed till the condition be performed.'⁶ So, if a sale be on trial, that is to say, if the buyer has the power of rejection should the commodity not please on being examined, the delivery does not pass the property.⁷ So, again, if the buyer is to give bills for the price, or to retire the bills of

convenit de pretio might not claim his goods, albeit the price was not paid to him.' *Park*, 26 June 1621; *Hope*, Maj. Pract. ms. vol. ii. p. 48.

In the case of *Prince v Pallet*, 1680, M. 4932, the Court decided 'that the wares, being delivered to the skipper on Udney's order, the property was vested in Udney; and that there is no hypothec in ware for the price by the law of Scotland.'

¹ On the Continent, in some places, delivery was held to complete the transference, even where ready money was stipulated. *Consuet. Middleb. tit. 8, sec. 3*; *Bynkersh. Quest. Jur. Priv. lib. 3, tit. 15, vol. vi. p. 496*.

² In England this doctrine was laid down in the case of *Bishop v Shillito* (p. 259, note 1). Mr. Justice Bayley said: 'If a tradesman sold goods to be paid for on delivery, and his servant by mistake delivers them without receiving the money, he may, after demand and refusal to deliver or pay, bring trover for his goods against the purchaser.' [*Smith, Merc. Law*, 7th ed. 487.]

³ After showing that reservations of a power to redeem are not real rights, but merely personal obligations, his Lordship proceeds thus: 'As to other pactions adjected to sale, sometimes they are so conceived and meant that thereby the bargain is truly conditional and pendent, and so is not a perfect bargain till the condition be existent; neither doth the property of the thing sold pass thereby (though possession follow) till it be performed: as, if the bargain be conditional only upon payment of the price at such a time, till payment

the property passeth not to the buyer.' Afterwards he says: 'If such conditions do stop the transmission of property, and be so meant and expressed, then, as is said before, the bargain is pendent, and the property not transmitted, and the seller remains the proprietor.' *Stair i. 14. 4 and 5*.

See also Annotations on *Stair*, p. 80 et seq.

⁴ *Ersk. iii. 3. 11*.

⁵ *Cowan v Spence*, 1824, 3 S. 42. *Cowan*, tenant of a paper-mill, sublet it with the machinery, which was his own, and stipulated 'that as the whole machinery belonged to him in property, he has now delivered the same to A. Nasmyth for his free use and benefit during the lease, declaring that at the expiry thereof, and upon all the rents, etc., hereby contracted to be paid being fully paid up, the whole said moveable machinery shall be held to be the absolute and exclusive property of the said A. Nasmyth.' On Nasmyth's bankruptcy in possession under this agreement, his creditors claimed the machinery. But the Court held the machinery not to be transferred; the event, both in point of time and of payment, not having taken place on which the transference was to depend. [*Wight v Forman*, 1828, 7 S. 175.]

⁶ *Com. Dig. Agreement, A. 4*.

⁷ *Ib.* same section. *Ellis v Mortimer*, 1 New Rep. 257; *Humphries v Carvalho*, 16 East 45. In these cases, the buyer had by the bargain power within a certain time to disapprove and reject; and while it was so, the property was held to be in the vendor.

the seller in the circle, the property is not passed by delivery under such condition till the act stipulated be performed.¹

In Scotland the doctrine has been applied in similar circumstances. In the case below there was much doubt whether the condition was suspensive, or whether it was not rather a dissolving condition; but on the idea of its being properly suspensive, the doctrine as laid down by Stair and Erskine, and practically applied in England, was admitted as effectual against creditors.² So, if it be stipulated as the condition of a bargain, or if goods be [239] sent accompanied by a draft to be accepted and returned, and the goods are received, but the acceptance not sent, the property is not passed—the goods are still unsold.³

¹ *Bishop v Shillito*, 1819, 2 Barn. and Ald. 329, note. Here iron was to be delivered on condition that certain bills were to be taken out of circulation. Part was delivered, but the condition was not fulfilled. The vendor stopped further delivery, and brought an action of trover for what had been delivered. This action can proceed only on the ground of property in the plaintiff. And the Court of King's Bench held this only a conditional delivery; and the condition being broken, the plaintiff might bring trover. Abbot, Chief Justice, said he had left it to the jury to say whether the delivery of the iron and the redelivery of the bills were to be contemporary, and that the jury found that fact in the affirmative; and Bayley, Justice, concurred with the observation already quoted. *Supra*, p. 258.

² *M'Cartney v M'Credie's Ors.* M'Credie purchased cattle from M'Cartney, and granted a bill at three months for the price. The cattle were committed to two servants, one of M'Credie's and one of M'Cartney's, to be driven to M'Credie the vendee's farm. The vendor having heard something to the discredit of the vendee's circumstances, followed the cattle and stopped them on the road. This stoppage *in transitu* put the parties on the footing on which they stood before the bargain; and a new bargain was made by the following letter, written by M'Credie, the vendee, to the vendor:—'18th August 1798.—Sir, I acknowledge to have bought, and received from you, twenty-one beasts at the agreed price of £5, 7s. 3d. per beast, which I have granted my acceptance for of £116, 15s.; and if the bill is not punctually paid when it falls due, you are to be allowed to take back your own cattle, and to pay me £10 sterling for grass.' The cattle were on the vendee's farm till the beginning of November, when, previous to the term of payment of the bill, he gave notice that he could not pay the bill; and that the vendor might therefore come and take back his cattle on paying the stipulated £10 for grazing. The vendor accordingly sent for his cattle; but the vendee's landlord stopped them as the property of his tenant, and subject to his hypothec. The vendor offered the £10 to the landlord, but it was refused, and he brought his action for recovery of his cattle. The Sheriff decided: 'That, by the transaction between M'Cartney and M'Credie, the property of the cattle in question was transferred by the delivery thereof; and that the interest of M'Credie's creditors cannot be affected by a missive of so collusive a nature as that produced and founded on appears to be.' The late Lord Meadowbank, in the Bill Chamber, remitted to the Sheriff, with instructions 'to find that, by the bargain (as established by the letter), the sale of the cattle to M'Credie was not suspended, but only a resolution of the sale stipulated, in the event of the price not being

paid in terms of M'Credie's acceptance; and that as M'Credie became bankrupt before the event happened on which the bargain was to be resolved, the agreement to resolve the bargain cannot afford the vendor any claim to the *ipsa corpora* of the cattle in competition with the other creditors of M'Credie: so that M'Cartney must be satisfied with ranking for the price of the cattle as originally stipulated, or for damages for non-implementation if he conceive these to exceed the said price.' The Court altered this judgment, and 'found M'Cartney entitled to restitution from M'Credie and his creditors of the cattle in question, upon payment of the £10 of grass-mail, or payment of the contents of the bill granted for the price of the cattle.' There was much difference of opinion on the bench. It was very strongly urged by some of the judges that this was a condition not suspensive of the transference, but merely dissolving a vested right; that in moveables no such conditional bargain as this can be effectual, and that the false credit to which they give birth forms a complete bar to their having effect against creditors or purchasers. The prevailing opinion was, that the condition was of a suspensive nature; that the property never was vested; that the condition not being illegal, it must have effect, since there was no fraud on either part, nor design of either bestowing an undue preference or raising a false credit. 26 Nov. 1799, Sess. Papers *penes me*; M. App. Sale, No. 1. [See *Cowan v Spence*, 21 May 1824; *Wight v Forman*, 1828, 7 S. 175.]

³ A case of this kind occurred in which the goods had not reached the buyer; but if they had got into his possession, the result would have been the same. *Brodie v Tod & Co.*, 20 May 1814, 17 Fac. Coll. 609. This was a purchase of clover, said to be paid for by a bill payable in London at three months. In transmitting the bill of lading, the vendors sent the stipulated draft payable in London, adding, 'which please return in course.' Not receiving the draft accepted in due course, the vendors relanded the goods. The Court held the sale conditional. [It is impossible to conceive how, after a completed sale containing nothing about 'a bill in course,' the sellers could effectually adject to the contract a new condition of that nature. On examining the Faculty Report attentively, it will appear that this was rather a case where there never was a concluded bargain at all. Arnott seems to have ordered seed; Tod & Co. proceeded to execute the order; but in their letter in reply to the order, indicated that they would execute it only on this condition, which not being complied with, they desisted from executing the order. On any other ground the decision cannot be maintained.]

See, however, the reasoning of the English courts as to the construction of a similar stipulation in *Wilmshurst v Booker*, 7 M. and G. 882, and *Key v Cotesworth*, 22 L. J. Ex. 4. No

Difficulties sometimes arise in the construction of the conditions thus annexed to sales, as to the description of the security to be given by the buyer; but these are points which will be more properly considered in treating of sale as a contract. See below, Book III.

2. DISSOLVING CONDITIONS in a sale have an effect very different from that of conditions suspensive.

It is settled as law in Scotland, that an express paction, made by the seller when delivering the property, that the property shall be reinstated in him if the price be not paid against an appointed day, is quite ineffectual against the buyer's creditors. This is the *Pactum Legis Commissoriæ* of the Roman law, which had not the effect of making the sale conditional, but of making it conditionally dissoluble. Mr. Erskine, in treating of conditions incidental to the contract of sale, lays it down that the *Pactum Legis Commissoriæ*, though it has no effect in suspending the transference of the thing sold, yet has this effect, that 'if the buyer fail to pay the price within the time limited, the sale resolves, and the property returns from him to the seller.'¹ But this doctrine is too loosely expressed, and is not to be understood as applicable to cases where third parties are concerned. Accordingly, we find that this doctrine is diametrically opposite to that which is delivered by Lord Stair.² Lord Stair draws that distinction which is of chief importance in practice, and to which the [240] present discussion requires particular attention. The question he proposes for discussion is this: 'Whether a clause, irritant or resolute, in a sale ("that if such a condition were or were not, in that case the bargain should be null and void, as if it had never been made or granted"), be a personal obligation only, which, though it may annul the property or bargain if it remain in the hands of the contractor (buyer), cannot reach it if it be in the hands of a third party?' His general doctrine is, that 'when the buyer once becomes proprietor, the condition that he shall cease to be proprietor in a certain case is but personal; for property or dominion passes not by conditions or provisions, but by tradition, and the other ways prescribed by law.' And taking this as the general doctrine, unless where common law or statute have otherwise established (as in the alienation of feudal rights without consent of the superior, the not-payment of feu-duty, etc.), he next lays down that such conditions have not the effect of a real burden, even when mentioned in the body of the contract, and where, of course, the condition appears openly; that they have no effect against creditors using diligence, for they know nothing of the nature of the right; nor against creditors taking voluntary conveyances *ex necessitate*, having no other probable way of payment; nor even against voluntary acquirers, who, if they see the condition, are entitled to consider it as a *jus ad rem*, not a *jus in re*. There may, indeed, be fraud in such voluntary acquisition,

precise words are requisite to constitute a condition precedent, and no formal words will do so if it is obvious from the whole instrument, or from the subject-matter to which it relates, that this was not the understanding or intention of the parties. It is to be collected in each case from the terms of the entire deed or the necessities of the transaction, and the reason and sense of the whole affair. See Tindal, C. J., in *Glaholm v Hays*, 2 M. and G. 266; Ellenborough, C. J., in *Ritchie v Atkinson*, 10 East 295; Parsons, Contr. vol. ii. pp. 526-9.]

¹ Ersk. iii. 3. 11.

² In contrasting the authority of these great lawyers, it may be observed that they wrote in a very different spirit, and with their minds turned to different objects. Mr. Erskine composed his Institute as a course of academical instruction, following out the several divisions and train of his course with admirable perspicuity, but without having his attention turned to the shock of principles which in actual practice, and especially in the keenly contested competitions that bankruptcy produces, brings out the true principle. And this respectable

author often follows in the train of the Roman jurisprudence; and delivers almost a translation of a Roman rescript as the law of Scotland, without distinguishing the difference of manners and change of principle which materially affect the law, or the qualifications it receives in the opposition of contending rights.

Lord Stair composed his Institutions in a very different spirit: he had practised at the bar for nearly twenty years with eminent success; he had sat as a Senator of the College of Justice for nine years, and for eleven years more he had been President of the Court; and thus, with his mind continually turned to practice, and the application of legal rules and principles in the business of life, he had, as he himself tells us, 'followed the study and practice of the law constantly and diligently for nearly forty years.' The effects of this course of study are manifest in his book. He seeks with a liberal and learned spirit for the principle of all his doctrines; but he is in general careful to submit them to the test of practice, and to examine rights and obligations with reference to their effects on purchasers and creditors.

which may expose the acquirer to a claim of damages ; but even that claim is merely personal, and will not pass with the property.¹

There appears to be no decision of the Court of Session tending to support the *Pactum Legis Commissoriæ*, as bestowing on sellers a right to restitution of moveables against creditors, where the transference was completed in the person of the buyer.²

SUBSECTION II.—OF RESTITUTION ON ACCOUNT OF FRAUD IN THE CONTRACT OF SALE.

‘Nunquam nuda traditio transfert dominium,’ says Paulus, ‘sed ita, si venditio aut aliqua justa causa præcesserit, propter quam traditio sequeretur.’³ On the foundation of this great principle rest several important exceptions to the effect of delivery in passing property.

Although, lawful consent and actual delivery once concurring, the real right to [241] the subject sold is vested in the purchaser, and the seller has no privilege of restitution as a resource against the bankruptcy of the buyer, yet where the consent is only apparent, there is no effectual transference ; but the seller is entitled to restitution against the creditors of the buyer. Restitution will therefore be given, not only against the buyer, but even against purchasers from him, where the seller is incapable of full and legal consent ; or where the sale has proceeded from such fear and compulsion as in law annuls and makes it void. Where the sale has been induced by fraud, the seller is to be considered as having given his consent ; but in consequence of the deceit, that consent is held to be revocable to the effect of grounding an action for reduction and restitution, which, though not available against purchasers *bona fide*,⁴ is good against the buyer and his general creditors.⁵

¹ Stair i. 14. 5.

² In the sale of lands there are two cases of which it is proper to take notice. In a competition between the Crs. of Jap and David Baird, the judgment seems to imply (and that is all the length to which I carry it) that, if the conveyance had been delivered, the purchaser's right would have been held complete, notwithstanding a private paction. Baird sold a house to Jap, and gave him possession, but retained the conveyance and title-deeds, delivering nothing but an inventory. A letter was written by Baird, binding himself to deliver up the titles on receiving the price. Jap failed, and his creditors claimed the house ; but the Court found ‘that Baird, in respect he never delivered the disposition, is entitled to the house or to the price.’ *Baird v Jap*, 1758, M. 14156.

In the case of *Young v Dun*, 1785, M. 14191, a house having been sold for £2500, it was conditioned that the price should be paid at the next term, or that the sale should be void, and the buyer as tenant should pay a rent of £225. The buyer did not pay, and the seller proceeded without further notice to sell the house to another, and then brought an action of removing, in which he was found entitled to succeed. But here, 1. There was no third party concerned. 2. The property was not transferred, for sasine had not been taken, and the possession of the house might be ascribed to the contract of lease included in the bargain.

³ Dig. lib. 41, tit. 1, l. 31.

⁴ *Elliot v Wilson*, 1826, 4 S. 429, N. E. 435.

⁵ In England, it is a doctrine of equity that the property which passes at law on the footing of the contract is restored in equity on proof of fraud. And although strictly it is in equity only that this remedy is to be obtained, yet, as it is available against creditors as well as against the bankrupt

himself, the English courts of law have more recently come to regard it as consistent with the sound administration of the law to avoid wasting the bankrupt's funds by adjudging to the assignees, as vested in them by law, what it only requires a bill in equity to force them to refund. *Scott v Surman*, Willis 402 ; *Gladstone v Hadwen*, 1 Maule and Selw. 517. [*Campbell, Robertson, & Co. v Shepherd*, 8 Nov. 1776, 2 Pat. 399. See Add. Contr. 6th ed. 825.]

To protect a *bona fide* purchaser from one who obtains goods by fraud, there must have been on the part of the original owner a consent to sell—not merely to yield up possession on some *causa* not capable, even when followed by delivery, of passing the property. And there must have been a consent to sell to the *fraudulent person* from whom the *bona fide* purchaser acquires. If the fraud is only successful in inducing the owner to part with the goods without any intention of selling them at all ; or if it only creates in his mind, as the inductive cause of the transaction, a belief that he is selling them to some other person, or any other error in *substantialibus*, the effect of which is to render the transaction simply a nullity : in neither case will the *bona fide* purchaser be able to resist the original owner's *rei vindicatio*. In the one case, though there is consent, it is not consent to transfer property ; in the other there is no *consensus in idem placitum* between the parties : in neither case, therefore, is there a *habile titulus transferendi domini*, or sufficient *causa* to enable the tradition to carry the property to the fraudulent person so as to enable him in turn to transfer it to the *bona fide* purchaser. See *Kingsford v Merry*, 26 L. J. Ex. 83 ; *Higgons v Burton*, 26 L. J. Ex. 342 ; *Hardman v Booth*, 32 L. J. Ex. 105 ; *Pease v Gloaher*, L. R. 1 P. C. 220, 3 Moore N. S. 566 ; *Oakes v Turquand*, L. R. 2 H. L. Ca. 325 ; *Stevenson v Newnham*, 22 L. J. C. P. 110.]

In the further prosecution of this subject, I shall confine myself to the question relative to that species of fraud which consists in the concealment of bankruptcy.

Wherever a transference has been brought about by fraud, such as utterly to subvert the contract, and destroy the original consent to transfer, the objection will be available not only against the buyer himself, but also against his creditors, entitling the seller to restitution of his property. But here it is necessary to recur to a distinction already taken notice of between the law of this country and the Roman and foreign laws; a neglect of which might lead to misapplication of authorities, and a neglect of the true principles and doctrine of our own jurisprudence.

In the Roman and Continental law, however fair, regular, and unobjectionable the contract of sale might be, the property was not transferred by the delivery following upon that contract, so as to divest the seller, unless at the time of delivery the seller, by a kind of secondary contract, expressly gave credit for the price, and renounced his hypothec. The consequence of this was, that not only such frauds as undermined the original contract, but such deceptions or concealments as should induce credit at the time of delivery, were sufficient to entitle the seller to restitution, by reinstating him in the full enjoyment of his hypothec for the price. But in the law of Scotland there is no such necessity for special credit being given at the time of delivery, in order to constitute a real right in the buyer; since that law acknowledges no hypothec for the price, requiring to be renounced. The contract of sale, once concluded, is, when accompanied or followed by delivery, an irrevocable transference, leaving to the seller no other ground of restitution than such as will be sufficient to overturn that contract, and annihilate the original consent.

Thus, there is a material difference between the Scottish and Continental laws not only in the *direction* of the challenge on the ground of fraud, the one being pointed to the original contract, the other to the credit given at delivery, but in the *force* and *degree* of the fraud necessary to accomplish the restitution; as much slighter circumstances must be held to undermine the consent to give credit, than would be sufficient to overturn *ab initio* the original bargain.

The civilians define fraud to be ‘*Calliditas, falacia, machinatio, ad circumveniendum, fallendum, decipiendum alterum adhibita.*’¹ But it is not in every case that fraud, machination, [242] or deceit entitles to restitution in sale. The principle already explained requires that the fraud shall have formed the inductive cause of that consent which is the essence of the contract. It must be a deceit practised by the buyer, so as essentially to alter, in the mind of the seller, his conception of the bargain into which he is entering, and to induce and give birth to a consent which would not otherwise have been given. Hence the distinction of fraud into that ‘*quod causam dedit contractui,*’ and that ‘*quod tantum in contractum incidit.*’ Fraud of the former kind annuls the contract; fraud of the latter species gives only an action for restitution or damages.²

¹ Dig. lib. 4, tit. 3, l. 1, sec. 2.

² These two species of fraud are thus distinguished by Voet: ‘*Causam dare contractui dicitur dolus, cum animum contrahendi non habens, ad contrahendum inducitur, nullatenus contracturus si dolus defuisset. Incidere vero in contractum tunc censetur, cum quis sponte quidem contrahit, sed in modo contrahendi, veluti in pretio aut aliter, decipitur.*’ Lib. 4, tit. 3, sec. 3.

[Fraud, even *ubi dedit causam contractui*, does not with us annul the contract; that is, the contract, though induced by fraud, is not *ipso jure* null and void, but only voidable *ab initio* at the instance of the injured party. (See *Addie v Western Bank*, 1867, L. R. 1 H. L. Sc. 145, and the authorities cited there in argument for the Bank; Kerr on Fraud, pp. 7, 8.) Nor is avoidance of the contract the only remedy

competent in such a case. Fraud of this kind gives the defrauded party the *option* of avoiding the contract or bringing an action of damages. (Stair i. 9. 14.) The former remedy, however—avoidance *ab initio*—implies a *restitutio in integrum*, and is lost where that cannot take place (*Addie’s* case, *ut supra*), and it may be barred otherwise; yet even though, from inability to give restitution, or other causes, the party may not be able to rescind the contract, it does not follow that the other remedy of damages is not still competent to him. (See Leake on Contracts, p. 195; Kerr on Fraud, p. 264; Sugden, Vendors and Purchasers, pp. 204 and 211.) The distinction taken by the author between *Dolus dans causam contractui* and *dolus incidens* is stated in precisely the same manner by Pothier, Oblig. No. 31; Duranton, vol. x. liv. 3, sec. 169; Toullier, Droit Civ. 3. 3. 2. 5, art. 90;

Fraud may consist either in misrepresentation or in concealment.

1. Fraud by misrepresentation is the more distinct and definite species, and generally the more capable of proof, whether it consists in express misstatement, or in that silent kind of misrepresentation which is accomplished by means of certain arrangements calculated to deceive.¹

2. Concealment of circumstances may often as strongly deceive a purchaser as the most express misrepresentation. But it is not every concealment which will taint a contract, and give a preference to the seller over the creditors of the purchaser. Where the circumstances left untold are such as the purchaser ought to know, or easily may become acquainted with, and for information regarding which he has no occasion to rely upon the other contracting party, concealment will not be held to injure the contract.² But wherever the circumstances are of a secret nature, or such as a purchaser does not usually or naturally think of inquiring into, or which he can learn only from the seller's information, the concealment is a fraud; and if that concealment have given birth to the contract, it will annul it.

In England, the question in all such cases seems to resolve into this, Whether the goods have been obtained on false pretences? The doctrine, taken in this way, circumscribes the cases in which restitution is to be given on account of fraud within narrow limits, but limits which, after all, are perhaps the most fit for a practical doctrine. It brings the question to a criterion on which a jury can fairly give their verdict, instead of leaving the matter [243] ambiguous and arbitrary.³

Bedarride sur Dol. p. 45. It is familiar to the civilians, but made with a view to other distinctions as to the remedies for fraud which have no place in our law. See Bankt. i. 10. 64-5; Heinecc. Pand. l. 4, t. 3, sec. 481; Brown, Sale, No. 582, and note. *Dolus dans causam contractui* is exactly what the English writers designate *material fraud*, and it is only material fraud that will found either damages at law or a suit for rescission in equity. (Leake, p. 189; Kerr, p. 31, and cases cited by both.) Lord Brougham, in *Attwood v Small*, 6 Cl. & Fin. 395, said: '*Dolus dans causam contractui* is the language of the civil law, not *dolus malus* generally; not the mere fraudulent conduct of one party trying to overreach his adversary; not mere misconduct and falsehood throughout, unless *dedit locum contractui*. . . . The materiality as well as the falsehood or fraud, and the knowledge of the party in making any false statement that it was untrue, must concur in order to give relief in equity (by setting aside the contract), or to give an action of damages at law,—the two remedies being co-extensive, and acting in exactly the same circumstances. . . . The fraud must be that which *dedit locum contractui*. General fraudulent conduct signifies nothing, . . . unless this dishonesty of purpose, this fraud, this intention and design, can be connected with the particular transaction, and not only connected with the particular transaction, but must be made to be the very ground upon which this transaction took place, and must have given rise to the contract.' If material fraud—*dolus dans causam contractui*—be necessary alike to reduction or damages, then what the author says of *incident fraud*, fraud not inducing the contract, fraud not material, giving remedy by damages, though not by reduction, is without foundation. The distinction is not recognised either at law or in equity in England. (Story on Sale, sec. 163; Kerr, p. 31, note; Leake, p. 189.)]

¹ 1. *Christie & Co. v Fairholmes*, 1748, M. 4897. The seller of goods having required the security of a certain individual along with the purchaser, the purchaser sent him a bill signed

by himself, and by another who bore the same name with the man whose security was required. The Court, in a question with the purchaser's creditors arresting the goods on ship-board, found the sellers entitled to restitution of the goods procured by this fraud. See below, Of the Effect of Fraud and Personal Exceptions.

2. *Dunlop v Cruickshanks & Co.*, 1752, M. 4879. Forbes having, as partner in a joint concern with Cruickshanks, commissioned goods from Dunlop, had afterwards occasion for some for himself, and wrote in the plural number, as if still acting for the joint concern. By this device he deceived Dunlop into a belief that the purchase was made by the company; and having failed and absconded, the Court seemed to consider the sale as absolutely null, and preferred Dunlop to the creditors of Forbes arresting the price unpaid, finding 'that the property of the goods was not transferred from, but remained with, the said John Dunlop, and preferred him for the price of the said goods to all the arrestors,' etc.

3. *Love v Kemp's Crs.*, 1786, M. 4948. Goods having been sold to Kemp upon the condition that his father, James Kemp, should become guarantee for the price, Kemp signed, without any authority from his father, a letter of guarantee, with the signature, 'James Kemp & Son, military agents, Leith.' The Court found this fraud sufficient to annul the sale in a question with Kemp's creditors, and ordered restitution to the seller.

² 'Neque enim id est celare quicquid reticeas; sed cum, quod tu scias, id ignorare, emolumenti tui causa, velis eos, quorum intersit id scire.' Cic. de Offic. lib. 3, c. 13.

Of this doctrine some good illustrations may be found in the decisions upon warrandice, representations, etc., in policies of insurance. [The analogy of the contract of insurance is deceptive as to the general question of concealment. See *Kent, Comm. ii. 489, note.*]

³ The two following cases will sufficiently illustrate the English doctrine:—

Gladstone v Hadwen, 1813, 1 Maule and Selw. 517. Sill

In distinguishing the cases of fraud which will entitle to restitution, and particularly looking to fraudulent concealment of insolvency, it, in the first place, is not necessary that a merchant who commissions goods should send a state of his affairs to the person with whom he proposes to deal. His proposal is to be accepted or rejected upon proper inquiries being made into his credit and circumstances, and character as a fair and honourable merchant. If it be accepted, the person who deals with him acts upon his own risk, in expectation of such a profit as may repay him for the interest of his stock, for his labour, and for the risk of the transaction. But if there be any particular circumstances in the situation of him who proposes the transaction, which make it impossible that he can answer for the price, or which plainly indicate a fraudulent design to get hold of the goods without [244] value, the contract will be voidable, and the property unavailable to the creditors, as obtained on fraudulent and false pretences.

There is some difficulty, however, in fixing what circumstances it is necessary for a person in such a situation to disclose.

At first, perhaps, it was natural to hold, that if a man were really insolvent, and especially if from his books it could be made to appear that he was so at the time of

& Watson on 25th November applied to Watson for £5000 in loan on ample security. The security was an order for 250 tierces of coffee (which, however, he had no right to pledge); on which Watson gave Sill bills of exchange for £1860, and a draft on his banker for £2139. Sill sent the bills to his partner to be applied to pay Richardson, Overard, & Co. certain bills due 27th November. On 26th Sill resolved to stop payment, and sent a messenger to prevent the paying away of Watson's bills. All were stopped except one bill for £49, which had been discounted, and from the proceeds of which he delivered back to Watson, along with the bills, two Bank of England notes for £5 each. This restitution was made after, and on the same day with, an act of bankruptcy and a commission being issued. The question in an action by the assignees was, Whether the property had not so passed, that to restore it was a fraudulent preference? and this, again, depended on the validity of the right of Sill & Watson, in the circumstances, to the bills delivered by Watson. Lord Ellenborough, in delivering the opinion of the Court, said: 'The bills were obtained by the bankrupt Sill under a false pretence of giving the defendant Watson an ample security, by delegating to him a right to hold coffee; whereas the coffee, which was the security pretended to be given, was the property of another person over which Sill had no control or lien; or if he had, had already pledged it in favour of another creditor. The bills therefore appear to have been obtained by a criminal fraud. It has been argued, indeed, on behalf of the assignees, that the property vested in them under the commission; and in support of the argument, it is supposed that, by analogy to cases in the criminal law, the property may be considered as having passed from the defendant to Sill & Co.; but if it did, it was under such circumstances as a court of equity, on a bill filed, would have directed the property to be restored. If that be so, we think it would be useless for a court of law to permit that to be recovered which could not be retained one moment.' As to the bank-notes, he added: 'We think that as they were not mixed with the rest of the bankrupt's property, and are capable of being distinctly traced, they stand in the same position as the bills themselves, and cannot be recovered.'

Noble v Adams, 1816, 2 Marsh 336. In this case two

points were raised, viz. stopping *in transitu* and restitution for fraud. Of the former I have already taken notice. The circumstances which led to the latter were, that Noble, dreading insolvency, went to Glasgow to purchase goods in order to enable him to go on and pay his creditors; that he previously wrote to Malcolm, one of his creditors, of his intention, and informed him of the insolvency of Outhwaite & Co., with whom he stood connected. At Glasgow he bought goods from Cross & Co., and paid for them by a bill of Outhwaite & Co., and another of Malcolm, which he presented to Malcolm to sign for his accommodation. The jury found the transaction fraudulent, undertaken knowingly and with intent to deceive Cross & Co. of the goods. The Court of Common Pleas granted a new trial, 'because, without defining exactly what may or may not amount to such a fraud as would render the sale in question absolutely void, we are of opinion that the evidence, as it stands, does not show any conduct on the part of Noble sufficient to convince us that the transaction was void. It was proved that he knew that Outhwaite's bill was worth nothing, and that he considered his own credit in England as nearly gone; that he went to Glasgow, intending to purchase goods there from persons unacquainted with his credit, or with the character of his bills. But by what means he prevailed on Cross & Co. to sell him the goods is not in proof; and unless his representations amounted to the offence of obtaining goods under false pretences, we cannot take upon ourselves to say that the contract was altogether void. Without, therefore, saying what proof the case may be capable of, seeing that there is strong presumption of fraud, we grant the new trial only on the ground that the proof as it stands is not sufficient to fix fraud to that extent on the plaintiff.'

[The criterion of fraud suggested in the text, with reference to claims of restitution after delivery, was approved by the Court in *Morton & Co. v Abercromby*, 1858, 20 D. 362, 369.

On the subject of fraud, both by misrepresentation and concealment, in contracts of sale, see Story on Sale, secs. 158-182; Story on Contracts, sec. 519 et seq.; Benjamin on Sale, pp. 313-377. With regard to the English and American law as to concealment by a purchaser of this state of his affairs—where there has been no active misrepresentation on the subject—see Story, Sale, sec. 176 and notes.]

entering into the contract, it was his bounden duty to disclose this circumstance; and that concealment of it amounted to fraud in the contract. Such, accordingly, was the opinion entertained by our judges in the end of the seventeenth century.¹ But this doctrine is inconsistent with an advanced state of commerce. The most flourishing and successful merchants are exposed to accidental losses, which may for a moment make them insolvent on the face of their books: but they still go on in full credit; and if no other misfortunes overtake them, proceed in the fair road to affluence. If a merchant, whatever might be his prospects or resources, were obliged, the instant that his ledger presented to him the view of insolvency, to relinquish his trade, and call his creditors together, the general trading interest would suffer; but most especially his individual creditors would feel the loss. A merchant's capital is in continual fluctuation; and an interruption to his trade, in consequence of every such threatened danger, would prove a death-blow to all the speculations in which he might have embarked his capital, and his funds would be recalled before the regular profits which were to redeem him from insolvency could return.

It is now settled, accordingly, that the mere appearance of insolvency from the books is not sufficient to infer fraud in the contract of sale;² nor is it enough that a purchaser is struggling even with impending bankruptcy, if there be room for the attempt to retrieve his affairs, and if he be persevering honestly in that attempt.³

¹ In the case of *Prince and Pallet*, they found a plea urged in support of the challenge—viz. that the purchaser was to be presumed insolvent within three months from his public bankruptcy—not relevant, ‘unless it were proven by his oath, or by his books, that his debts exceeded his estate the time he gave the order, which they found would have been relevant to annul the contract of vendition.’ 1680, M. 4932.

² This was fixed in the case of *Cave's Creditors*, where the Court rejected the doctrine assumed hypothetically in *Prince and Pallet's* case. Found it not relevant to reduce any bargain entered ‘into between Joseph Cave and Sir John Inglis, etc., for the purchase of barley in October 1734, that it appears by his books that at the time of the sale he was insolvent, since he continued his trade till the 21st January thereafter, and his bankruptcy was not discovered till that time.’ *Sir John Inglis v The Royal Bank*, 1736, Elchies, Bankrupt, No. 9.

Lord Bankton and Mr. Erskine do not seem sufficiently to have respected this decision; for they both lay it down, that a person purchasing ‘where he knows himself to be insolvent,’ does not acquire the property. And although this be not a doctrine directly in the face of the above decision, it is too loosely expressed after such a decision had been pronounced.

³ The case of *Allan & Stewart v Stein*, 1778, M. 4949, 14218, is very instructive upon this point. In October 1787, Mr. Stein, by whose singular skill, industry, and spirit the Scottish distilleries were pushed to an amazing extent, entered into an agreement with Allan & Stewart, by which, 1. All his grain was to be purchased through the medium of Allan & Stewart; 2. They were to receive a commission of two and a half per cent.; and, 3. Stein was to give bills at seven months. Allan & Stewart under this agreement purchased grain in their own name, taking the bills of lading deliverable ‘to them or their order,’ and these they endorsed to Stein. His bankruptcy took place while several of the cargoes were in the course of delivery, and Allan & Stewart entered into a competition with his creditors for all the grain that was extant. Of the undelivered part they stopped delivery; and of that part which had been delivered on the eve of bankruptcy, they claimed restitution on the ground of fraud. A

condescendence or specification of the circumstances of the alleged fraud was required. But Allan & Stewart failed in their endeavour to distinguish their own case from that of the other creditors. They showed, indeed, that in October 1787, when their contract was entered into, Stein was struggling with bankruptcy; they exposed many of the schemes by which he contrived to support the extensive range of circulation which alone prolonged his existence as a trader; they showed the history of the four months preceding his bankruptcy to have been a series of plans for shunning a bankruptcy, which seemed almost unavoidable. But the creditors at large explained satisfactorily all that at first seemed reprehensible in Mr. Stein's conduct. They showed that, after a most unlooked-for refusal of permits, by which a very large stock of spirits was lost to Mr. Stein, the Scottish distillers met with a formidable opposition from those of London, who, trembling for the consequences of what the Scottish distillers were able to accomplish, at last, as the sole hope of their rivalry, applied to Government for an alteration of the duties on importation. It was during this struggle, on which depended the ruin either of the English or of the Scottish distillers, that Mr. Stein resorted to the resources for supporting his credit so much found fault with; and it was the passing of the law on the 18th February 1788, which involved the ruin of the Scottish distillers, that forced Mr. Stein to stop payment on the 22d. The Court found the facts ‘and allegations stated in the condescendence not relevant to infer fraud, so as to entitle Messrs. Allan & Stewart to restitution of the grain delivered by them more than three days prior to the bankruptcy of James Stein.’

In deciding the case, the judges proceeded on the following grounds:—That in a case of this kind, where all are sufferers, and by the same means, something very precise must be made out to distinguish any particular creditor from another, and to entitle him to plead for a preference: that if distinct proof of fraud should be shown applicable to a particular bargain, it will annul it, and entitle the seller to restitution; but that in this case there was no such thing: that in October, when this contract began, though Stein's affairs were in disorder,

[245] But from the moment the final resolution is taken to abandon everything, *cedere foro*, the bankrupt acts fraudulently in entering into contracts. It is very difficult, however, to select circumstances which may be sufficient to establish this resolution.

1. The most obvious is, Contiguity in time to the public bankruptcy; and it is with regard to this point chiefly that the peculiarity of the civil and continental laws, already hinted at, had influence.

It was established in the continental jurisprudence as a legal presumption of fraudulent concealment of bankruptcy, that the buyer had failed within a few days after receiving the goods.¹

It does not appear that this rule was ever admitted without qualification into the law of Scotland; but when first pleaded in this country, the Court of Session so far gave their sanction to the doctrine, as to hold contiguity of public bankruptcy a circumstance of very powerful effect, taken in conjunction with insolvency and other indications, to establish a case of fraud. When the question first occurred, the Court ordered restitution of all grain delivered within three days of the public bankruptcy.² The *cessio fori* within three days was [246] not, however, taken as irrefragable evidence of fraud. The true spirit of the decision seems rather to be, that, conjoined with prior insolvency, this was to be considered as a circumstance almost decisive of a fraudulent purpose. Neither was the above presumption admitted, as of itself sufficient, in the next case that occurred; for there the contiguity of the bankruptcy was combined with several strong indications of fraud.³ The question did

they were not desperate; he had not at that time any intention of stopping payment; he tried, indeed, every possible resource which an active and enterprising mind could suggest for avoiding bankruptcy; but he flattered himself with hopes of success, not altogether without reason, since amidst all his difficulties he still went on till the 23d of February, when the passing of the Act for an additional duty on Scottish spirits gave him the *coup de grâce*, as he himself called it: that it were of the worst consequence in a commercial country, if all a man's acts were to be annulled from the moment of his insolvency;—he may struggle long, he may retrieve his affairs, or he may fail at last; but to annul all bargains which, from an investigation of books, etc., shall be found to have been made after what may appear even irretrievable insolvency, would put an end to commerce, and is a rule quite unfit for a trading nation.

When the cause came to the House of Lords, the judgment of the Court of Session, finding Allan & Stewart not entitled to restitution on the footing of Stein's having obtained the grain from them by fraud, was fully approved of. Lord Thurlow declared 'that there were no circumstances condescended on which inferred fraud; on the contrary, it seemed to be made out that Stein had no intention of stopping, or giving up his trade, till 23d February 1788; and consequently till then he had a right to make contracts, or to receive goods delivered in performance of contracts previously made, just as any merchant or dealer would do in the usual course of trade.' The interlocutor of the Court of Session on this point was therefore affirmed.

¹ Straccha, Tract. de Decoctoribus, p. 3, n. 31; Carpzovius, Jurisprud. foren. Rom. Saxon. p. 257, Dec. 18; Van Leewin, Censura Forens. lib. 4, c. 19, n. 20; Rodriguez, De Privileg. Cred. art. 7, No. 67, 76; Voet, lib. 6, tit. 1, sec. 14.

² Inglis v The Royal Bank, 1736, M. 4936. In October 1734, Joseph Cave agreed with Sir John Inglis and others to purchase barley, which was accordingly delivered to him by

parcels in November, December, and the beginning of January. Cave became bankrupt, and conveyed his effects to trustees for his creditors, 21st January 1735, and a claim was made by the sellers for restitution. Their plea was at first rested upon the insolvency of Cave; but this (see above, p. 265, note 2) was rejected by the Court. Then they pleaded a presumptive fraud, and argued, 1. That the date of delivery was alone to be considered in judging whether the transference to Cave was attained by fraud; and, 2. That upon the analogy of the Act 1696, c. 5, the debtor must be presumed to have determined on bankruptcy sixty days before it was declared. These pleas were opposed by the creditors, who, with regard to the presumptive fraud, seem to have been anxious only to prevent so long a period as sixty days from being taken as the presumptive term; and they founded on Van Leewin's authority, contending that the presumption could be carried no further back than three days. The Court admitted the presumptive term of three days, and ordered restitution of whatever grain was delivered within that time.

³ Crawford Newall v Mitchell, 1765, M. 4944. In that case, Mitchell having on the 17th May bought some cattle and given his bill for the price, was on the 18th proceeding with them towards England, when he was overtaken by two of his creditors, who pointed the cattle; and a question arose between them and Crawford Newall the seller, who alleged fraud in the purchase. The case is contained in the judgment of the Lord Ordinary, who found, 'that as Mitchell was not denied to have been insolvent at the date of the sale, and that he fled the country the day after the purchase of the cattle, and that it appeared from a letter dated 19th May (the second day after the purchase) that he had intimated a meeting of his creditors and acknowledged his bankruptcy, the bargain was to be held fraudulent, and the property of the cattle untransferred to Mitchell, so as to be attached by his creditors in prejudice of the seller.' To this judgment the Court adhered.

not again occur till 1788, when it formed a point in the case of Allan & Stewart against the Creditors of Stein;¹ and in the course of deciding that case, the whole doctrine of presumptive fraud *intra triduum* was overturned, as already explained in treating of the doctrine of stopping *in transitu*.

2. Although the declaration of bankruptcy within three days be thus rejected as grounding a *presumptio juris et de jure* of fraud, yet if any particular dealing shall be immediately followed by bankruptcy, it is a circumstance which, taken with others, will have considerable weight. Wherever the dealings of the bankrupt appear to have for their object, not his fair restoration to solvency, but the preference of some favourite creditors at the expense of a stranger; or the bankrupt's own emolument; or the advancement of some secret and selfish scheme which is not for the general behoof; these circumstances, [247] joined with insolvency, and quickly followed by bankruptcy, have been held to indicate fraud sufficient to annul the bargain.²

3. If, instead of being merely insolvent, and still finding it possible, with fair hopes of success, to continue the struggle, the buyer, when actually bankrupt, shall, without disclosing his condition, enter into a bargain, he is guilty of a fraud which will entitle the seller to restitution.³

¹ *Allan & Stewart v Stein's Crs.*, 1788, M. 4949, 14218. See above, p. 265, note 3. As to the grain delivered within three days of Stein's bankruptcy, the sellers contended that they were entitled to restitution, because by the law of Scotland the supervening bankruptcy inferred fraud in all dealings within three days prior to the actual declaration of bankruptcy, and because this was a *presumptio juris et de jure* which could not be repelled by contrary evidence. To this argument the Court of Session gave their sanction, conceiving themselves to be bound by former decisions. The judgment in the case of Cave's creditors was chiefly relied on by the judges, and that of Crawford Newall as a strong confirmation of it. It was held that, by the former of the cases above taken notice of, a rule was laid down absolutely, which had for half a century been considered as inviolable, and which it would be extremely dangerous again to throw loose. The Court therefore ordered restitution of the grain delivered within three days from the 23d February 1788, when Stein stopped payment.

When the cause came into the House of Lords a very different view was taken. Lord Chancellor Thurlow declared that, after attentively examining the adjudged cases relied on in support of the judgment of the Court of Session, he could not perceive that the Court had ever proceeded on that positive rule which the sellers had contended to be now fixed law. It rather was his opinion, from the examination of those cases, that the Court had considered the failure within three days as one circumstance only from which fraud might be presumed, but not as that from which singly fraud was to be absolutely inferred, though other circumstances might show there was none. In the present case, his Lordship observed, there was not a single circumstance condescended upon which applied more to the three days immediately preceding the bankruptcy than to an earlier period; and he concluded upon this point with declaring, that the buyer's failing within the three days after the transaction, or after the receipt of the goods, was not *per se* sufficient to void the contract, and that such a rule would be inexpedient and unjust. The judgment of the Court of Session on this point was therefore reversed. *Jeffrey v Allan, Stewart, & Co.*, 23 Dec. 1790, 3 Pat. 191.

² Thus, in the case of *Sandeman & Co. v Kemp's Crs.*, 1786, M. 4947, there can be no doubt of the intention to defraud, and yet there was no bankruptcy for forty-nine days after the sale. His insolvency was beyond hope in September 1785, and in this situation Kemp entered secretly into partnership with two notorious insolvents. He then from every quarter commissioned goods fit for a foreign market, and in particular a quantity of linens from Sandeman & Co., for which he said he would pay on delivery. To prevent an attachment of those goods, he executed a mock sale upon their arrival to his own clerk, who granted bills for the value. After this he conveyed the goods secretly to different towns on the Frith of Forth, and had a ship prepared to convey them abroad. No trace of all this appeared in his books. A sequestration was applied for, and the goods recovered by the factor under the sequestration. Sandeman & Co. petitioned the Court for restitution of their goods; and the Lords unanimously found 'that the sale of the goods in question, by the petitioners to Gavin Kemp, was brought about by fraud on the part of Gavin Kemp,' and found the same therefore void and null, and that the petitioners were entitled to restitution of their goods.

³ Thus, in the case of *Forbes v Main & Co.*, 1752, M. 4938, it was found that a person who had obtained a *cessio bonorum*, concealing that circumstance, and commissioning goods from a foreign merchant with all the confidence of a dealer of credit, was guilty of a fraudulent concealment sufficient to annul the bargain, or at least to give the foreign merchant a preference for the price.

This was a very strong case; for, 1. The *cessio bonorum* had been obtained no less than two years before the goods were commissioned; and, 2. The bankrupt had twice during this interval commissioned wines, which had faithfully been paid for. The grounds upon which the Court proceeded are reported by Lord Kilkerran: 'They considered the bankrupt's concealing his circumstances,' says his Lordship, 'to be fraud, especially when dealing with a merchant in a distant country; and it was further said not to be a clear point, that even a dealer in this country at a distance would be presumed to know that the person with whom he contracted had obtained

4. If, in addition to insolvency, the buyer shall have been imprisoned and bankrupt, according to the definition of the Act 1696, c. 5, he is guilty of fraud if he enter into a contract without disclosing his situation.¹ But bankruptcy in this sense is frequently considered only as insolvency, which does not close a trader's dealings; and although, correctly speaking, the effect of the bankruptcy cannot be extinguished otherwise than by restoration to solvency, or by a discharge from his creditors, either voluntary or under the sequestration statutes, enabling him to commence a new course of trade and raise a new credit, yet the Court has sustained a sale, though there was no such restoration from a state of insolvency.²

[248] 5. If the contract have been fairly entered into, the buyer being then in full credit and solvency, and bankruptcy or insolvency have taken place only before delivery, it does not appear that by the law of Scotland the delivery is ineffectual, or the transference voidable. Yet Lord President Blair took occasion in one case³ to say, that if a bankrupt were to take delivery of goods which he had bought as a solvent man, this would be a fraud which would entitle the seller to redress; and that although the doctrine of presumptive fraud *intra triduum* is now abandoned, the law remains unaltered in the case of actual fraud. In this question, the distinction formerly hinted at ought not to be lost sight of, wherever an attempt is made to argue from the authority of civilians or foreign writers. The attention of foreign lawyers is confined to the question of credit; and every circumstance which can influence the credit, as at the moment of delivery, is essential, and every concealment or fraud which touches it a ground of restitution. But with us the consent on which the efficacy of the contract rests is already passed, and the tradition is referred to that preceding consent, uninfluenced by intermediate circumstances. If, in the language of the English law, the goods have not been obtained on false pretences; and if, in the language more familiar to us, there is no *dolus dans causam contractui*, the contract will stand, and the property be transferred by it. The intermediate circumstances are in the nature of misfortunes, which equally attach to all the creditors; and the seller of goods, whose contract is completed, though the transference is not perfect, is a creditor entitled no doubt to stop *in transitu*, but not to restitution.⁴

a *cessio*; for that no man alive, in the knowledge that a person had got a *cessio bonorum*, would deal with him without taking care to be paid upon delivery.'

¹ In the case of *Robertson's Crs. v Udnies & Patullo*, 1757, M. 4941, the buyer was bankrupt by insolvency, diligence, and absconding, and there were, besides, other circumstances grossly fraudulent. Thus, at the time the commission was given, Robertson was at Hull—he dated his letters falsely at London; he went to London to accept the bills, and having got the goods into his hands, sent them off for Scotland to his son-in-law, in whose hands diligence was used. The Court preferred the seller to the buyer's creditors doing diligence in the hands of the son-in-law.

² *Gordon v Gardner*, 1784, M. 4946. Dalzel, who had been under ultimate diligence, and was forced to retire to the sanctuary of Holyrood House, bought about a year afterwards two copper stills of considerable value from Gordon, and in three months after he was imprisoned on the old diligence, and was unable to pay the price. Gordon sought to annul the transaction on the ground of fraud, and was opposed by Dalzel's creditors. The Court found, 'that the circumstances of the case did not establish a deception or a fraud

sufficient to set aside the sale.' But it will be observed that in this case the parties appear to have lived in the same place, so that the case might be supposed to come under the exception indicated in the case of *Main & Co.* above, p. 267, note 3.

³ *Steins v Hutchison*, 16 Nov. 1810, F. C.

⁴ In the case of *Cave's Crs.*, it was questioned (upon the assumption that concealment of impending bankruptcy amounted to fraud sufficient to annul a sale) whether it was necessary that the fraudulent concealment should have taken place at the date of the contract, or whether it was not enough that it occurred at the time of delivery. The Court found it sufficient, though it attached merely to the delivery. *Sir John Inglis v Royal Bank*, 1736, M. 4937.

In the subsequent case of *Allan & Stewart v the Crs. of Stein*, this doctrine was questioned both at the bar and on the bench, and an opinion delivered by some of the judges that both the taking of delivery and the contract itself must be chargeable with fraud. There was no occasion, however, to decide the point either here or in the House of Lords. [See 3 Pat. 191. See also Lord Mackenzie's opinion in *Watt v Findlay*, 1846, 8 D. 532.]

SECTION IV.

OF REPUTED OWNERSHIP OF MOVEABLES, AS RAISING A RESPONSIBILITY FOR THE DEBTS OF THE POSSESSOR.

We have been employed in the preceding sections in discussing the various questions which may arise relative to the completion of the transference of moveables, and are now to consider a subject of some importance, where, in consequence of such possession as may raise the credit of ownership, goods and effects are held responsible for the debts of those in whose hands they are found. The numerous class of questions of great nicety which fall under this branch of inquiry will at once be suggested to any one who considers, on the one hand, that possession is the badge of property in moveables; and, on the other, the many occasions on which the necessities of human affairs require that the fact of possession shall be separated from the right of property.

I propose, *first*, to consider the cases of collusive possession and reputed ownership which, raising a credit to the possessor, entitle his creditors to attach the goods in their debtor's hands, as if they were his own; and *secondly*, to point out the cases in which, [249] for lawful purposes, the possession and the right being necessarily separated, no such effect is produced.

ARTICLE I.—OF REPUTED OWNERSHIP.

While it is often necessary that the possession of moveables should be held by persons who have not the property, personal credit must in a great degree depend on the appearance of wealth which a trader is thus enabled to assume. And as, in general, possession of moveables presumes property, and the true owner ought to be aware that while the power of disposing of his goods remains uncontrolled, or ostensibly so, in another, it may raise a false credit to that other, as if he were proprietor of the effects; so every apparent ownership of moveables, which is either fraudulent, or at least careless or collusive, as not being necessary in the course of honest contracts, should entitle the creditors of the holder to take the subject, as if it actually were his property.¹ This rule is admitted both in England and in Scotland, but upon different footings and to a different extent. In England it is the mere creature of statute; in Scotland it is a rule of the common law grounded on the principles of equity.

In England the rule of the common law is, that the proprietor may, wherever he can find his property, recover it. This formerly was accomplished by the action of Detinue, now by the action of Trover and Conversion, which has succeeded in its place;² but a statute was made with a view to bankruptcy, for subjecting to the creditors, as a fund of payment, all goods and chattels which, by consent of the true owners, a bankrupt is allowed

¹ [The operation of this principle, however, is somewhat modified by the 1st section of the Mercantile Law Amendment Act, 19 & 20 Vict. c. 60.]

² Detinue was an action for the specific recovery of goods and chattels, or damages for the detainer; but as it was an action competent against bailees, borrowers, etc., it was in the old law thought not unfit that the plaintiff, who had at first trusted to the good faith of the defendant for the restoring of his property, should in the action be held to trust to his oath, and therefore the defendant was allowed the privi-

lege of waging his law, or swearing with compurgators in his own favour.

The inconvenience and injustice of this could not fail, with the increase of commerce, to be felt; and therefore a remedy of the nature of an action on the case, called an action of Trover and Conversion, was introduced, proceeding on the ground of the defendant having, by finding, etc., come into possession of the plaintiff's goods and converted them to his own use, and demanding specific delivery or damages. In this action the defendant has no privilege of waging his law.

so to possess as to appear owner of them.¹ This law has been held in the courts of England to be 'a wise regulation, passed at a time when the commercial interests of the country were extremely well understood, and in a reign where as many wise provisions were made for regulating both the external and internal trade of the country, as 'were ever made in [250] any equal number of years.'² But for more than a century after it passed, this statute does not appear to have been in observance. And since it has been revived in English practice, the terms of it were held dark and ambiguous, from the section which was meant as mere recital (but which by misprint was made a separate section) being more narrow than the enacting part; so that for a long time it was supposed that the Act applied only to property which *had once been* in the bankrupt, and was *left* in his order and disposition. In the course of a very long train of decisions, the system of its policy as applicable to trade was evolved, and settled to be, that while the bankrupt statutes are intended to place all those creditors who have equally trusted to the *personal* credit of the bankrupt on the same footing, this statute regards collusive possession held by a bankrupt without necessity to be equivalent to a consent on the part of the real proprietor to be considered as a mere personal creditor on account of that property which, according to the ordinary disposition of the law, he should on any other footing have had in his own possession as proprietor; and this construction has proceeded partly as a penalty on the owner of the property, and partly as construing his conduct to be a declaration of his personal trust in the bankrupt.³ This statute has been re-enacted in the words of the 11th section (but without the words of recital in the 11th), as the 72d section of the new Bankrupt Act of England.⁴

The effect produced in England by the statute of James I. is in Scotland accomplished by the operation of the common law; and the rule may be stated in this proposition, That where one is unnecessarily, or by the collusion or gross negligence of the true owner, permitted to give himself an appearance to the world, as if he were proprietor of goods and wares not belonging to himself, and this by exercising acts of ownership, and by holding a possession seemingly uncontrolled, his creditors will be entitled to proceed against the goods as if they really belonged to him.⁵

1. In order to make property liable for the debts of the possessor, not being the true proprietor, the possession should be accompanied by that uncontrolled power and disposal of it which belongs to an owner. In England it has this effect by the statute; in Scotland, such possession will have the same effect, independently of the aid of statute on the one

¹ This is the statute 21 James I. c. 19. After a preamble, sec. 10, 'That it often falls out that many persons, before they become bankrupts, do convey their goods to other men upon good consideration, yet still do keep the same and are reputed the owners thereof, and dispose the same as their own;' the statute proceeds in the 11th section to provide, that 'if any person shall become bankrupt, and at such time as they shall so become bankrupt shall by the consent and permission of the true owner and proprietor have in their possession, order, and disposition, any goods or chattels whereof they shall be reputed owners, and take upon them the sale, alteration, or disposition as owners, that in every such case the said commissioners, or the greater part of them, shall have power to sell and dispose of the same to and for the benefit of the creditors which shall seek relief by the said commission, as fully as any other part of the estate of the bankrupt.'

This last section now is re-enacted in the late consolidating Act of Bankruptcy in England.

[See the corresponding provisions of the more recent statute, 12 & 13 Vict. c. 106, sec. 125. Smith, Merc. Law, 7th ed. 696 et seq.; Addison on Torts, 335-347, 3d ed.]

² Lord Kenyon in *Gordon v The East India Company*, 7 Term. Rep. 234.

³ This law is largely discussed and laid down by Lord Hardwicke, Lord Chief Baron Parker, and Mr. Justice Burnet, in *Ryal v Rolfe*, 1 Atk. 165, 185. See Cullen's Principles of the Bankrupt Law, where the general view of the statute is very concisely given, p. 286 et seq.; Holt's Nisi Prius Cases 559, note.

⁴ 6 Geo. IV. c. 16, sec. 72; Eden on the Bankrupt Law, 256.

⁵ [The above definition was adopted in *Anderson v Buchanan*, 1848, 11 D. 281-3, by Lord Moncreiff, whose observations deserve to be carefully noted, as insisting strongly on the elements of fraud and collusion as essential to reputed ownership,—a point which, though clearly enough stated by Mr. Bell in this passage, he seems to have rather overlooked elsewhere. See *post*, p. 485. The first section of the Mercantile Law Act has been thought to interfere with the doctrine; but having regard to the distinction taken in *Sim v Grant* between simple custody and possession with the power of using the goods, Lord Moncreiff's definition still holds good. See the case, 1862, 24 D. 1033; also *Edmond v Mowat*, 1868, 7 Macph. 59.]

hand, or of any supposed vestige of property (as in cases of sale *retenta possessione*) on the other.¹

2. But while the law protects creditors from being deceived by such false grounds of credit as may be produced by collusive arrangements, they must so far protect themselves as to avoid giving credit too easily. They must be aware of the many honest occasions of possession independently of property which the varied business and connections of life require, and must distinguish such temporary possession as may arise in the fair course of a legal contract, from that which naturally indicates property: they must take care also to make allowance for the possibility of the true proprietor being abused and defrauded in the use to which his property is applied: and they must satisfy themselves that the circumstances are such as to entitle them to charge him with blameable carelessness or collusion, or simulation in the bankrupt's unfair attempt; or to regard him as holding himself out as a personal creditor, and abandoning his right as proprietor.

Thus the possession must be unequivocal to justify credit; it must imply a full [251] power of disposal; and it must be such as actually to raise a reputation of ownership. If, therefore, in point of fact, the goods are notoriously not the property of the possessor, the rule of reputed ownership derived from possession will not make them available to creditors. The *presumption* is in such case refuted by the *fact*.² In cases, for example, where a public sale by auction has taken place under a landlord's sequestration, and the price has been paid or secured by bills of the purchasers with cautioners, the possession being still with the tenant, from the difficulty of removal, as growing crop, etc., will not give to creditors the privilege of attaching the property as their debtor's.

1. The doctrine of reputed ownership from possession properly applies to moveables only, not to land or other heritable estate.³ So far as here discussed, it rests on the presumption of property in moveables arising from possession, and continued or conferred without due regard to the right of creditors. In England it is by the statute limited to 'goods and chattels;' but this, though not extending to any interest in lands or houses, includes more than moveables: it comprehends stock, bills of exchange, choses in action, policies of insurance, and similar rights.⁴

2. By the law of England, if the possession be left with the vendor, it does not prevent the property from passing at law by the mere contract; but it is sufficient under the statute to raise a reputed ownership, of which the vendor's creditors may avail themselves. And the only exception admitted to this, is in the case where, by express agreement, the possession is to continue with the vendor, in circumstances which by usage gives implied notice to persons dealing with the vendor, of the possibility of the goods being the property of another.⁵ In Scotland, the law is so far different, that no circumstances appear to be sufficient to pass the property at law, while the possession continues

¹ See below.

² *Gurr v Rutton*, Holt's Nisi Prius Cases 327. Gibbs, C. J., permitted evidence of *contrary reputation*. He said: 'Reputation of ownership is made up of the opinions of a man's neighbours; it is a number of voices concurring upon one or two facts. Are we to count the voices on one side and not on the other?'

Muller v Moss, 1813, 1 Maule and Selw. 335. See below, p. 274, note. [So possession of furniture by a liferenter is not relevant to infer reputed ownership. *Scott v Price*, 1837, 15 S. 916. But where a widow had right to furniture under a bequest by her husband, it was held liable to be attached for the debt of a second husband, although by a post-nuptial contract he had renounced his *jus mariti*. *Shearer v Christie*, 1842, 5 D. 132. See *Campbell v Stewart*, 1848, 10 D. 1280; *Ross v Fleming*, 1850, 13 D. 373. See *contra* in England,

Simmons v Edwards, 16 M. and W. 838; *Jarman v Woolton*, 3 T. R. 618; *Martin ex parte*, 19 Vesey 493.]

³ A very important class of cases will be discussed hereafter, where a similar principle applied to heritable rights and rights incorporeal has sometimes raised questions of great interest to creditors and purchasers. See below, Of the Effect of Fraud and Personal Exceptions, Book ii., concl. [As to the case of a latent assignation of a lease, with machinery, etc., see *Benton v Craig*, 1864, 2 Macph. 1365; *Union Bank v Mackenzie*, 1865, 3 Macph. 765. The First Division of the Court of Session appear to have thought it could apply to heritable estate in *Abbott v Mitchell*, May 1870.]

⁴ See Eden on Bankrupt Law, p. 258.

⁵ See above, p. 190. See below, p. 273, *Horn v Baker*, note, *id. pag.*

In *Thackthwaite v Cook*, 1811, *supra*, p. 190, note 3,

unaltered with the vendor; and in this, the law of sale and the rule of reputed ownership concur.

3. In what is delivered of this doctrine by our institutional writers, they seem to place the doctrine entirely upon fraud and collusion on the part of the true owner;¹ and there [252] does not appear to be any ground for questioning that in proper cases, under the doctrine of reputed ownership, this is the true principle, though it may concur, as already observed, with the imperfect right of the vendee where delivery has not taken place.

4. There are two classes of cases in which this question may be raised: one, where property belonging to the debtor has been sold by him, and either not delivered at all, or redelivered to the vendor so as to appear in his possession and disposal; another, where the debtor has moveables placed in his hands which did not previously belong to him. In the former of these classes, the rule of property, as already said, may concur with that of reputed ownership; or if the property has passed by delivery, and has again found its way into the debtor's hands, the doctrine of reputed ownership alone must be relied on. The other class of cases is strictly under the rule of reputed ownership.

There is a considerable difference in the strength of the presumption for collusion, between the case of a bankrupt being *left* in possession of goods originally belonging to him, and *acquiring* the possession of goods with which he had formerly no connection. In the former case, all the presumptions on which the doctrine now under consideration rests, are much stronger; the aptness towards the belief of the bankrupt's right greater, the honesty of his possession less probable, than in the latter case, where a man comes newly into possession of goods or property. For many occasions of such possession arise in the course of affairs, independent altogether of any title whereon credit can fairly rest.² In the latter case, the justification of the possession rests upon the proof of an honest occasion, requiring temporary custody. In the former, the justification is often more difficult, and requires a greater detail. And where no such justification can be made out, the new acquirer may not only be held to have no effectual right, but be subjected in damages for any opposition he shall give to the diligence of creditors.³

5. It is not a sufficient justification of a continuance in the possession of moveables,

Mansfield, C. J., delivered the opinion of the Court: 'It seems to the Court, and the more I consider it the more I am strengthened in that opinion, that though the custom of a trade may have the effect referred to in *Horn v Baker*, it must be a custom much more clearly proved than this is, and such that persons dealing with the traders may see and know that the goods may possibly not be the property of the possessor. Here is a custom to put no mark on the hops, so that no person may perceive or know that they are not the property of the seller. The reason is, that after hops have lain a year they deteriorate; and therefore if A B or any other ear-mark were visible, it would hurt the sale when that mark got old and known; and therefore they are not to be distinguished from the common stock of the seller. There is not, therefore, such a clear, distinct, and precise custom proved as would enable others to see that these may not be the hops of the possessor. The custom is to let hops which are sold remain in such a manner that it may not be known there has been a sale. The objection against disclosing the real owner would be easily obviated by having a separate warehouse for hops held there for the benefit of the persons who had bought them.' 3 Taunt. 487.

¹ Lord Stair lays down the doctrine: 'Fraud gives remedy by reparation to all that are damnified thereby against the actor of the fraud, either by annulling of the contract, etc.,

or by making up the damages sustained by the fraud.' And he proceeds to say, that under fraud are comprehended collusion and simulation, of which he gives conveyances *retenta possessione* as an example: 'For although the disposition be delivered, and that there be instruments of delivery of the goods disposed, yet if the natural possession be retained, the disposition is presumed simulate, and others affecting the things by legal diligence or by natural possession are preferred.' B. 1, tit. 9, secs. 12 and 14. See also b. 2, tit. 3, sec. 27, and b. 3, tit. 3, sec. 21.

² Where a debtor's furniture, under an execution by a creditor, was purchased by the wife from her separate estate, and the husband still continued in possession, Lord Kenyon, at Nisi Prius, said: 'Undoubtedly the plaintiff (the wife's trustee) must be held to great strictness of proof, as the possession continued as before the goods were sold; but where such change of property is made out, the mere possession is not sufficient to warrant us in saying the goods shall be deemed the property of the husband.' *Cross v Glode*, 1798, 2 Espi. 574, 575; *Carse v Halyburton*, 1714, M. 18970. [*McDougall v Whitelaw*, 1840, 2 D. 500; *Fyfe v Woodman*, 1841, 4 D. 255; *Anderson v Buchanan*, 1848, 11 D. 270; *Brown v Fleming*, 1850, 13 D. 373.]

³ See this distinction strongly stated by Mr. Justice Bayley in *Lingard v Messiter*, 1 Barn. and Cress. 312. See below, p. 274.

that the conveyance was only in security; for, by the law of Scotland, there is no effectual conveyance of moveables in security without possession. Delivery must take place fairly in such a conveyance, as well as in an absolute sale; and therefore the Court preferred a creditor doing diligence against shop goods and furniture, to a creditor who had received a disposition *omnium bonorum* in security.¹

The same doctrine prevails in England. 'The law,' said Lord Mansfield, 'has declared that a trader cannot mortgage his effects, and at the same time keep possession.'² And it is no answer, that as, where property is let on hire, the possessor and property are [253] justifiably separate, so the possession may be continued to the debtor on the footing of location.³

6. In England, it seems to be a sufficient justification of possession, that the conveyance is 'conditional only, to take effect on the performance of a condition at some future time.'⁴ In Scotland, in the case of a conveyance in relief to a cautioner, although a doctrine similar to that of the English law seems to have been started, and listened to at first, the Court finally decided that a conveyance of a flock of sheep, in relief of a cautionary obligation, being followed only by symbolical delivery, was not effectual against a person purchasing the sheep from the debtor, in whose possession they were allowed to remain.⁵

7. Here, in reverting to a question formerly discussed, it naturally occurs to be determined what effect the principles of the doctrine now under review should have on a suspending condition in a sale.⁶ And although it appeared to be the result of the cases above stated, that creditors must henceforth lay their account with such a condition in giving credit, and not conceive themselves entitled absolutely to rely on the property as irrevocably vested in their debtor; this must always be understood under the qualification that there is perfect honesty in the arrangement, and no design on the part of the seller to aid the buyer's credit, without risk to himself.

8. In all cases of possession on temporary contracts, it is important to observe whether the thing in the bankrupt's possession is of a kind that is usually let out and held separately from the ownership, or whether there be any other circumstance to counteract the reputed ownership. If there be not, as the possession tends to raise credit to the possessor, the parties ought to avoid such ambiguous dealing. On this principle, it is difficult to admit a justification of the retained possession of furniture, or stock, or implements of trade; as such possession very strongly implies a continued ownership, and the mere fact of possession a power of disposal and of property.⁷ In England, a known usage to rent such implements, or a public sale giving notice of the change of ownership, or acknowledged notoriety of the change, have been admitted to counteract the reputed ownership.⁸ This doctrine was laid down by Lord Ellenborough and Mr. Justice Lawrence,⁹ and was afterwards followed [254]

¹ *Boys v Watson*, 27 July 1708. See also *Carse's* case above, and 1 Dict. 156.

² Lord Mansfield in *Bryson v Wylie*, 1784, 1 Bos. and Pul. 83, note.

³ In the case of *Bryson v Wylie* such an arrangement was disregarded. See also *Lingham v Biggs*, 1 Bos. and Pul. 82, below, note 7.

⁴ Cullen's Principles of the Bankrupt Law, 300.

⁵ *Sir William Ker v Elliot*, 1695, 1696, M. 9122. It should be observed, that in this case the question arose with a purchaser of the sheep, not with the general creditors of the owner.

⁶ See p. 258.

⁷ In the case already cited of *Carse v Sir J. Halyburton*, M. 13970, the circumstances were indeed very strong to confirm the inference of ownership; but in a later case, a debtor having conveyed the furniture of his house to his creditor on the

16th of May, and having afterwards continued in possession of it only till the 8th of August, when, another creditor proceeding to do diligence, the first creditor as purchaser received actual possession, the Court found the possession of the debtor collusive, and annulled the conveyance. *Chalmers v M'Auley*, 1739, M. 11590. In England the same rule has been followed.

So in *Lingham v Biggs*, 1797. Here the furniture of a coffeehouse was taken in execution, and without being removed hired to the debtor after the execution of a bill of sale, for the value found by the Sheriff. It was held a case of reputed ownership. 1 Bos. and Pul. 82.

⁸ [*Storer v Hunter*, 3 B. and C. 368; *Watson v Peache*, 1 Sc. 149; *Hornsby v Miller*, 28 L. J. Q. B. 99; *Burton v Hughes*, 9 Moore 334.]

⁹ *Horn v Baker*, 1808, 9 East 215. This was a case of machinery and utensils at one time used by a company, and belonging to one of the partners; but this partner having

out in several cases.¹ But the fact of taking in execution is not evidence of any transference to the creditor, but only of the execution.² The same principles would be admitted in Scotland.

9. It is a strong point in the seller's justification, in all cases of possession allowed to be retained for a fair purpose, that the seller has taken the best means he could to inform the public of the circumstances, as by public advertisement.³

10. But although the creditors of the reputed owner get the benefit of the goods thus in his possession, these goods cannot be held as *forfeited*. The owner must still be entitled to claim as a creditor for the value.

ARTICLE II.—OF POSSESSION LEGITIMATELY SEPARATED FROM THE OWNERSHIP.

Although possession be the usual badge of property in moveables, and, when collusive, has the effect of raising a liability for the debts of the possessor, there are situations in which it is necessary that the possession and the property should be separated; and contracts, on which the existence of commerce depends, often require a temporary possession in those who have no real right as proprietors. These legitimate occasions for a possession separate from the property, are, in the question of reputed ownership, justifications of the possession, and have the effect of excluding liability on that ground. Those who are thus, in the course of such contracts, obliged to yield a temporary possession, are held, on the bankruptcy of the person entrusted with the possession, entitled to have their property separated from the bankrupt's funds, and restored to them, subject to such claims as the bankrupt would have been entitled to set off against it.

This is the general rule, but it receives several modifications, and may be perplexed [255] with difficulties amidst the varying circumstances in which a bankrupt's affairs and the property in his possession may be found. To explain these, it may be proper, 1. To lay down and illustrate the general rule, as applicable to the several contracts which require a temporary possession in another than the owner without any change on the subject; and,

withdrawn, left them in possession of a new partnership. Here the Court of King's Bench held that the utensils were in the order and disposition of the new company, to the effect of raising reputed ownership, and credit sufficient to ground a liability for the possessor's debts. As to the effect of usage, Lord Ellenborough said: 'If, as in some manufactories where the engines necessary for carrying on the business are known to be let out to the several manufacturers employed upon them, there had been a known usage in this trade for distillers to grant or hire the vats and other articles used by them for the purpose of distilling, the possession and use of such articles would not in such a case have carried the reputed ownership. But in the absence of such a usage, there is nothing in the case which qualifies the reputed ownership arising out of the possession and use of the things in their trade.' Mr. Justice Lawrence said: 'It may happen, from the course of certain trades, that masses of machinery are let out by the owners to the mechanics engaged in them; and the notoriety of such a usage in the trade may rebut the presumption of ownership which would otherwise arise from the possession; but in general, the possession of utensils of trade must be taken to be by the owners of them.' 9 East 239, 243.

¹ *Muller v Moss*, 1813, 1 Maule and Sel. 335. Here the transfer was notorious. *Gurr v Rutton*, *supra*, p. 271, note 2; *Watkins v Birch*, 1813, 4 Taunt. 823, where, after goods were

taken in execution, there was a public sale, at which the creditor becoming purchaser, afterwards allowed the debtor to retain the possession for a rent.

² *Lingard v Messiter*, 1823, 1 Barn. and Cress. 308. The subject was machinery taken in execution and sold to the creditor, but not by public sale, and afterwards delivered to the debtor for rent. The verdict was for the bankrupt's creditors, and the Court discharged the rule for a new trial. Bayley, J., said: 'It has been held, that where there has been a public sale of property under an execution, the new owner may permit the former owner to continue in possession; and that in the event of the bankruptcy of the latter, the property will not pass to his assignees. In that case the change of property becomes notorious by the public sale. If the vendor, however, permits the former owner to continue in possession without making the change of property notorious to the world, the consequence will be, that in the event of his bankruptcy it will pass to his assignees, as being in his order and disposition within the statutes of James.' In this *Holroyd and Best*, Justices, concurred. *Holroyd* said: 'The fact of the goods having been seized under an execution, etc., was at most only evidence of the notoriety of their having been taken in execution.'

³ In *Bamford v Baron*, 2 Term. Rep. 594, the transaction was with the trustees of the owner's creditors, and the permission to possess was publicly advertised.

2. To inquire into the modifications which the right of the proprietor suffers in consequence of the loss of identity, by changes in the shape, appearance, or nature of the subject while in the bankrupt's possession.

SUBSECTION I.—OF GOODS AND EFFECTS IN POSSESSION OF ANOTHER THAN THE OWNER IN THE COURSE OF
LEGAL CONTRACTS.

Several of the known and definite contracts, and many of the arrangements convenient in trade, require or produce a temporary separation of the property and possession.

1. CONTRACT OF LOAN.—This contract is either *commodate* or *mutuum*; loan for Use, or loan for Consumption. Where a thing is lent in *COMMODATE*, or for use only,¹ the borrower binding himself to return it specifically, there is, of course, no transference of the property or real right. Where the thing is lent in *MUTUUM*, or for consumption, as in the case of all fungibles,² the obligation of the borrower being to return it in equal value or quantity, the absolute property is transferred to the borrower,³ and the lender becomes a mere creditor for the value. If the borrower fail while the things lent are still unconsumed, his creditors have a right to them as part of the divisible fund.

2. CONTRACT OF HIRING.—*LOCATION* is in general defined: A contract by which the temporary use of a subject, or the work or service of a person, is given for an ascertained hire.

It may be distinguished into three classes:—

First, IN THE HIRING OF A SUBJECT (*LOCATIO CONDUCTIO REI*), by which the hirer acquires for a price the right of possessing a thing for a particular period or purpose, the property remains unaltered, and the owner has a right to recover it from the hirer and his creditors, subject to the stipulated right of possession and use.⁴ But where property has been sold privately, and immediately afterwards let out to hire by the purchaser to the former owner, the separation of possession as owner and as tenant is so thin, and the collusion so difficult to be detected, that this seems a case proper to be disposed of on the principle of reputed ownership. See above, p. 271. This is a transaction which frequently takes place where the machinery used in trade is attached by the diligence of a creditor: the goods or implements being purchased or given over to the creditor, he grants the use of the machinery to the debtor for a rent, and the business goes on as before. In such cases, the creditor of the person holding possession has been held entitled to take the property as his, unless the change of property has been made notorious.⁵

Secondly, IN THE HIRING OF WORK (*LOCATIO OPERIS FACIENDI*): as, where a [256] carpenter receives wood to be made into a waggon; or a tailor, cloth to be made into a coat; or a bleacher or dyer, cloth to be bleached or dyed,—the employer, if he furnish the materials, has, on the workman's failure, a claim for the specific subject delivered, as being his undivested property, subject, of course, to the claim of the workman for his labour bestowed.⁶ But it has already been observed, that difficulties often arise from the complica-

¹ *Nemo commodando rem facit ejus cui commodat.* Dig. lib. 13, tit. 6, De Comm. l. 6.

² *Fungible* is not an English word. In the civil law it was taken to mean *res quæ pondere numero et mensura constant*; and this is its meaning in Scottish law: whatever consists in quantity, and is regulated by number, weight, or measure, is a *fungible*—as corn, money, wine. It is a word adopted in the same sense by the French lawyers. 2 Denizart 449.

³ Paulus says, 'Appellata mutui datio ab eo quod de meo tuum fiat.' Dig. lib. 12, tit. 2, De Reb. Cred. l. 2, sec. 2.

⁴ 'Non solet locatio dominium mutare,' says Ulpian, Dig. lib. 19, tit. 2, Loc. Cond. l. 39; *Non solet* being (as Cujacius,

lib. 8, Obs. c. 39, and Bynkersh. Obs. Jur. Rom. lib. 8, c. 4, learnedly show) used to express that it has the force of a negative rule.

⁵ See above, p. 273.

⁶ This is a rule so well established, that authorities are unnecessary. It is taken in the English cases, for example, as a resting point of argument, but never as in itself questionable. See *Collins v Forbes*, for example, 3 Term. Rep. 328. See also Eyre, Ch. Justice, in case *Lingham v Biggs*, 1 Pull. and Bos. 89. [*Carruthers v Payne*, 2 M. and P. 429; *Bartram v Payne*, 3 C. and P. 177; *Wilkins v Bromhead*, 7 Sc. N. R. 921.]

tion of this contract of *Locatio operis faciendi* with that of sale.¹ It is strictly requisite to the contract of the Hire of Work, when simple, that the locator, or person who hires the labour, should furnish the materials, the conductor only the labour; and in this case, the property of the materials remains with the locator, unaffected by the conductor's temporary possession of them while he is finishing his work. Where the conductor furnishes the materials, or even the principal materials, as well as the labour, it is more strictly sale than location, in which the tradition seems to be completed only by the delivery of the perfect work. It is only from the confusion of the two contracts, that on bankruptcy any question can arise concerning the locator's right of vindication and preference. Where I send a jewel to be set, the jewel continues mine, and cannot be claimed by the creditors of the jeweller. Where the materials of the work to be performed are fungibles, if they be delivered indefinitely to the workman, with an order 'to make the thing wanted,' the property of them has, in the subtilty of the Roman law, been held as transferred to the workman; but if with a particular order to 'make it from those very materials,' the property is not changed. Such is the rule laid down by Alfenus and by Pomponius in the Roman law. Alfenus, in the celebrated law, 31,² lays it down that there is a difference in the right of the person employing the workman, when he gives him a subject to be specifically restored (as clothes to a fuller), and when he delivers materials to be restored in kind; as silver to a goldsmith, with orders for a vase; or gold, with an order for a ring. Pomponius³ more pointedly says, that where the order is to manufacture *that* gold (*ex eo auro*), the property of the gold is undivested; but where the order is not to manufacture that gold, but merely general (*non tamen ex eo auro, sed ex alio*), the property is passed to the workman, and the employer becomes a creditor. Perhaps where the materials so entrusted to the workman are not found distinguishable in his hands, this rule would be followed. But if, by the commencement of the work, or any other unquestionable indication, the materials were marked as identically those entrusted to the workman, they would not go to his general creditors; and this is not inconsistent with the general rule respecting all fungibles, that the person receiving them is held to restore only their equivalents. The rules laid down by Alfenus and Pomponius were applied to corn delivered for transportation from place to place, where no care was taken to keep it separate and distinct.⁴

Thirdly, HIRE OF LABOUR IN CARRIAGE (LOCATIO OPERIS MERCIUM VEHENDARUM).—In this contract for carriage of goods, the property does not pass to the carrier—he is a mere possessor for a special purpose; and there is no distinction worth observing between the [257] case of fungibles and other commodities, according to the common practice of trade.⁵

¹ See above, p. 194.

² Dig. lib. 19, tit. 2, Locat. Cond. l. 31.

³ Dig. lib. 34, tit. 2, de Aur. et Argent. Leg. l. 34.

⁴ The rule of the Roman law is followed in England. Blackstone, speaking of the action of Detinue, says: 'In this action it is necessary to ascertain the thing detained, in such a manner as that it may be sufficiently known and recovered. Therefore it cannot be brought for money, corn, or the like; for that cannot be known from other money or corn, unless it be, in a bag or sack; for then it may be distinguishably marked.' 3 Blackst. 152.

⁵ In the case discussed by Alfenus in the law alluded to above—namely, that of a cargo of corn to be delivered to several persons by measurement—a distinction should perhaps be made. 1. As against the creditors in general, the persons interested in the cargo seem entitled to the character of *creditores domini*, or proprietors of the cargo, and to *rei vindicatio*; leaving their respective rights to be settled according to their several proportions. 2. As with each other, the

several consignees seem to be only personal creditors of the shipmaster or carrier. It is not, however, a likely case to occur, according to the present practice of trade.

In that case, a cargo of corn was loaded on board the ship *Saufeius*, consisting of grain belonging to several traders in one undistinguished heap. One of the traders had received his share, after which the ship perished with the remainder. The question was, What remedy the others had? It is for the decision of this case that Alfenus lays down the doctrine already detailed; and he applies it in this way,—that if the corn had been kept separate, and each man's quantity specific and distinct, it might have been known whether the person receiving delivery had received his own or not: if he had got the portion of another, the person whose quantity had been given would have had *rei vindicatio*, with an *actio locati conducti* against the master; but as they were confounded, each was merely a creditor for a quantity of grain, and the master was justifiable in delivering the quantity required.

Money is almost the only fungible which is now sent otherwise than specifically. In sending money by a carrier, it is common to take his receipt for the sum, with an obligation to pay it according to order. It would rather appear that the sender of the money is in such a case a mere creditor; so that if the carrier fail, he comes in only for a dividend. But if the money be rendered specific by being enclosed in a box or in a sealed bag, there is no question that the property is still with the employer. It is, for example, the custom of banks to send to their branches and country correspondents, or it is often necessary for the branches to send to the bank specie or notes. The banks in the metropolis have branches in the country; or a country bank maintains its credit perhaps by the notes of the Bank of England, or of the Scottish chartered banks, which the public receives as cash. In sending supplies to the country for the use of such establishments, it is necessary to send bank-notes or coin. But if the carrier were to become merely a debtor for the amount, he might pay the debt in the notes of the very company to which he is carrying it, and thus the object of the transaction would be disappointed. He must therefore deliver the specific parcel which he receives. But unless the notes be sealed up, or at least put in a separate parcel or box, the sudden death or bankruptcy of the carrier would leave to the senders of the remittance only a general claim against his estate, and not a specific right of vindication. Perhaps it would be held sufficient specification if the carrier's receipt were taken for particular bank-notes, with an obligation to deliver them according to their numbers and other marks. But a proof of extraneous and collateral circumstances of identification would not probably be admitted, for it is impossible to say where that would stop.

3. CONTRACT OF DEPOSITE.—Deposite is that contract by which one delivers property to another to be kept for the owner's behoof without reward. The depositor has right to have the deposited property restored; the depositary has neither the use nor disposal of it; and the possession and property are effectually separated.¹ The depositary may indeed fraudulently sell the deposite, in which case it may be doubtful whether the purchaser in market will be safe against the proprietor's claim for restitution; but it is certain that while the subject continues in the possession of the depositary himself, his creditors have no right to it, and never can avail themselves of it, as of property belonging to their debtor. But this is true only of what is called PROPER DEPOSITE; in which a special subject is placed with the depositary, to be restored without alteration.² There is another species of the contract which lawyers have called IMPROPER DEPOSITE, with regard to which a distinction is admitted similar to that already marked between *commodate* and *mutuum*:³ in improper deposite, money, or other fungibles, are placed in the depositary's hands, to be returned in kind. In the former the possession as well as the real right of the subject remain with the depositor; in the latter the real right is transferred, and the depositor becomes merely a creditor of the depositary for the quantity of fungibles or money which he binds himself to return.

There may be a proper deposition even of fungibles and of money; but then they must be delivered as a specific subject, and be kept distinct; and they must be so put up and marked as to be fairly distinguishable from the debtor's stock, and from all other fungibles of the same kind: they must, as the English judges term it, have an ear-mark.⁴ On this subject, in the Roman law, Alfenus held that money must have been delivered in bags, or sealed and marked so as to be distinguished, otherwise the depositary's obligation resolved

¹ 'Rei depositæ,' says Alfenus, 'proprietas apud deponentem manet sed et possessio.'

² [Parke v Eliason, 1 East 544; Thompson v Giles, 2 B. and C. 431; Sadler v Belcher, 2 M. and Rob. 489; Truck v Walker, 2 W. Bl. 1154; Lombart v Woollet, 2 Mylne and Cr. 389; Tooke v Hollingsworth, 5 T. R. 215, 227; Taylor v Plumer, 3 M. and S. 562, 575.]

³ See above, p. 275.

⁴ 'If an executor,' says Lord Mansfield [in *Howard v Jemmet*, 3 Burr. 1369, note], 'becomes bankrupt, the commissioners cannot seize the specific effects of his testator; not even money, which can be specifically distinguished and ascertained to belong to such testator, and not to the bankrupt himself.' This is the general rule applicable to all cases of temporary possession and trusteeship; but the difficulty is to lay down rules for distinguishing the identity.

into that of a common money debt. And on the same principle, corn must be put up in sacks or barrels, or in separate and distinct repositories, so that it may be known and distinguished.¹ This doctrine is taken for granted in all those laws of the title in the Pandects, '*Depositi vel contra*,' in which the irregular deposit is spoken of;² and Paulus says: 'If I have deposited a money-bag, or money marked and distinguished, and the depositary without my consent has spent it, I have an action of deposit and theft against him.'³

There may be a proper deposit of bills and other documents of debt; but if of a negotiable nature, they must be so deposited that the power of negotiation is not with the depositary, otherwise he may, as in the case of money, pay them away, and defeat the depositor's right. We shall see afterwards, in treating of factory and of pledge, several distinctions that must be observed in questions of this sort.⁴

It appears, then, 1. That where deposited goods are extant and distinguishable, the depositor, in all cases of proper deposit, is entitled to have them set apart from the common fund, and delivered up to him. 2. That where the subject deposited is not to be itself returned, but only in kind, the depositor is only a personal creditor.

4. CONTRACT OF PLEDGE.—The creditor who receives a pledge, holds the possession for the debtor; but the property in the goods continues unchanged. The creditor is said [259] indeed in English law to have a *special property* in the thing pledged; but the meaning of this is only that he is entitled to keep possession till the claim, in security of which he received it, is satisfied; and that in order to protect himself in the enjoyment of his right, he has all the remedies by which a proprietor is protected.

The pledgor, or person who receives the advance and gives the pledge, is the true proprietor of the subject impledged, under the burden of the debt in security of which the pledge is constituted.⁵ Thus, if one receive an advance from another, and in security deposit in his warehouse a bale of goods, the borrower is on the bankruptcy of the lender bound to repay the money before he can be entitled to redelivery of the bale; but on the other hand, if the money is tendered, or if, on a statement of accounts, the balance is even, the lender is entitled as proprietor to the bale in the bankrupt's warehouse.

Where, instead of money actually advanced upon a pledge, the person to whom the pledge is delivered engages his credit, or accepts a bill, or allows the pledgor to draw on him; and, becoming unable to answer his engagement, the pledgor himself is obliged to provide for the bill; the pledgor is entitled to recover his pledge against the creditors of the pledgee.

5. CONTRACT OF MANDATE OR FACTORY.—In the Roman law the contract of MANDATE was merely gratuitous; but with us, FACTORY, an improper species of mandate, is a more important and useful contract. Perhaps, indeed, the modern contract of factory is more accurately referable to *locatio operarum* than to mandate, or rather it is a mixed contract

¹ Dig. lib. 19, tit. 2, Loc. Cond. l. 31.

² Lib. 16, tit. 3, Depos. vel Contra, l. 24, l. 25, sec. 1; l. 26, sec. 1. The continental lawyers seem to admit a much looser proof, by indications from the shortness of time between the delivery of the money and the question; the situation of the money-holder; the probability of his having cash elsewhere, etc. Cardinal de Lucca, de Cred. Disc. 1, sec. 12; and Disc. 26, sec. 3.

³ 'Si sacculum vel argentum signatum deposuero, et is penes quem depositum fuit me invito contrectaverit, et depositi et furti actio mihi in eum competit.' Lib. 16, tit. 3, Dep. vel Contra, l. 29.

There are deposits (or what are commonly called deposits) in daily use in trade, which are in law properly referable to the contracts of pledge or of mandate. I allude to deposit accounts and transactions with bankers. The class to which

the claims of the customers of a banker for money, bills, etc., in his possession on his bankruptcy are referable, is that of mandate or factory. See below. But frequently, especially in England, jewels, etc. are deposited with bankers merely for safe custody; in which case there is no question that the property remains unaltered. See in a case reported by Strange, a case of jewels, sealed in a bag, and deposited with a banker, who, abusing his confidence, broke the seal, and sold them. The Court gave trover against the purchaser. *Harlop v Hoare*, Strange 1187.

⁴ See below.

⁵ [There may be cases, however, of sale *cum pacto de retro-vendendo*, which are difficult to be distinguished from pledge. See Stair i. 14. 4; *Latta v Park & Co.*, 1865, 3 Macph. 508. As to ostensible ownership, see *Cooke v Hemming*, L. R., 3 C. P. 334.]

composed of those two. This contract is in the English books discussed under the title PRINCIPAL and AGENT. We shall have occasion hereafter to consider the contract itself in relation to the personal claims which arise out of the respective obligations of the parties. At present we have to consider only the disposition of the property which in the course of the factory may be thrown into the possession of others than the owner.¹

The cases of temporary possession which naturally arise either in the course of an occasional and single mandate to act as factor, or in the execution of the duties belonging to a settled course of employment, are very numerous, including mercantile consignments of cargoes, or commodities to be sold for the consignor's behoof; deposits of bills with bankers to be duly and regularly negotiated for the holder; orders for the purchase of goods in the name of the mandant; and, in short, every sort of temporary possession which can occur in the course of a person acting by the order of another, in conducting transactions for him and managing his trade.

The general doctrine is, that where the goods sent by the principal, or acquired for him by his order, are found in the hands of the factor, distinguishable from the general mass of his property, they are not part of the factor's estate, but must be given up to the principal, subject of course to lien.

1. In England, the general rule was distinctly laid down in the following terms, by Lord Chancellor King,² as applicable to goods consigned to a factor, to be sold for the principal, and found in his possession on his bankruptcy: 'When a merchant beyond seas consigns goods to a merchant in London on account of the latter, and draws bills on him for such goods, though the money is not paid, yet the property of the goods rests in the merchant in London, who is credited for them, and consequently they are liable to his debts; but where a merchant beyond seas consigns goods to a *factor* in London, who receives them, the factor in this case, being only a servant or agent for the merchant beyond seas, can [260] have no property in such goods, neither will they be affected by his bankruptcy: and the Lord Chancellor said he had discoursed with the merchants about the matter, who held this to be the practice among them.' This has always been held as sound law, and particularly by three eminent judges—Lords Hardwicke, Mansfield, and Kenyon.³ This is law in Scotland as well as in England.

2. Where a factor, being ordered to purchase goods for his principal (and being properly reimbursed), has made his purchases in compliance with the orders, and failed with the goods in his warehouse, the goods are not to be taken as part of his divisible estate, but as the property of the principal. This seems never to have been thought doubtful in Scotland,

¹ [On the subject of property and securities in the hands of factors, agents, and bankers, see Paley on Principal and Agent, by Lloyd, pp. 78–97; Livermore on Principal and Agent, vol. i. pp. 261–307; Thomson on Bills, pp. 787–810 (2d ed.), pp. 541–55 (3d ed.); Grant on Banking, ch. vi. As to ostensible ownership of goods in the hands of factors and commission agents for sale, *Whitfield v Brand*, 16 M. and W. 282; *Carruthers v Payne*, 2 M. and P. 429, 441; *Shaw v Harvey*, 1 Ad. and E. 920.]

² *Godfrey v Furzo*, 3 P. Williams 185.

³ Lord Hardwicke, in the case of *Dumas*, thus expressed himself: 'Suppose the petitioners had consigned over goods to Julian as their factor, and he had sold them and turned them into money, the principal then could only have come in as a general creditor under the commission; but if the goods had continued in specie, and had been found in Julian's hands at the time of his bankruptcy, it would have been otherwise, and has been so determined in several cases; and even contrary to the express words of the statute, 21 Jac. I., factors

have been excepted out of it for the sake of trade and merchandise.' *Ex parte Dumas*, 1 Atk. 234.

Lord Mansfield, in *Mace and Cadell*, said that the statute of James 'does not extend to the case of factors or goldsmiths who have possession of other men's goods merely as trustees, or under a bare authority to sell for the use of their principal.' *Cowper*, 232.

Lord Kenyon, in *Tooke v Hollingsworth*, said: 'The case of a factor has been so frequently decided, and so much taken for granted, for a series of years past, that it must now be considered to be at rest. If goods be sent to a factor to be disposed of, who afterwards becomes a bankrupt, and the goods remain distinguishable from the general mass of his property, the principal may recover the goods in specie, and is not driven to the necessity of proving his debt under the commission of bankrupt. Nay, if the goods be sold and reduced to money, provided that money be in separate bags, and distinguishable from the factor's other property, the law is the same. Then taking that as an incontrovertible point,' etc. 5 Term. Rep. 226.

when the purchase was made in the principal's name, and the goods were found in the factor's possession.¹ And in England the same rule is observed.

The only doubts that seem ever to have occurred respecting cases of this kind, have been where the factor has purchased *in his own name*. But even in that case, the doctrine of the English law seems to be clear (and it is the doctrine most consistent with principle), that where the goods are clearly identified as those ordered by the principal, the factor's creditors cannot take them as his. And so a purchase of stock in the factor's name, but entered in his books for the principal, is held not distributable under the factor's commission.²

3. Where the principal remits bills or money to the factor, and the factor becomes a [261] bankrupt with the remittances in his hand, the great distinctions seem to be these:³

1. That to give to the principal, on the factor's bankruptcy, any claim of property in the remittance, the remittance must be made as to a factor, and not on the footing of a sale.
2. That it must be a remittance for a special purpose, and not merely for the liquidation of a general balance. And,
3. That the remittance must be specific, 'money having no ear-mark.'⁴

1. The remittance must be made as to a factor. If one order goods from a merchant abroad, not his factor, and, on receiving the invoice, remit bills for the amount, it is a simple contract of sale; and therefore, if the goods are not sent, and the foreign merchant fail with the bills in his possession, the buyer is nothing more than a general creditor, and cannot demand his bill back, in preference to other creditors. But if one employ a *factor* to purchase goods, and remit bills to him for the purpose of paying the price, those bills, if found in the factor's repositories, are the principal's, as having been sent to a mere factor to relieve the principal from the claim for the price; so that if the factor fail to pay the price, and the

¹ *Spence's case*, 1687, M. 3153. A supercargo was employed to export some goods, and to sell them in Holland, and with the price to buy other species of goods. The supercargo fulfilled his commission; and having returned with the goods, wrote to the principal that he had cellared them for his behoof. In this situation a creditor of the supercargo poulded the goods as his; and against an action by the principal for the goods, the creditor defended himself on the ground that possession presumes property in moveables; that there was no bill of lading showing the goods to belong to the principal; that he would not have been bound, had they been lost, to have owned them, or stood to the loss; and that in every view, till delivery, they were to be reputed the goods of the factor. The Court found that the property of the goods was in the pursuer (the principal), and ordered the defender to make restitution.

Hotchkis v Dundee Bank, 1797, M. 2673. The Dundee Bank employed Bertram, Gardner, & Co. to take up their notes from the Edinburgh banks, for which they were put in cash by remittances. Bertram, Gardner, & Co. regularly took up the Dundee bank-notes in the hands of the Edinburgh bankers every Monday and Friday, put them up in parcels, sealed them, entered the amount in their book, notified it by post to the Dundee Bank, and sent the parcels by the first opportunity. On Bertram, Gardner, & Co.'s failure, the manager of the Dundee Bank went to Edinburgh and received a parcel of 1340 notes, which had been taken up, parcelled, entered in the books, and notified to the Bank; and the trustee on Bertram, Gardner, & Co.'s estate claimed these notes as improperly given up by the bankrupt. The Court found that the creditors were not entitled to have the notes back.

² *Ex parte Chion*, Tr. Term. 1721, 3 Peere Williams 187,

note. A trader in London having money of J. S., who resided in Holland, in his hands, bought South Sea stock as factor for J. S., and took the stock in his own name. In his account-book, however, it was entered as bought for J. S. The trader after this transaction became bankrupt, and the question between the principal and the creditors of the factor was, Whether the stock was liable to the bankruptcy? Lord Parker determined that it was not liable to the creditors.

Lord Parker is here reported to have said that it would lessen the credit of the nation if the stock were to be held as the factor's. This does not appear to have been the ground of the decision, but merely an additional consideration. It may perhaps be imagined that some weight in this question should be given to the circumstance of the money with which the goods are purchased having been the principal's, and the goods, in truth, a mere substitution for it; but this were to mingle two questions. The effect of such change we shall have an opportunity of considering hereafter.

See *ex parte Sayers*, 5 Ves. jun. 169.

³ Bills perhaps ought to be considered not here, but in a subsequent part of the work; but it is better to show the principle in cases so closely analogous to moveables.

⁴ Lord Mansfield has said of this expression, that 'it has been quaintly said that the reason why money cannot be followed is because it has no ear-mark; but that is not true. The true reason is on account of the currency of it' (1 Burrow, Rep. 457). But it has been well observed by Mr. Paley, that his Lordship was there 'considering the case not of *reclaiming* money from the person with whom it had been deposited, but of *following* it into the hands of a third, to whom it had passed in currency; and that it is only in that view that he expresses a disapprobation of the reason alluded to.' *Law of Principal and Agent*, p. 73.

principal satisfy this claim himself, the factor holds the bills for the principal's behoof alone, just as if they were goods.¹

2. The remittance must be for a special purpose, and not for the liquidation of [262] the general balance. This is distinctly explained in a case which occurred before Lord Hardwicke, where the following principles were laid down:—That if bills are sent by a correspondent to a merchant here to be received, and the money applied to a particular use, and the merchant become bankrupt before the money is received on the bills, the correspondent has a special property in respect of those bills, and the money shall not be divided among the merchant's creditors at large;² but that where bills are sent on a general account between the correspondent and merchant, and as an item in the account, it is otherwise.³

Where there is only one transaction between the parties, the thing entrusted to the mandatory must, of course, be considered as particularly appropriated, as in his hands for a special purpose, not as transferred.⁴

Where there is a running account between the parties, it is frequently a nice question, Whether a remittance be an item in the general account, or specially appropriated? The

¹ In the case of *Tooke and Hollingsworth*, already taken notice of, there was an agreement of a double nature: 1st, That the bankrupt should purchase of Tooke, at a certain rate, all the light gold he should send, and that Tooke should draw bills for the price at two months. 2dly, That Tooke should be allowed to draw bills on the bankrupt for his accommodation, and that he should in that case remit value to answer them. The bankrupt had accepted much in advance, when Tooke sent him three bills and 218 light guineas, and 19 light half-guineas, to answer his acceptances. Both in the King's Bench, where the case was first tried, and in the Exchequer Chamber, it was thought that if the transaction had stood on the footing of the first part of the agreement, there would have been difficulty in the case; but that, on the footing of the second, Tooke was entitled to recover the property from the creditors.

'If it really were a sale of goods under the first part of the agreement,' said Mr. Justice Grose, 'I should have considerable doubts about the case. If the gold is to be considered as goods sold to the defendant, then bills were to be drawn by the plaintiff on the bankrupt at two months; but in the verdict not a word is said about the bills being drawn for the light gold mentioned in the verdict. The state of the transaction at the time of the bankruptcy was this:—There were acceptances by the bankrupt to the amount of £873, over and above the gold and bills in question. Now, the bankrupt being under such acceptances, what was the probability of the transaction? Not that the plaintiff would sell the gold, but that he would remit goods to discharge the acceptances. However, we are not left to determine on conjecture or probabilities on a special verdict; for it is expressly found as a fact, that the plaintiff, in order to enable the bankrupt to pay the acceptances when they should become due, sent the goods in question; and it is also found by the verdict that those bills were afterwards paid by the plaintiff. Then, the purpose for which the property in question was sent was answered by the plaintiff himself; and that lets in the doctrine of Lord Hardwicke in the case *ex parte Dumas*, which I consider immediately and directly in point. The instant the acceptances were taken up by the plaintiff, and the end for which the goods were sent was answered, I consider the property as re-vested in the plaintiff. But it has been asked, When and how

was this property re-vested in the plaintiff? I consider it to have been a qualified and conditional property in the defendants. It was not vested in them as an absolute and unconditional property by the transmission for a particular purpose. It was vested in them only for a special purpose; and the instant that purpose was answered in another way, the property was re-vested in the plaintiff. Then it was asked, What would have been the case had the acceptance been discharged by the bankrupt? I answer, that in such a case the purpose for which they were sent would have been answered by the bankrupt, and then the plaintiff would have had no property in the goods: then that property which was before conditional would have become absolute in the bankrupt. This case comes directly within that of *Dumas*: for here the goods were sent for a particular purpose; and as soon as that purpose could not be answered by the bankrupt, or was otherwise answered by the plaintiff, the property re-vested in the plaintiff. And therefore I think he may maintain this action of trover to recover back this property, or the value of it.' 5 Term. Rep. 234. In the Exchequer Chamber a similar view was taken of the agreement by Lord Chief Justice Eyre, who delivered the opinion of the Court. 2 H. Blackstone 501. See also *Bent v Fuller*, 5 Term. Rep. 494.

² *Ex parte Dumas*, Julian's bankruptcy, 9 Aug. 1754. See below, p. 282, note 3.

³ *Ex parte Oursell*, in the same bankruptcy, 1754, Ambler 297. Below, p. 282, note 3.

⁴ *M'Kenzie v Watson and Stewart*, 1678, M. 10188. M'Kenzie held a blank bond (a kind of security very common in Scotland in the seventeenth century), and being unwilling to do diligence in his own name, he filled up the name of another in the blank, and that other gave an acknowledgment that he held the bond merely in trust. The creditors of this trustee or factor attached the money as his; and a question arose in the Court of Session between them and M'Kenzie, Whether he was not, as principal, entitled to this bond as his property? The Court found that he was entitled to it.

There is a similar case reported, *Black v Sutherland*, 1705, M. 10189; and another, *Monteith v Douglas*, 1710, M. 10191.

In England, the case of *Parke v Elleason*, 1 East 544, affords an illustration of the same position. See below, p. 290.

chief or sole illustrations of the doctrine are to be found in the English cases. It would appear, 1. That it is held a specific appropriation of bills, when bill is pledged against bill, or one transaction against another.¹ 2. That the allotment of a particular account, under a specific title or mark, for a certain class of remittances, will sufficiently distinguish bills [263] which are meant to be specifically appropriated.² 3. That where bills are sent in a letter to answer 'what remains for the sender to pay,' the appropriation has been held sufficient.³ 4. That, where a banker has engaged to accept bills for his correspondent's con-

¹ *Bent v Puller*, 5 Term. Rep. K. B. 494. Bent had kept a banking account with Caldwell & Co., bankers at Liverpool. This account consisted, on the one side, of bills drawn by Caldwell & Co. in Bent's favour, on Forbes & Gregory, bankers in London. It was filled up by Bent with bills and negotiable securities lodged with Caldwell & Co. An interest account was kept, wherein the bankers, when in advance, debited Bent with interest; and when they were in cash for Bent, gave him credit for interest. The account was balanced every three months, and a commission charged by the bankers of 5 per cent. on the amount of the bills drawn by them. The accounts were balanced in February 1793, with a balance against Bent of £3882. In March he received other bills for £445. On the 13th March he sent them seven excise debentures, to the amount of £674. On the 16th he sent them further fifteen bills for £3953, which, if placed to his credit, would have turned the balance £799 in his favour, on the supposition of Caldwell & Co.'s drafts being good. On the same day, the 16th March, the London banker stopped, and, with the arrival of the post on the 18th, Caldwell & Co. stopped also, and their drafts were returned on Bent; and the question, in an action of trover by Bent against the assignees of Caldwell & Co., was, Whether the bills sent on the 16th were paid to the bankers on a general account, or with a particular appropriation for the answering of the current drafts? The jury, under the direction of Lord Kenyon at Guildhall, and after inspecting Bent's books, held the bills to have been paid to Caldwell & Co. on the general account; and they therefore nonsuited Bent, the plaintiff. On the argument on a rule for a new trial, the Court was unanimously of opinion that Bent could not recover in the circumstances of the case. Mr. Justice Buller said: 'In order to make a specific appropriation of bills, there must be a lodging of a bill for a bill, or at least several deposited at once, as one entire transaction, to answer some particular purpose; whereas here the bills were paid in on a general running account, and the amount of the bills claimed as a deposit, not even corresponding with the amount of those for which they were supposed to be deposited. And the case must be considered in the same manner as if the question had arisen before the bankruptcy of Caldwell & Co., in which case the plaintiffs could not have compelled the bankers to deliver up the bills in question on paying the others.' Lord Kenyon said: 'I agree with my brother Buller, that there must be either a bill pledged against a bill, or a transaction against a transaction; but here the bills were coming in day after day, not for the purpose of opposing a bill on one side of the account to another on the other, but all were paid in one general account. The plaintiff therefore is not entitled to recover these bills, on the ground that the particular purpose for which they were deposited has not been answered, because it does not appear that they were deposited to answer that particular purpose. On the trial, the jury, on inspecting the

books, thought that this was a general banker's account, and that there was no specific appropriation of the bills in question: it appears to me in the same light.'

² *Ex parte Dumas*, 1754, 1 Atk. 232. Dumas & Co. of Paris drew bills on Julian & Son of London for £1115, and undertook to provide for them by remittances. They informed Julians that the transaction was for the benefit of their house at Cadiz, and desired it to be kept in a particular account, distinguished by the letter G. They, in terms of the agreement, sent bills of £1146, and the Julians acknowledged receipt of the bills to the credit of the new account G. The father died, and the son stopped. After taking the resolution to stop, he discounted two of the bills; the rest remained in his drawer. Dumas & Co. gave up all pretensions to the discounted bills in the hands of the *bona fide* holders, but claimed the others as appropriated to a special purpose. Lord Hardwicke said: 'The present is a very plain case, to give the petitioners a title to those bills which remain in specie unnegotiated. The letter G appears to be the initial letter of the first partner's name at the house at Cadiz. These bills I consider as appropriated to a particular purpose, and intended to answer and reimburse the Julians what they should pay on this special account; for, by being endorsed, they could negotiate and discount them: £580 appears to be the amount of the bills left in specie. Upon all these circumstances, it would be the hardest thing in the world to say these bills should go to the creditors at large; and therefore, on the whole, I am clearly of opinion that the specific bills, amounting to £580, must be delivered up by the assignees of Julian to the petitioners Dumas & Co., or to such persons as they shall empower to receive them, and order accordingly.'

³ In the bankruptcy of the Julians, a case occurred in which the question was, Whether there was sufficient evidence of an appropriation of the bills of exchange remitted by Oursell? Lord Hardwicke said: 'When this matter came on before, it was in a more general way insisted, that where bills of exchange are remitted on a general account, if they can be got at before the money due upon them is received by the merchant here, who becomes bankrupt, it shall not be divided among his creditors at large, but the correspondent shall have them returned. But, in my opinion, that is going too far. The fact now is, Oursell at Paris and Julians at London corresponded and dealt with each other in drawing and redrawing bills of exchange. They kept separate accounts; and in the account kept by Oursell the Julians were indebted to him on balance £2200. In the account kept by the Julians, Oursell was indebted to them £316. Oursell drew several bills of exchange on the Julians, to the amount of £2200, which were protested for non-payment, and returned; and Oursell discharged them, with the cost of the protest. After those bills were drawn, Oursell remitted to Julians two bills, one for £540, the other for £460, payable to Julians. These two last

venience, on an agreement to remit for answering them, and the correspondent sends bills accordingly for the purpose of answering acceptances, such remitted bills are in the [264] banker's hand, unapplied in the nature of goods unsold: the property is in the remitter, subject to the banker's lien.¹

3. The money or bills must remain in a state capable of being identified and distinguished from the factor's other property. On this subject some remarks have already been made in treating of deposits.² Where a public bank employs agents in the country to manage the business of their branches, the money entrusted to those agents is the *commodity* in which the bank deals; and under the agent's management in the office of the bank, and lying in the strong-box, drawers, and desks used in carrying on the bank's trade as dealers in this commodity, it has been held the specific property of the bank, not divisible on the bankruptcy of the agent among his creditors.

The changes which, in the course of the bank transactions, are made in that commodity, may suggest a doubt whether the bank can, on the agent's bankruptcy, claim all the cash in the repositories as their own, although not one note or guinea of the supply originally given to the agent may remain in his possession? In one case which occurred of this sort, the Court of Session held the money in the strong-box to be the specific property of the bank. And so far the decision appears to rest on sound principles. But in the case to which the rule was applied, the agent had been engaged, with the knowledge of the bank, in very extensive business on his own account, and in the course of that business large sums were passing through his hands as factor for other persons.³ And it may well be doubted whether,

bills were not paid till after Julians' bankruptcy, and were then received by the assignees. It appears these two last bills were sent to enable Julians to pay the bills drawn on them. When Oursell sent them he wrote a letter to Julian, and in it takes notice that he would send to answer what *was remaining for him to pay* on his account, not what was due on his account. Argued, that these bills must be on account of the remittances, and were intended in the first place to pay the £316 balance due from Oursell; but that cannot be, for Julians had satisfaction for that balance in their own hands, for they were indebted to him in a greater sum, and the letter imports otherwise. It must be taken as the letter imports. It is a matter of fact, not of law. I am satisfied on the evidence. It amounts to an appropriation, and is within the rule and reasoning I went upon and laid down in the case *ex parte Dumas*.⁴ *Ex parte Oursell*, Ambler 297.

¹ *Zink v Walker*. Jenner was employed as an agent or banker by Zink, who drew bills on him, under an agreement to make remittances to answer the same when due. Jenner sent (November 1776) an account current, including all the accepted bills running on him up to 30th November, amounting to £1022, and making the balance due to himself £1137. Zink sent first a bill for £150, then one for £300; and on the same day on which they were sent Jenner became bankrupt, without having paid any of the drafts, and Zink himself was obliged to retire them. The bills for £450 were, when they came to hand, deposited by Jenner's clerk with Staples & Co., who wrote them short in Jenner's book. Zink claimed his £450, under deduction of £195, for which he stood indebted to Jenner for commission, etc.; and the Court held him entitled to it. The bills were held to be merely deposited with Staples & Co., and to be in Jenner's hands, as factor, till paid in the nature of goods unsold. 2 Blackst. 1154.

² See above, p. 277 et seq.

³ *Tooke v Hollingsworth*, 1793, 5 Term. Rep. 215, 2 H.

Blackst. 501. The question was concerning the specific appropriation of three bills and a quantity of light guineas. It arose out of an agreement between one Daniel, a goldsmith in London, and Tooke, a merchant in Manchester, under which Tooke, to answer the special purpose of the agreement, sent to Daniel the bankrupt, in a box by the mail-coach, 213 guineas and 19 half-guineas, with three bills, and a letter informing Daniel of their being intended for answering his drafts. The box with its contents was delivered to the officer under the commission of bankruptcy on Daniel's estate; and the Court of King's Bench held, that the bills and money 'remaining in specie, and not blended with the other subjects of Daniel,' Tooke had a right to recover them from the other creditors of Daniel. [See Smith, Merc. Law, 7th ed. 702.]

⁴ *Gilchrist v Thomson*, as trustee for Christie's creditors, 4 July 1809, F. C. Christie was manager of the British Linen Co.'s branch at Montrose. He received at first a large sum of cash, and this was deposited in a strong-box in the office where the bank business was done, the bank having one key and he another. Christie carried on extensive concerns as a trader, in partnership with others; and he was treasurer for some public institutions, and factor for gentlemen of large estates, whose rents he levied. He failed, when there was found in the strong-box £3000. The bank claimed this as their own money; the other creditors contended that the placing of money in the strong-box being voluntary on the part of Christie, he could not appropriate the cash in his hands to one of his employers more than to another, and that the money there deposited could not possibly be the identical money trusted to his management at the first. There was some difference of opinion on the bench, but the majority held that the money belonged to the bank; that the agent was the mere institor and servant of the bank; that the money taken out and put into the chest in the course of bank operations was the bank's money, sufficiently identified and kept

[265] in such a case, an exception ought not to be admitted to the general rule. Indeed, on this ground, and from want of confidence in the decision, the case was afterwards compromised.

From connection with the subject now before us, some cases may here be considered which strictly belong to the next section, viz. cases of Factor, in which the goods in the factor's hands have been changed in the course of his transactions.

1. Where the factor has sold the goods of his principal, and failed before the price of the goods has been paid, the principal is the creditor, and preferable to the creditors of the factor.¹

2. Where bills have been taken for the price, and are still in the factor's hands, undiscounted at his failure, or where goods have been taken in return for those sold, the principal is entitled to them, as forming no part of the divisible fund.²

3. Where the price has been paid in money, coin, bank-notes, etc., it remains the property of the principal, if kept distinct as his. 'If goods be sent to a factor to be disposed [266] of,' says Lord Kenyon, 'who afterwards becomes a bankrupt, and the goods remain distinguishable from the general mass of his property, the principal may recover the goods in specie, etc. Nay, if the goods be sold and reduced to money, provided that money be in separate bags, and distinguishable from the factor's other property, the law is the same; and this,' he adds, 'may be taken as an incontrovertible point.'³ Where not kept distinct, the rule that seems to be adopted on the Continent is, that circumstantial and presumptive proof of identity may be received; such as the evidence of the bankrupt's having no other

specific; that the agent may have by fraud augmented this store, for which the bank might be liable, as for their servant; but that the justice to be done on this ground should not be allowed to injure the general principles which made the distinguishable money the property of the bank.

This case was settled out of Court.

¹ *Ex parte Murray*, Dec. 1783, Cook's B. L. 4th ed. p. 400. Murray consigned linens to Bate & Hankell with a *del credere* commission, which implies a guarantee by the factor, so that if the purchaser fail the principal does not suffer. They sold the linens, and before receiving the price became bankrupts. Their assignees afterwards received the price from the purchasers, and refused to deliver it to Murray the principal, desiring him to come in as a creditor. Murray petitioned the Lord Chancellor for delivery of the price of his linens, deducting commission, etc. His Lordship was clearly of opinion, after hearing the point of law argued, that the purchaser not having paid for the linens previous to the bankruptcy, Murray the consignor was entitled to receive the price of the linens, and accordingly the assignees were ordered to pay him the money.

In Scotland, the case of *Hay v Hay*, below, p. 288, note 1, affords an example of the same doctrine. See below, p. 285, note 4.

² In England, in the case of *Dumas*, Lord Hardwicke mentioned a case in these words: 'The Court of Common Pleas in a case, the name of which I do not remember, determined that, notwithstanding the goods so consigned were sold, yet as the factor took notes instead of money for them, the principal was entitled to the notes, and not the creditors at large.' This was the case of *Scott v Surman*, Willis' Rep. 400.

In Scotland the following cases may suffice on this point:—

Street v Home & Bruntfield, 1669, M. 15122. Street, a merchant in London, having sent down a parcel of skins to Lyel, his factor at Edinburgh, Lyel the factor sold them, and took

a bond for the price in his own name, advising Street of the receipt of the skins, and giving him the names of the purchasers. Lyel died bankrupt, and Street claimed this bond as his property, and obtained a decree of declarator to that effect. Having raised an action for the contents of the bond, the debtors objected that they were not in safety to pay, lest they should expose themselves by payment to a claim for second payment at the instance of Lyel's creditors. The Lords repelled the defence, and found the bond not to be *in bonis* of Lyel, nor to be confirmable as his goods, but to belong to the pursuer Street.

Sir John Baird v Murray's Crs., 1744, M. 7737. Murray was executor to Sir James Rothead; and having taken the assistance of Gordon in recovering the estate, a balance was struck upon Gordon's intromissions, a bill granted by him to Murray for £286, payable to order, and Gordon completely discharged. Murray died with this bill in his possession; and some of his creditors having attached it, the question arose, Whether they or the next of kin of Sir James Rothead had the preferable right to the bill? The Court found 'that there was sufficient evidence that the sum contained in Gordon's bill was part of the proceeds of Sir James Rothead's executry; and therefore that Sir James Rothead's next of kin are preferable for the sum in the said bill, before the other creditors of Murray.'

A question remains here, Whether the purchaser can have compensation upon debts due to him by the factor? The most respectable of the continental lawyers are decidedly against such compensation. *Casaregis*, Dis. 75, secs. 23, 24. But of this hereafter, in considering the doctrine of Retention and Compensation.

³ In the case of *Tooke v Hollingsworth*, 5 Term. Rep. 227. See also *Scott v Surman*, 1743, Willis 400; *Howard v Jemmet*, 1763, 2 Burr. 1369; *ex parte Sayers*, 1800, 5 Ves. jun. 169; *Montagu, Bank. Laws*, vol. ii., notes, p. 233.

money, or that arising from the shortness of the interval between his acquisition and the question,¹ etc. But such evidence does not seem to be admissible with us.

4. Where a bill received for the goods, or placed with the factor, has been discounted, or where money coming into his hands has been paid away, the endorsee of the bill, or the person receiving the money, will be free from all claim at the instance of the principal, however cruelly the purpose for which they were deposited should be disappointed;² but it has been doubted whether the principal will have a preference for the value on the funds of the factor. This is indeed as much an unlawful conversion of the money and bills to the factor's use, as if he had actually stolen them; or as if, having goods deposited with him, he had made free with them. But the presumption is, that the bankrupt has accomplished the fraud, not so much for the benefit of his general creditors, as for the purpose of embezzlement, and there seems to be no ground for a preference.

5. Where the factor sinks the name of the principal entirely (which may be done without fraud³), it is necessary to distinguish. Wherever a factor, employed to sell goods, receives a *del credere* commission, for which he engages to guarantee the payment to the principal, it is not the practice to communicate the name of the purchasers to the principal, except where the factor fails. In this situation, there are several points well fixed in England: 1. Where the factor fails, the principal is the creditor of the buyer, and has a direct action against him for the price.⁴ If, therefore, the principal give notice to the buyer, on the factor's failure, not to pay the factor, and the buyer notwithstanding does pay the factor, he will be liable to pay the price over again to the principal. But, 2. The persons contracting with the factor in his own name, and *bona fide*, are entitled to set off the factor's debt to them. Lord Mansfield thus laid down the law: 'Where a factor, dealing for [267] a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him, to all intents and purposes, as the principal; and though the real principal may appear, and bring an action upon that contract against the purchaser of the goods, yet that purchaser may set off any claim he may have against the factor in answer to the demand of the principal; this being long settled.'⁵ 3. Where the

¹ De Lucca De Cred. Disc. 1, No. 12, and Disc. 26, No. 3.

² Collins v Martin and others, 1 Bos. and Pul. 648; Bolden v Fuller, 1 Bos. and Pul. 539. [See Stewart v Central Bank of Scotland, 1859, 21 D. 1180; Sm. Merc. Law, 7th ed. 200.]

³ Casaregis delivers it as the practice of merchants: 'Introdotto per motiva di prudenza il contrattare senza spiegare la persona per cui fanno il negozio.' Disc. 56, sec. 12.

⁴ See above, p. 284, note 1. This doctrine was first laid down by Lord Chief Justice Lee ineffectually, for the jury would not decide according to his direction. Scrimshire v Alderstone, 2 Stra. 1182. [Add. Cont. 6th ed. 598.]

Afterwards it was fully established, and the assignees were ordered, when they had received the price from the buyer after the bankruptcy, to pay to the principal.

This was first decided where there was no *del credere* commission. Garrat v Callum, Buller's N. P. 42.

The effect of an obligation under a *del credere* commission may appear to make an essential difference, and to be decisive against this doctrine (since the principal is not obliged to take the bills of the buyer in payment, but entitled to look only to the factor); but the factor's obligation here is as guarantee, or rather, properly speaking, as insurer; and though he gets a premium to insure the solvency of those to whom he sells, yet where he fails the buyer is the debtor to the principal, the factor debtor only for the loss that may arise from insolvency. Accordingly this was decided in a case where there was such a commission. *Ex parte Murray*, Dec. 1783, Cook's B. L. p. 400.

⁵ Rabone v Williams, 7 Term. Rep. 360, note (a). Rabone, senior, & Co., of Exeter, were factors for Rabone, junior, and sold goods to Williams. The factors failed before receiving the price from Williams; and he, when called on by the principal, set off a debt due to him by the factors, alleging that the plaintiff—Rabone, junior—had not appeared at all in the transaction, and that credit had been given by Rabone & Co., the factors, and not by the plaintiff. The set-off was allowed.

In the former edition of Cook's Bankrupt Law, a doctrine very opposite was laid down on the authority of Escot v Milward, tried two years before the above case. But Mr. Cook had mistaken the decision, which proceeded entirely upon the ground of fraud between the factor and purchaser, as appears from an accurate note of the case obtained from Mr. Justice Buller, who tried the case. 7 Term. Rep. 361. It was upon the strength of the erroneous report of Escot's case that the new trial was applied for in the above case of Rabone & Co.

A case was, conformably to this doctrine, decided by Lord Kenyon at Guildhall.

George v Olagget. George, a clothier at Frome, employed Rich & Heapy, of London, as factors under a *del credere* commission. Besides acting as factors, they dealt in woollen cloth on their own account, and all their business was done at one warehouse. Olagget bought woollen cloth from Rich & Heapy for exportation, at the price of £1237. The cloth was taken out of a general mass in the warehouse, and Rich & Heapy made out a bill of parcels in their own name, never disclosing

factor is entrusted with property or money of his principal to buy stock, Exchequer bills, etc., and misapplies it, the produce will be the principal's, if still clearly distinguishable. And although it has been attempted to be maintained, that such misapplication not being in execution of the trust, the property acquired could not be held as acquired for the principal, but as added to the general stock of the factor, leaving the principal a creditor; this has been rejected as mischievous in principle, and supported by no authority in law.¹

to Clagget that George was owner of the goods. Rich & Heapy became bankrupts, and George gave notice to Clagget not to pay the price of a part of the goods, amounting to £142, as to that extent the goods were his. But Clagget stood as endorsee of a bill of Rich & Heapy for £1198; and a question arose, Whether he was entitled to set off this bill against the price of the woollen cloth? Lord Kenyon was of opinion that he was. A new trial was applied for, and the Court was clearly of opinion that the direction given by the learned judge on the trial was right, and that the case was not distinguishable from that of *Rabone v Williams*. 7 Term. Rep. 359. [See the notes to *George v Clagget* in Smith's Leading Cases, vol. ii.; also in same vol., *Paterson v Gandasequi*, *Addison v Gandasequi*, *Thomson v Davenport*, and notes.]

¹ *Taylor v Sir Thomas Plumer*, 1815. Sir T. Plumer employed Walsh, a stockbroker. Intending to buy an estate, he consulted Walsh about the proper time of selling out stock, and afterwards gave Walsh an order to sell out. He accordingly sold to the amount of £21,774, 5s. The stock was transferred by Sir Thomas, and Walsh received the money and paid it into Sir Thomas' bankers. It was then proposed to invest it till wanted in Exchequer bills, and Sir Thomas gave Walsh a cheque for £22,000, to be laid out in Exchequer bills, to be delivered on the same day to Sir Thomas or his banker. Walsh bought Exchequer bills with £6500, which he lodged at the bankers. With eleven of the Bank of England notes of £1000, received from the banker, he bought from an American merchant American bank shares and stock of the United States. He with other of the notes bought bullion. He then went off for America, taking the way of Lisbon, and was overtaken at Falmouth, when he surrendered the certificates and bullion, and gave an assignment in trust for payment to Sir Thomas of £15,500, the difference between the Exchequer bills lodged in the bankers and the £22,000; and he also gave a double bond for the sum. A commission having been issued, an action of trover was brought by his assignees against Sir Thomas Plumer. A verdict was given for the plaintiffs for the bank stock and American stock, and for the bullion separately, subject to the opinion of the Court on a case. Lord Ellenborough delivered the opinion of the Court. He said: 'The plaintiff in this case is not entitled to recover if the defendant has succeeded in maintaining these propositions in point of law, viz. that the property of a principal entrusted by him to his factor for any special purpose belongs to the principal, notwithstanding any change which that property may have undergone in point of form, so long as such property is capable of being identified and distinguished from all other property. And, secondly, That all property thus circumstanced is equally recoverable from the assignees of the factor in the event of his becoming a bankrupt, as it was from the factor himself before his bankruptcy. And indeed, upon a view of the authorities, and consideration of the arguments, it should seem that if the property in its

original state and form was covered with a trust in favour of the principal, no change of that state and form can divest it of such trust, or give the factor, or those who represent him in right, any other more valid claim in respect to it than they respectively had before such change. An abuse of trust can confer no rights on the party abusing it, nor on those who claim in privity with him. The argument which has been advanced in favour of the plaintiffs, that the property of the principal continues only so long as the authority of the principal is pursued in respect to the order and disposition of it, and that it ceases when the property is tortiously converted into another form for the use of the factor himself, is mischievous in principle, and supported by no authorities of law. And the position which was held out in argument on the part of the plaintiffs, as being the untenable result of the arguments on the part of the defendant, is no doubt a result deducible from those arguments; but unless it be a result at variance with the law, the plaintiffs are not on that account entitled to recover. The contention on the part of the defendant was represented by the plaintiff's counsel as pushed to what he conceived to be an extravagant length, in the defendant's counsel being obliged to contend that, "If A is trusted by B with money to purchase a horse for him, and he purchases a carriage with that money, then B is entitled to the carriage." And indeed, if he be not so entitled, the case on the part of the defendant appears to be hardly sustainable in argument. It makes no difference in reason or law into what other form different from the original the change may have been made, whether it be into that of promissory-notes for the security of the money which was produced by the sale of the goods of the principal, as in *Scott v Surman*, Willis 400; or into other merchandise, as in *Whitecomb v Jacob*, Salk. 160: for the product of or substitute for the original thing still follows the nature of the thing itself as long as it can be ascertained to be such; and the right only ceases when the means of ascertainment fail, which is the case when the subject is turned into money, and mixed and confounded in a general mass of the same description. The difficulty which arises in such a case is a difficulty of fact, and not of law; and the dictum that money has no ear-mark must be understood in the same way, i.e. as predicated only of an undivided and undistinguishable mass of current money. But money in a bag, or otherwise kept apart from other money, guineas, or other coin marked (if the fact were so) for the purpose of being distinguished, are so far ear-marked as to fall within the rule on this subject which applies to every other description of personal property whilst it remains (as the property in question did) in the hands of the factor or his general legal representatives.' His Lordship then went into a discussion of the previous cases, and concluded with saying that the difficulty in respect of proof which occasioned doubt in any of those cases, does not stand between the original proprietor and his rights in respect to the ascertained produce of his own funds

6. Where the factor purchases goods for behoof of his principal, but on his own [268] general current account, without mention of the principal, the goods vest in the factor, and the principal has only an obligation against the factor's estate.¹ But where the factor, after purchasing the goods, writes to his principal that he has bought such a quantity of goods in consequence of his order, and that they are lying in his warehouse or elsewhere, the property would seem to be vested in the principal.

Thus, the general rule may be laid down, that in all cases of factory, where the property remitted by the principal, or acquired for him by his order, is found distinguishable in [269] the hands of the factor, capable of being traced by a clear and connected chain of identity, in no one link of it degenerating from a specific trust into a general debt; the creditors of the factor, who has become a bankrupt, have no right to the specific property. The case quoted below shows the discriminations necessary in the application of the doctrine.²

6. NEGOTIORUM GESTIO.—I may here briefly dispose of the analogous contract of NEGOTIORUM GESTIO, which is a species of spontaneous factory; one interfering, from friendship or benevolence, in the affairs of another, without authority. In this situation, still less than in factory, is there any alteration of the property which comes into the possession of the gestor. Thus, Mr Seton, brother to the Earl of Winton, assumed, during the Earl's absence, the management of his estate, and entered into a contract with Hay, Mitchell, & Gordon for the sale of 400 bolls of the wheat of the estate. He engaged to deliver the wheat at a certain place, and they to pay the price to him, or his order. The wheat was accordingly delivered; but before the price was paid, Mr Seton died; and his creditors having attached

on this occasion: 'He has repossessed himself of that of which, according to the principles established in the cases I have cited, he never ceased to be the lawful proprietor; and having so done, we are of opinion that the assignees cannot in this action recover that which, if an action were brought against them, the assignees, by the defendant, they could not have effectually retained against him, inasmuch as it was trust-property of the defendant, which as such did not pass to them under the commission.' 3 Maule and Sel. 562. [See Add. Cont. 6th ed. 588.]

¹ *Boylston v Robertson & Fleming*, 1672, M. 15125. Boylston in London employed Mackelwood in Halifax to buy linen cloth for him, and sent money for the purpose. The factor sent Palmer, her servant, and purchased the cloth; and having left it in the hands of Robertson, a third party, it was there arrested by a creditor of the factor, Mackelwood. Boylston claimed the goods. Evidence was taken, and two witnesses swore that Palmer subscribed in the transaction as servant to Mackelwood; and that the cloth was bought and received by him in her name, and for her use. Mackelwood deposed that she was employed by Boylston to buy the cloth, and sent the money furnished by him with Palmer, who again swore he bought the cloth for the use of Boylston. The Court found, that the cloth being bought in name and for the use of Mackelwood, the property was thereby stated in her person, and not in the person of Boylston, although she had a mandate or trust from him, which is but a personal obligation. But property or dominion is transmitted or constituted only by possession; and Boylston had got no possession of the linen cloth, either by himself, or by any in his name to his use. Lord Stair (i. 12. 16) and Erskine (iii. 3. 34) lay it down, that the mandatory receiving money from his principal, but buying goods in his own name, becomes proprietor: the real right is in him, and there is an obligation on him to transmit them to his constituent.

² *Ex parte Sayers*, 5 Ves. jun. 169. Sayers, paymaster of the forces in the island of Dominica, wrote to Cheap & Co. of London to purchase for him certain kinds of foreign coin, and enclosed for them bills upon the paymaster-general for £16,000. For this amount he desired them to give him credit; and he drew upon them for £2000. Cheap & Co. discounted the bills; and not being able to procure the coin in England, they remitted £5000 to Peter & Co. at Lisbon, with directions to purchase the coin wanted, or, if not to be procured, to return the money in good bills. They afterwards sent a similar sum with the same directions. Not being able to procure the coin, Peter & Co. sent back the money in good bills not endorsed by them; and Cheap & Co. having become bankrupts, those bills came into the hands of the assignees, and Sayers petitioned to have them delivered up as specifically his property. Lord Chancellor Loughborough, in deciding this case, proceeded upon the following grounds:—1st, That the money was sent for a particular purpose to Cheap & Co. 2^{dly}, That the correspondence showed the remittance by them to Lisbon to have been made for the specific purpose of executing the trust by making the purchase. 3^{dly}, That if coin had been returned, it would have been specifically the property of Sayers, and not a general debt, as being purchased by his order with money remitted for the purpose. 4^{thly}, That if Sayers had gone to Lisbon he might have stopped the transaction, and taken bills instead of the coin ordered. 5^{thly}, That the bills when sent to London might equally well have been taken by Sayers had he been there; and, on the whole, that the right of Sayers to the bills should be allowed. His Lordship at the same time acknowledged the case to be difficult, and offered to take it for further consideration. The general ground of his decision was this: 'That the money acquired an identity, and a distinction from all the rest of the fund, by the application of it in sending it to Portugal.'

the price, a contest ensued with the creditor of the Earl of Winton, who attached it as the property of the Earl. The Court found that the grain was not Mr Seton's, and therefore that the price could not be claimed by his creditors.¹

There are some other cases of frequent occurrence, which may here be explained, as presenting difficulties respecting the property of goods, or bills, or money.

I.—GOODS SENT ON SALE AND RETURN.

It has been often questioned, Whether goods sent on sale and return, are in the same condition, in respect of the law of reputed ownership, as goods in the hands of a factor?

1. Sometimes goods are sent by a manufacturer or wholesale dealer to a retail trader, in the hope that he may be induced to purchase them, on the understanding that what he may choose to take, he shall receive on the footing of the contract of sale; what he does not take, are to be in his hands for the consignor. Here the goods not purchased are not held to fall under reputed ownership; but they are, on the footing of deposit or factory, in the consignee's hands for benefit of the creditors of the consignor.

[270] 2. Where goods are sent subject to approbation, the simple fact of possession, without some act of acceptance to change the property, will still leave the property undisturbed by reputed ownership.

3. Where goods are sent on the proper footing of sale and return, the transaction is commonly of this nature:—The wholesale dealer sends goods periodically, which the retail dealer is to sell. The settlement is monthly, or quarterly, or annually, at a certain rate (as, perhaps, at invoice price, or with a certain deduction from invoice price), and the stock is to be kept up to a certain proportion. If the retail dealer find the commodity does not take the market at any particular time, he may stop sales, and return upon the consignor what is unsold. This is frequent in the woollen manufactory, in bookselling, and in several other lines of trade. The question is, Whether, in case of a bankruptcy of the retail dealer, the goods which are in his hand unsold are the property of the wholesale trader; or can, on the footing of reputed ownership, be made responsible to the creditors of the retailer? It has been held in England, that the goods so in the hands of the retailer are in his order and disposition, and, by the law of reputed ownership, liable to his creditors.² And the

¹ *Hay v Hay, etc.*, 1707, M. 15128.

² *Livesay v Hood*, 1809, 2 Camp. 84. By agreement between Livesay, a wholesale hosier, and Almond, a retailer, the former was to supply the latter with hosiery goods upon sale or return, and to keep up the stock to £100; the settlement to be monthly, Almond to pay the invoice price, deducting five per cent. The bill of parcels bore, 'J. Almond from Livesay & Co.' At the end of the first month the account was settled, the articles sold paid for, and the stock agreement made up to £100 worth. About the end of the second month Almond failed, with goods in his shop, furnished as above, to the value of £61. The question was, Whether the assignees under Almond's commission were entitled to the goods? The plea for Livesay was, that Almond was a factor. But Mr. Justice Lawrence directed a nonsuit, as the goods appeared to the world as Almond's property, and this reputed ownership was calculated to gain him a delusive credit. [*Shaw v Harvey*, 1 A. and E. 920.]

Gibson v Bray, 1817, 1 Holt 556. Here goods were sent to Markham on sale and return, and so expressed in the invoice. Markham not being at home, the goods were taken in, and

the carriage paid by his servant. He afterwards became bankrupt, while the parcel containing the goods remained unopened. This was a strong case for the original owner of the goods, and the statute of reputed ownership was held not to apply. Gibbs, Chief Justice, said: 'We all know what is meant by the ordinary terms of sending goods on sale and return. They become the property of the trader so far that he may sell them either for money or credit, and receive the proceeds; but if he is unable to sell them, the seller cannot, as a matter of course, call upon him for the value of the goods, but he has a right to return them in specie. He is not a factor, nor anything like it.' He adds: 'Goods sent upon sale and return, in the ordinary meaning of that contract, are within the order and disposition of the bankrupt: he deals with them as his own stock, they procure him credit; but it is not reasonable that those who so trust him should take their chance with his other creditors. It is, however, a strong feature in this case which sustains the claim of the plaintiff (the consignor), that the parcel so sent was never opened, nor taken to, by any express act of acceptance on the part of the bankrupt.' A verdict was directed for the plaintiff,

same decision would probably be given in Scotland; such a transaction, with the uncontrolled power in the consignee, being a fair ground of extended credit.¹

subject to the opinion of the Court. The Court of Common Pleas was of opinion that this was not a case of reputed ownership under the Act.

¹ [The contract of sale and return is one in this country of some importance, from the large amount of property under its operation. It appears not to be well understood as yet by law writers. The author assumes that goods sent on sale and return are not sold, but deposited. Mr. Brown (*Sale*, p. 37) treats this contract as a sale of goods under a suspensive condition—only sold if re-sold; if not re-sold, to be returned. The question, what the real nature of the transaction is, arises sometimes with regard to the property in the goods, and sometimes as to the *periculum* in case of their destruction *damno fatali* while in the hands of the retailer not re-sold. On Mr. Brown's view of its nature, neither the property nor the *periculum* would pass *pendente conditione*, i.e. until the first sale became absolute either by a re-sale, or by the lapse, without return of the goods, of a reasonable time, according to the usage of the trade, within which, if not returned, they should be considered absolutely sold. See Brown, Nos. 47, 509–55. In another passage, however, he deals with a similar transaction as a sale with a resolutive condition annexed (No. 625). If the transaction be a resolutive sale, the property passes from the date of delivery, and the risk from that of sale. In *Gibson v Bray*, *supra*, Gibbs, C. J., holds that the property passes, which it could not do by an incomplete sale such as a sale on a suspensive condition is. Where the retailer is 'not a factor, nor anything like it,' it is difficult to see whence he has his power of selling at what price he pleases, or of pledging, or even giving away gratuitously,—all which things are understood to be competent to him, if it is not from his *jus disponendi* as proprietor. Parsons (*Contr.* i. 539) says that in these 'sales on condition, called contracts of sale and return, the property in the goods passes to the purchaser, subject to an option in him to return them within a fixed period or a reasonable time,' i.e. such contracts are sales under a resolutive condition. See *Moss v Sweet*, 16 Q. B. 493 (overruling *Iley v Frankenstein*, 8 Scott N. R. 889; and *Lyons v Barns*, 2 Stark. 39); *Beverley v Lincoln Gas Light and Coke Co.*, 6 A. and E. 829; *Bayley v Gouldsmith*, Peake Cas. 56; *Neate v Ball*, 2 East 116. And see also the American cases cited by Parsons, *ib.*, and by Story (*Sale*, sec. 249), who seems to regard them as sales upon a condition subsequent or resolutive; for he holds the property to vest by delivery in the vendee. In *Delauney v Barker*, 2 Starkie 539, Abbott, C. J., held that where goods were delivered to a person on sale and return, he had no authority to pledge them; but unless the circumstances of the pledging indicated a mere intention to obtain goods by swindling, this is contrary to the usual mercantile understanding, which is, that in such a case a retailer's rights of disposal are unlimited. The Contract of Sale and Return is the *contractus æstimatorius* of the civil law. Heineccius, ad Pand. par. 3, sec. 339 et seq., Dig. 19. 3. 1, 1 pr. See also Pothier, Pand. Justin. 19. 3, vol. i. p. 548; Mackeldey, sec. 449, and places cited. The Roman lawyers were uncertain how to classify it, whether as sale, *locatio*, *conductio*, mandate, or partnership; and then ended by appropriating to it—*tolendæ dubitationis gratiâ*—a peculiar form of action, *De æsti-*

mato. Ulpian, Poth. *ubi sup.* As to the *periculum*, Ulpian in one place lays it down that it is his who receives the goods on sale or return; and in another, draws the distinction whether the transaction is gone into at the request of the giver or that of the receiver of the goods, the person at whose request it is gone into bearing the risk: if it is at the request of neither in particular, but of mutual consent, the receiver is bound only *dolum et culpam præstare*. On one occasion in Glasgow, where a considerable quantity of valuable goods held by a retail jeweller on sale and return were destroyed in an accidental fire, the understanding of merchants seemed to be that the risk lay with the retailer, but on different grounds, some viewing it as a sale, which, when followed by delivery, passed the property to the retailer, with all powers incident to property, and with no power in the wholesale dealer to re-demand the goods, though the retailer had the option of returning them within reasonable time; others holding that the property was understood to remain with the wholesale dealer till sale, or failure to return after demand, or the lapse of a reasonable time, but that there was a duty on the retailer to insure for behoof of whom it might concern, which in this case had been neglected. The truth is, that the nature of the bargain is not always the same. The express terms differ; and the implications arising from the circumstances and understood relations of parties, and the necessities of different branches of trade, create further differences in regard to the real intention of the parties. What at first sight appears to be one form of transaction, will, on inquiry, be found to vary through a series of gradations from sale under resolutive conditions to pure agency. Thus, it is not unusual in certain trades for an avowed agent to have goods put into his hands for sale with a price fixed by his principal, below which he is not to sell, but with an arrangement that, if he can sell for more, he is to have the excess either as the only commission he is to look for, or as an addition to a commission fixed at a low rate. This is merely agency. The creditors of the agent could not, it seems, attach the goods, nor would the agent be liable for their natural deterioration or accidental destruction. But this is sometimes complicated by the agent standing *del credere*, and even guaranteeing that he will sell not less than a certain amount of the goods; and he is sometimes required to accept the principal's drafts against goods sent him, in anticipation of the sales, in order to give the principal the use of the money before it is received by the agent from the customer. Sometimes the receiver of the goods is both a buyer and seller on his own account, and an agent for the purchase and sale of such goods for other people; and there is a difficulty in ascertaining in which of these capacities he acts on a particular occasion. Sometimes the value of the goods sent is so large in proportion to the credit which the retailer could command from the wholesale dealer on his personal obligation, that it is manifest there is no intention in the wholesale dealer of parting with the property; as where a jeweller is entrusted with a very costly service of gold plate or sets of diamonds worth several thousand pounds. Sometimes a retail dealer applies to a manufacturer or wholesale merchant to send him goods on sale and return. These are invoiced as

II.—TRANSACTIONS WITH BANKERS.

The general rule is, that where a banker fails possessed of his customer's property, distinguishable from his own, it does not pass to his creditors, but may be vindicated by the true owner, subject to such liens as the banker may have over it.¹

In transactions relative to bills between bankers and their customers, it is not always easy to distinguish precisely, on the failure of the banker, what the nature of the contract is to which the transaction is referable, and where the property is.²

[271] 1. Bills discounted in a single transaction are *bought* by the banker, and are the property of his creditors on his bankruptcy.³

2. But when a bill is sent to a banker, not for discount, but for a special purpose, as for the purpose of negotiation, or to get payment, the banker is a mere agent, and the bill, being distinguishable, is the property of the principal.⁴

The ordinary and more correct way of entering this transaction in the books, is by what is called a *short entry*; that is to say, stating the amount in an inner column, and carrying it out into the account between the parties only when the bill is paid. Thus, the amount of the bill, while unpaid, does not go into account at all between the parties; and the banker is a mere agent holding the property of the customer, which on the banker's failure makes no part of his estate, unless upon inquiry it shall appear that between the parties they were held as cash, the onus of which is on the banker.⁵

'Bought of so and so—on sale or return within twelve months.' The price is stated, and sometimes there is a special statement as to risk being the buyer's. Sometimes a manufacturer attempts to force his goods on the market by getting a dealer to take them at his request on terms similar or slightly varied—sometimes expressly at the sender's risk till re-sale. It may sometimes bear on the question of risk, and even on that of property, whether the goods are sent *rogatu accipientis* or *rogatu dantis*, as Heineccius expresses it (*supra*, sec. 341). Occasionally the terms are clearly expressive of a suspensive condition. But where, notwithstanding conditions apparently suspending the completion of any sale between them, the manufacturer by the bargain invests the dealer with all the powers usually annexed to property, reserving to himself, in the event of their exercise by the dealer, only a claim against him for the price fixed between them, it will be a question whether the substance and reality of the transaction does not control the mere wording of the invoice or other documents; and whether the transaction, if it does not on the one hand resolve into a mere agency for the manufacturer, can be anything on the other but an interim sale and delivery, with a power of resolution in a certain event. As to what is a reasonable time for return of goods, see Parsons, and Story's note, *ubi supra*, and cases there. A sale 'on trial or approval' is a totally different transaction (as to which, see Brown, Sale, Nos. 43-7, 625-6; and Benjamin, Sale, pp. 441-2), though sometimes dealers confound names. See also Pothier, Vente, secs. 264-6, 311; Oblig. No. 224; Pardessus, Cours de Droit Commerce, vol. i. 294, 370.]

¹ *Walker v Burnell*, Douglas 303; *Bryson v Wylie*, 1 Bos. and Pul. 83; *Bolton v Puller*, 1 Bos. and Pul. 539.

² [As to bills, see Thomson on Bills, p. 541 et seq., and Grant on Banking, ch. vi. 2d ed.]

³ *Carstairs v Bates*, 1813, 3 Camp. 301. Kensington & Co., bankers, discounted three bills for Allport, the drawer, and credited him with the amount, debiting him with the dis-

count, so that, deducting the discount, they were placed to his account as cash which he might have drawn out. A balance was at this time due to Allport, when the bankers failed. Lord Ellenborough held the bankers here to be purchasers of the bill, of which the whole property and interest vested in them, they standing all risks from the moment of discount; so that, if burnt or stolen, it would have been lost to them. Verdict for Carstairs, assignee of the banker.

See *ex parte Sargeant*, below, note 5.

See also *Giles v Perkins*, below, p. 291, note 1; and *Parke v Elleason*, p. 291, note 4.

⁴ *Bruce v Hurley*, 1815, 1 Starkie 24. Bruce & Co., London bankers, held a certain note, with other securities, from Young & Co., bankers at Taunton; and on the day before the note became due, Bruce & Co. sent it down to Young & Co. to get payment. It was not paid; and Young & Co. failing, it was found by their assignees among their papers. In an action of assumpsit by Bruce & Co., as endorsers, against Hurley, the maker of the note, Bruce & Co. produced the letter enclosing the note to Young & Co., and proved that this note had been placed with them as a security, and the custom of sending such notes back to the correspondents to get payment. Young & Co. had overdrawn the amount of their securities in Bruce's hands. Lord Ellenborough was of opinion that there was evidence to show that the note had been sent down by the plaintiffs to Young & Co. for the purpose of procuring payment, and the plaintiffs had a verdict.

See *ex parte Aikin*, 2 Maddock 192, where bills were by a customer placed with his banker, to be applied in providing for the customer's acceptances, and they were found not to be distributable among the banker's creditors. [See *Patten v Royal Bank*, 1853, 15 D. 617.]

⁵ In the case of *Sargeant*, p. 291, note 1, Lord Chancellor Eldon said: 'It is quite clear that *short bills*, in the possession of bankers, are to be considered as still remaining in the

Even where the bills are sent to the banker indefinitely, and entered not short, but generally in account, it would appear that they are not to be held as discounted, or as the property of the banker, unless where the customer has been allowed credit to their amount, and has drawn upon it;¹ or at least the customer is allowed to draw checks to the [272] amount, the banker has uncontrolled power over the bills, and the customer is credited and debited with interest.²

3. The bills are still more clearly to be held as the customer's, where the agreement with the banker is, that the customer shall be permitted to draw only a certain proportion of the amount. This is a very common arrangement with bankers. The bills are blank endorsed, and the banker receives payment when due. If he fail before they are due, the bills belong to the depositor, under a lien for the advances.³

4. Where the banker has received bills at long dates, and has on the security of them given bills or accepted drafts at shorter dates, for the purpose of discounting, the long-dated bills seem to be with the banker only in pledge; so that the customer may demand them on the banker's failure, provided he relieve the estate of the short-dated drafts.⁴

possession of the parties by their agents, to be specifically returned; and if *these* bills were written short, the petitioner could have compelled Kensington & Co. so to settle with Burrough as not to break in on his claim.' 1 Rose 153.

¹ *Giles v Perkins*, 9 East 12. Dickenson & Co., bankers at Birmingham, had an account with Giles. On 12th November 1805 Giles paid in three bills, amounting to £1100. They were endorsed by him, but not due till December and January. Dickenson & Co. failed on 18th November. Independently of these bills, there was a large balance due by them to Giles. The assignees considered the bills as having been entered in the books in common with cash, so that Giles might have drawn for the amount, and they refused to deliver them up to him. Lord Ellenborough was of opinion that Giles was entitled to the bills. On a motion for a new trial, his Lordship said: 'Every man who pays bills not then due into the hands of his banker, places them there, as in the hands of his agent, to obtain payment of them when due. If the banker discount the bill, or advance money upon the credit of it, that alters the case: he then acquires the entire property in it, or has a lien on it *pro tanto* for his advance. The only difference between the practice stated of London and country bankers in this respect is, that the former, if overdrawn, has a lien on the bill deposited with him, though not endorsed; whereas the country banker, who always takes the bill endorsed, has not only a lien upon it, if his account be overdrawn, but has also his legal remedy upon the bill by the endorsement; but neither of them can have any lien on such bills until their account be overdrawn: and here the balance of the cash account, at the time of the bankruptcy, was in favour of the plaintiff.' *Per curiam*. Rule refused.

Ex parte Sargeant, in the matter of Burrough, 1810. Sargeant employed Burrough, a banker at Salisbury, as his banker, and had been in the habit of paying bills and cash indiscriminately into his account, and they were entered without distinction. He paid in two bills, not due till after Burrough's bankruptcy, and Burrough remitted them to Kensington & Co., his London agents, in whose hands they remained at Burrough's bankruptcy; the balance on Kensington & Co.'s account being in Burrough's favour. Sargeant petitioned, on Burrough's bankruptcy, to have those two bills delivered up, or their amount from the estate. Lord Chan-

cellor Eldon, after laying down, as above in note 5, p. 290, the doctrine as to short bills, says: 'That these bills were not written short amounts to nothing, unless there be a concurrence, manifested at the time, or to be inferred from the habits of dealing between the parties, that they were to be considered as cash. If they were there with the petitioner's knowledge as cash, and he drawing or entitled to draw upon them as having that credit in cash, he would thereby be precluded from recurring to them specifically; but it is upon them to prove that to be the case, and the petitioner is therefore entitled, unless they have been carried to his credit as cash, with his knowledge or consent.

'Take an inquiry before the commissioners, and declare the petitioner entitled to the proceeds of the bills, unless by his consent, or from the habit of dealing between the parties, they can be considered as cash.' 1 Rose 153.

² *Thomson v Giles*, 2 Barn. and Cress. 422. [Add. Contr. 6th ed. 423.]

³ See below, p. 294.

⁴ *Parke v Elleason*. Parke sent to Persent and Bodecker bills blank endorsed for £4833, to be allowed to draw, without renewals, at two or three months. The bankers answered that they had discounted the bills, and that short drafts would meet due honour. Parke accordingly drew to the amount at three months, and the drafts were accepted; but soon after the bankers failed, with Parke's bills in their hands. The assignees under the commission received the contents; but none of Parke's drafts having been paid, an action was raised against the assignees. Lord Kenyon said: 'If the bills had been taken upon a simple proposal to discount them, the transaction would have been merely that of a purchase, and no question could have arisen. But this is nothing like a case of discount, but the bills were placed in their hands to answer a particular purpose.' Referring to the cases of *Tooke v Hollingsworth* (see above, p. 281, note 1), and *Bent v Fuller* (see above, p. 282, note 1), as settling the distinction between bills paid into a banker's hand on a running account, and the case of a single transaction, where a deposit is made for a special purpose, Lord Kenyon added that he would make no exceptions or nice distinctions; and that the bills here were deposited to enable Parke to draw; and that those very bills, having an ear-mark on them, remained distinguished from the

[273] 5. Where a bank allows credit on bills deposited, the property is not changed while the credit is not operated on ; but it is sometimes agreed that the banker shall have it in his power to discount all or any of the bills, when the credit is drawn out. And when

bankrupts' property at their bankruptcy. The rest of the judges agreed that this was a deposit of bills for a specific purpose, though the word discount was used ; and the condition not having been complied with, the depositor was entitled to have them back. 1 East, Rep. 544.

Bolton v Puller. Forbes and Gregory carried on business in London under the firm of Barton, Forbes, & Gregory. They also were partners of the house of Charles Caldwell & Co., bankers at Liverpool. The Liverpool house had connections with the London company, and there was an open current account between them. Bolton, a merchant in Liverpool, employed the Liverpool house as his bankers, and they procured his bills drawn payable in London, to be paid by the London company. The payments so made were by the London house carried to account with the Liverpool house, who stated them in their account with Bolton. In the Liverpool house account, Bolton was debtor for the bills payable in London, and for cash drawn by him ; and he was creditor for all bills and cash paid in. Bolton accepted bills payable in London for £19,000 ; and, to enable the Liverpool house to provide for them, he delivered certain bills. The London house failed, and then the Liverpool ; and Bolton had £2000 due to him by the latter. None of the acceptances were provided for by the bank, and Bolton retired them. Two of Bolton's bills came into the hands of the assignees of the London house, and the action was trover to recover them. Lord Chief Justice Eyre, after stating the case, said : 'The question is, whether the plaintiff can maintain his action upon this case ? For him it is urged that the house in London is a house of trade, carried on by two of the partners in the banking-house at Liverpool, though it is admitted that the trade carried on in London is the separate estate of those two partners. It is insisted that the bills in their hands remained in the same state, subject to the same rules of law and equity, as would have applied to them in the possession of the house at Liverpool ; and that, having been appropriated (as it is called) or delivered to the house at Liverpool for a special purpose, and not having been ultimately applied to that purpose, and remaining in specie in their possession, Bolton would have been entitled to demand to have them delivered up to him by the banking-house at Liverpool, or by the assignees of that house, supposing them to have come to the hands of those assignees. I take it to be now settled, that bills in the hands of a banker, like goods in the hands of a factor, in the event of a bankruptcy, are to be delivered up, subject only to the lien which the banker may have upon them for the balance of his account. On the other hand, it is clear that if endorsed bills are deposited with a banker, and they are by him negotiated to a third person, though the purpose for which they were deposited should be ever so cruelly disappointed by his becoming bankrupt, the original owner can have no claim to recover them in trover against such third person. The present seems to be a middle case, and, I believe, is a new one. We must endeavour to ascertain to which class it belongs. The true nature of that transaction has been warmly disputed in the course of the argument, but it comes out to be simply this : Bolton paid into his bankers' hands these bills on his general account for

a particular purpose. This has been called an appropriation, and legal consequences are deduced from thence, as if appropriation was a technical term, or at least was used in some definite or precise sense ; whereas no term in popular use can be more general, or more uncertain in its import. In truth, when I say these bills were paid in on a general account for a particular purpose, I mean only to say that the object which the parties had in their view was, that the bankers might be enabled to provide for the payment of Mr. Bolton's acceptances in London. So far from being appropriated to any particular purpose, in the strict sense of the word, the bills in specie were not intended to be applied to any other purpose than to be converted into cash, in order to increase Mr. Bolton's credit with his bankers ; and, in the nature of things, they could not be applied in specie to the particular purpose of paying Mr. Bolton's acceptances in London. These bills, at least the bills in question, were remitted to the house in London, on the general account of the banking-houses. We cannot think that this was a misapplication, or that the confidence of Mr. Bolton was abused. It may be asked, assuming that Mr. Bolton considered both houses to be in full credit, Was it not the very thing he meant ? Was not this the probable mode by which the banking-house would be enabled to provide for the payment of Mr. Bolton's acceptances at the house of Forbes & Gregory ? They were to be dealt with as the banking-house thought fit to deal with them,—to be negotiated if they thought fit, to be discounted at Liverpool if they pleased, or remitted to whom they pleased ; and were necessarily to be converted into money, in order to be means effectual to the purpose even of the parties who deposited them.

'If, then, Forbes and Gregory were parties capable of acquiring a property in these bills, as capable as any third party, and did acquire it without reproach, and, in truth, in pursuance of that agreement upon which they were delivered to the banking-house, why are not Forbes and Gregory to be considered as third persons, with whom these bills have been negotiated ? If they were to be so considered, this determines the class to which I said, in a former part of the argument, we were to endeavour to reduce this middle case—between the case of original parties to the transaction, and the case of a third person holding such bills as these in the ordinary course of the negotiation of bills of exchange.' Judgment for the defendants. 1 Bos. and Pul. 539, 1796.

Cases on Boldero's bankruptcy. In consequence of the failure of the great house of Boldero & Co., several questions of this kind arose, particularly on their dealings with the Hull, Wakefield, and Leeds banks ; and it was held that the property was with the depositor, he relieving the estate of the other engagements. See those cases in 1 Rose 232, 243, 254.

Ex parte Buchanan. The Chancellor ordered the provisional assignee to deliver up short bills, which were in the hands of Kensington & Co., bankers, at the time of their bankruptcy, to the petitioners, bankers at Glasgow, upon their giving security to pay all the bills which Kensington had accepted for them. 1 Rose 280, 1812.

Ex parte Clayton. Kensingtons, bankers, at the time of

the bills are so discounted, the property is passed. It is not, however, enough to pass [274] the property as by discount, that the bankers charge interest on the sums overdrawn.¹

6. The banker holding bills with blank endorsements, has it in his power to discount them, although deposited with him only as agent, or for a special purpose;² and in that

their bankruptcy, had £5000 of the cash of Clayton & Co. of Preston; the bankers had accepted bills to the amount of £219,000, of which £9000 worth so accepted had been paid by Clayton & Co. (or their payees or the endorsees) to the Crown, for duties upon the excise; the officers of the Crown entered Kensingtons' premises by an extent, and had these bills paid in full by Kensingtons' assignees from the general fund.

Kensingtons' house held, at the time of failure, about £20,000 worth of short bills remitted by Clayton.

The petition of Clayton was, that these short bills might be given back upon his paying all the acceptances, because, by paying them and taking them up, Clayton would not be in any degree indebted to Kensingtons' house, and would therefore be entitled to take all their property remaining in specie.

The order was to the following effect:—

The first thing Clayton had to do was to pay the £6000 which Kensingtons' house had paid to the excise, for that is just the same as if the bills had been paid by Clayton at Preston.

Then all the other acceptances by Kensingtons, which Clayton had received cash for by discounting, must be paid by Clayton, so that they may never appear under Kensingtons' commission.

Clayton must prove and take a dividend upon the £5000 which Kensingtons had in their hands at the time of their bankruptcy.

Then Clayton will be entitled to all the short bills, or bills not due, transmitted by Clayton to Kensingtons, and not discounted by them before the bankruptcy, or to the proceeds of them, if any have been received by Kensingtons' assignees since the bankruptcy. 12 Aug. 1813. [See Smith, Merc. Law, 7th ed. 562.]

¹ *Ex parte Madison*. C. & T. Shaw established a bank at Southampton, and a correspondence with Staples & Co. in London. There was a special agreement that short bills remitted to Staples & Co. should not be discounted unless Staples & Co. were overdrawn; then they might discount. Staples & Co., however, did not discount when overdrawn, but charged interest instead for the sums overdrawn. The petition prayed the delivery of the short bills to the petitioners.

The Court ordered the assignees of Staples & Co. to pay to the petitioners, as assignees of Shaw & Co., the bills to the amount of £2000, and also the sum of £200 admitted by their counsel to have been received. 12 Nov. 1796, cited by Lord Eldon in *ex parte Pease*, 1 Rose 241.

² See above, *Bolton v Puller*, in note, p. 292.

Collins v Martin, 1797, 1 Bos. and Pul. 648. Collins had sent bills to Nightingales, his bankers, endorsed in blank in order to be received by them when due, and carried to his account. They were entered short by the Nightingales, and the balance was in favour of Collins. The Nightingales being in want of money, deposited some of the bills with Martin and other bankers, and got money on the pledge. Collins brought an action of trover against Martin, etc., for the bills pledged in their hands. He was nonsuited by Lord

Chief Justice Eyre at Guildhall; and a rule having been obtained to set aside this nonsuit, the cause came on before the Court of Common Pleas, when the opinion of the Court was delivered by his Lordship thus: 'We are all of opinion that the plaintiff was properly nonsuited. I have little to add to what I stated to be the ground of this nonsuit when I made my report. The counsel for the plaintiff admitted that the bankers might have sold these bills, but it was argued that they could not pledge them; and the case of a factor pledging the property of his principal was urged as an authority, for it was said that bankers have been considered as factors. In questions between bankers, or those representing them, and their customers, they have been considered to some purposes as factors, or in the nature of factors; upon the same principle as in other cases between holders of bills of exchange and acceptors, or the first endorser of bills payable to a man's own order, the truth of the transactions between them has been allowed to be entered into to destroy the *prima facie* consideration of a bill the supposed value received. But no evidence of want of consideration, or other ground to impeach the apparent value received, was ever admitted in a case between such an acceptor and drawer, and a third person holding the bill for value; and the rule is so strict, that it will be presumed that he does hold for value until the contrary appears. The *onus probandi* lies on the defendant. If it can be proved that the holder gave no value for the bill, then indeed he is in privity with the first holder, and will be affected with everything which would affect that first holder. This all proceeds upon an *argumentum ad hominem*: it is saying, You have the title, but you shall not be heard in a court of justice to enforce it against good faith and conscience. In strict law, and with respect to third persons, bankers do not at all resemble factors; nor will the rule that factors cannot pledge apply to the case of a banker pledging endorsed bills. That rule is grounded on the strict rule of property: the goods are not the factor's, and therefore he cannot pledge them. He may sell them; because, though they are not his, he is entrusted to sell them for his principal. He manages the sale; but it is his principal who, through him, sells them. For the purpose of rendering bills of exchange negotiable, the right of property in them passes with the bills. Every holder with the bills takes the property, and his title is stamped upon the bills themselves. The property and the possession are inseparable. This was necessary to make them negotiable; and in this respect they differ essentially from goods, of which the property and possession may be in different persons. The property passing with the possession, it is admitted that a banker who receives endorsed bills from his customers, to be got in when due, and carried to his account, may discount or sell them. Why may he not pledge them? Either is a breach of the confidence reposed in him. He may sell, because the property has been entrusted to him; and he may pledge for the same reason: for he who has the property has a disposing power, and the law has not limited it to be used in any particular manner. Perhaps the confidence reposed in bankers may be abused, and it might be wished that they

[275] case the owner of the bills is a mere personal creditor of the banker. Even a restrictive endorsement does not seem to afford any safeguard.¹

7. If the bill has only been pledged by the banker for less than its amount, the owner of the bill will be entitled to redeem it on paying the sum advanced.

8. The banker has a lien for the general balance of his banking account over all bills placed with him; ² unless they have been *discounted*, in which case they are taken out of the account between the parties.

III.—CONSIGNMENTS OF GOODS FOR ADVANCES AND SALE.

As a banker, in respect of bills sent to be negotiated, sometimes gives permission to the owner of the bills to draw for a certain proportion of the amount, so merchants, factors, and commission agents sometimes agree to a similar mode of dealing. They receive goods to be sold, and allow the owners of the goods to draw for a certain proportion, greater or less, according to the promise of the market. In such a case, it is clear, 1. That if the factor should fail, and the principal should be obliged to pay the bills which he had drawn on the factor, he may demand back, as his unalienated property, the goods consigned. 2. That if the principal should fail and the goods remain unsold, the factor has a lien over the goods to the amount of all engagements on the faith of them. But, 3. If both houses fail while the goods are unsold, and the bills are in the circle, the bill-holder, in the *first* place, has his claim against each for the amount of the bill, to the effect of receiving on the whole full payment; *secondly*, The factor's estate has a lien over the goods, to the effect of entire relief and indemnification; and *thirdly*, The estate of the principal is entitled to demand the goods after such indemnification has been given from the proceeds, or on full security given to relieve the factor and his estate of the bills.

An incidental advantage may arise to the *bill-holder* in such a case deserving of notice. Although the bill-holder has to trust to the personal credit only of those whose names are on the bill, he may, in certain circumstances, have the benefit of the factor's lien. The factor is liable to his demand, not only in his *estate*, but in his *person*; and therefore if the factor be a bankrupt undischarged, he is undoubtedly entitled to resist the demand of the principal to have back the goods, till not only his *estate* is indemnified for the dividend paid from it, but till the last farthing of the debt be paid for which he can be made personally liable. And so the bill-holder, to the amount of what the factor is liable to pay, will have the benefit of the factor's lien.

SUBSECTION II.—OF THE EFFECT OF CHANGES ON THE PROPERTY ENTRUSTED TO THE BANKRUPT.

[276] Where the goods are extant, and remain unchanged, and capable of complete identification, in the bankrupt's possession, the *ipsa corpora* must of course be delivered up. But there is a difficulty where the goods have suffered change. In the preceding section some very important cases of this sort have been incidentally considered; but some still remain to be discussed.

could be restrained from abusing their trust. But an arbitrary restriction cannot be imposed: any restriction would possibly check the facility of negotiation. As in cases of other property we say, "Caveat emptor;" so in this particular case we may say to the customer who prefers to entrust his bankers with his bills, and with his cash, rather than be at the trouble of doing his own business, Caveat!

¹ The Legislature, under the momentary impression produced by the great failure among London bankers, enlarged the criminal code by an Act 'for more effectually preventing

the embezzlement of securities, etc., left or deposited for safe custody or other special purpose in the hands of bankers, merchants, brokers, attorneys, or other agents.' 52 Geo. III. c. 63. The punishment is transportation not exceeding fourteen years, or an arbitrary punishment as for a misdemeanour. The Act extends to Scotland. It contains an exception of the right of bankers, etc., to sell, negotiate, transfer, etc. securities, etc., over which they have a lien, etc., which by law may entitle them to dispose of them.

² See below, Of Liens.

It is impossible to enter upon this inquiry without recollecting the famous controversy of the Proculiani and Sabiniani concerning specification, which, after a course of perplexed and subtle reasoning, turning on imaginary and vain distinctions, was by Tribonian and the other lawyers appointed by Justinian to digest the Roman jurisprudence, decided according to a rule as distant perhaps from plain sense, or any useful purpose, as the opinions which it professed to reconcile. On the Continent, wherever it remained as law that property might be revindicated by the former proprietors, long after having been purchased and delivered, a claim of restitution must often have attached to subjects in situations very different from those in which they first came into the bankrupt's possession; and this controversy continued, or may still continue, to find a place in jurisprudence.¹

But in this country little room is left for these perplexing subtleties. The [277] occasions on which a proprietor is entitled, on the bankruptcy of one who holds his property, to claim against the creditors of the possessor the *surrogatum* that has come in place of his goods, are of two kinds: 1. Where the bankrupt has acquired the property by some

¹ Neither the system of the Proculiani, nor that of the Sabiniani, nor the middle opinion of Justinian's lawyers, have been universally approved of abroad. The Proculiani maintained (according to the doctrines of the Stoics) the superiority of form and of the manufacture, and that the new species formed by the workman should belong to him that made it. The Sabiniani, on the other hand, contended that the essential part being the materials, the property of them was not to be changed by the mere alteration of their form and appearance. Like most other disputes of the kind, where the palm that belongs to ingenious and subtle reasoning rather than the plain use and application of a doctrine to the business of life is the object of the disputants, no progress was made in resolving the difficulty or settling the controversy on satisfactory grounds. The dispute proceeded, with great names arrayed on either side, when Justinian, or rather the lawyers whom he employed, pretended to settle it by taking what they called the '*media sententia*.' But this conciliating doctrine was founded too much in subtilty: for, 1. Wherever the new species could be restored to its pristine form, the owner of the materials was held the proprietor. 2. Wherever this restoration to the original form was impracticable, the manufacturer was held to be the proprietor, more especially where the new subject was composed partly of the manufacturer's own materials. Instit. lib. 2, tit. 1, De rer. divis. sec. 25.

It was not to be expected that a rule founded on this kind of subtilty should be tamely acquiesced in by modern nations, to whom the Roman jurisprudence was rather a fountain than a code of law. And, accordingly, we find the commentators of various countries contesting this point. One commentator, who is quoted by Vinnius, speaks very judiciously on the subject. He considers it as absurd to enter into these distinctions, and holds that in common sense the point on which the attention should be fixed is the comparative value of the rude material and of the manufacture; Connanus, lib. 3, Comm. 6. Grotius takes another view: he holds that there should be a common property established; De jure belli ac pacis, l. 2, c. 8, n. 19. [See *Wylie & Lochhead v Mitchell*, 17 Feb. 1870. In *Lupton v Whyte*, 15 Ves. jun. 432, Lord Eldon held that, where a person under an obligation to keep the property of another separate and distinguishable from his own (in this case it was lead from his own mine and another's), fraudulently mixes them up so as to prevent identification, the other shall have the whole

mass, or whatever the person mixing them cannot prove to be his. See *L. Chedworth v Edwards*, 8 Ves. jun. 46; *Panton v Panton*, cited 15 Ves. jun. 440.] But Vinnius (Instit. Imper. Com. p. 148) differs from both, and holds that the rule established by Justinian is the true one; for, without regard to value, the point is, Where in truth does the property lie? And to determine this point, the essential question is, Whether the original subject be extinguished or not? This, on the authority of Grotius (Manud. ad Juris. Holl. lib. 2, c. 8), he represents as the modern rule of the Dutch states. Pothier seems to approve of Justinian's middle course, with this qualification, that a certain degree of arbitrary judgment should be reserved to determine according to circumstances. *Traité du Droit de Propriété*, No. 188.

In the practical jurisprudence of the Continent, it was essential to revindication, in many provinces and states, that the thing should remain unaltered. In Marseilles, it was necessary that the goods should be '*trouvées en nature, et existantes entre les mains du premier acheteur ou de ses commissaires, ou du second acheteur, qui n'en a pas payé le prix au premier*.' So it was established by a regulation of the Chamber of Commerce and Consuls, 11th August 1730, confirmed by an arret of the Parliament of Aix, 26th August 1730. In Lyons a similar rule was enacted, 14th December 1722, and 19th January 1731. Nay, in Paris the matter was carried much further; for by an '*Acte de Notoriété du Chatelet*,' 13th May 1711, the right of vindication was extinguished if the goods were taken out of their original strings and packages. Denizart, vol. iv. pp. 376, 377. But these rules were in other places thought too harsh and unjust, and plainly the principle of them could not be applied to our questions of revindication: they seem to have proceeded on the idea that, by the change, the presumed power of annulling the conditional trust was at an end. In Rochelle, it was sufficient if the property could be traced, though altered. Valin lays down the rule to be, that wherever there is clear evidence of the identity of the thing, or of what remains of it, it must be restored; nay, that even where the form is changed, brown sugar into white, skins into leather, corn into flour, the proprietor of the original material is entitled to it, on reimbursing the creditors for the addition made to its value. Com. sur les Coutumes de Rochelle, tome 3, p. 150. Basnage delivers the same doctrine, with several cases to illustrate it. Basnage, *Traité des Hyp. Œuvres*, vol. ii. pp. 68, 69.

fraudulent or illegal title; and, 2. Where he has held it on the footing of a legal contract, requiring temporary possession.

I. PROPERTY ACQUIRED BY FRAUD.—In this case, the bankrupt cannot acquire for his creditors an effectual right by any change which he may make upon the subject; so that all the doctrines of the controversy are out of place in such circumstances.¹ The chief decided cases illustrative of this doctrine are those in which the goods fraudulently acquired have been disposed of by the bankrupt, and where the claim of the proprietor has been for the price.

1. It has been decided that, as a sale of the goods does not divest the original proprietor of his right, the proprietor has a preference for the price where it is still unpaid.²

2. Where the price has been paid in money to the bankrupt, perhaps there may be room for a distinction. While property obtained by fraud is extant in the hands of the bankrupt, the creditors who take that property, or who resist the claim for restitution, are striving to gain by the proprietor's loss: they participate in the fraud of their debtor. In the same way, where the price of the goods sold is still due, they also participate in the fraud in claiming that price. But if the price have been paid to the bankrupt, there is no evidence of the general fund having been increased by it: the presumption, indeed, is rather that the bankrupt has applied it to his own secret purposes. To give a preference, therefore, upon [278] the general fund, would be to risk a gross injustice to the other creditors, and to lay upon them that loss which had been occasioned by the imprudence or misfortune of the owner of the goods.

Although a proof of identification may in many cases be made out,—as where the money may be traced by unquestionable marks into a bank account, or to the purchase of goods which remain extant in the warehouse, or into the hands of a creditor,—and although in such cases the other creditors are benefited by the fraud of the debtor, at least to the extent of what they are thus enabled to draw beyond the dividend, which, without such payment, would have been demandable from the common fund; yet it is an undecided point, whether the proprietor suffering by the fraud is entitled to indemnification.

3. Where the bankrupt has acquired, not goods, but money, by deceit,—as where, by forged documents, or on false pretences, he has induced a person to pay him cash; there, equally as if he had delivered goods, the person defrauded is entitled to indemnification in a question with him who has deceived him. But, as in the case just discussed, it is a difficult, and seems to be an undecided question, whether the person defrauded is entitled to a pre-

¹ In the case of *Cave* (p. 266, note 2), he had *maltd* the grain obtained by what was held to be a fraud. But 'it was found that the specification by malting did not bar the reduction.' *Elchies*, Bankrupt, No. 9.

See above, the case of *Sir Thomas Plumer*, p. 286, note 1.

² *Christie & Co. v Fairholmes* (already taken notice of on the general question of fraud, p. 263, note 1). Here the claim of the sellers was made while the price of the goods remained in the hands of the bankrupt's consignee, and the sellers were preferred to the creditors of the bankrupt arresting. 1748, M. 4896.

Dunlop v Cruickshanks, 1752, M. 4879, p. 263, note 1, the Court found the goods not transferred, and preferred the sellers to the price in the hands of the purchasers from the bankrupt.

In another branch of the same cause a distinction was taken, the Court thinking the fraud to be of such a kind as to entitle the seller to restitution, but at the same time holding the bargain to be legal, and one in which *fides habita erat de pretio*. They agreed in this, that were the goods extant in *Forbes*' (the bankrupt's) hands, *Dunlop* (the seller) would

have direct access to them without the aid of diligence; but as, in fact, the goods were not extant, but had been sold to a third party, the question remained whether *Dunlop* should have the same access to the price yet in the purchaser's hands without the aid of diligence, and on that ground be preferable to the arresters? And on this point the Lords were of different opinions. 'Some thought that the price came into the place of the goods as surrogatum; but the more general opinion seemed to be, that *Dunlop* could have no preference upon the price as the same never was his, and that were once that doctrine laid down, there was no saying how far it might go after the goods may have gone through many different hands.' But the cause was not decided upon this view: it was merely an opinion, not a judgment; and however much entitled to respect, there seems to be good reason for questioning the grounds on which it rests.

Robertson's Crs. v Udnies & Patullo, 1757, M. 4941. The sellers of goods obtained by fraud, and sold, were found preferable on the price in the hands of the purchaser from the bankrupt against the arresting creditors of the bankrupt. See above, p. 268, note 1.

ference on the common fund? and whether collateral evidence of identity is admissible to show that the common fund has been enlarged by the money received?¹

II. CHANGE ON PROPERTY POSSESSED ON LEGAL CONTRACT.—Where the possession by the bankrupt is temporary, on the footing of a legal contract, any change produced must either be accidental, or fraudulent, or in the natural course of the contract.

1. No fraudulent change can benefit the creditors, or prevent the owner from getting back his property from them, if in any way distinguishable.²

2. No accidental change, not intended by the owner, is sufficient to destroy the right of the proprietor, unless it should amount to a total destruction of the subject, and necessarily reduce the owner of the goods to claim as a creditor for damages. It would appear that a person whose property (corn, wine, or spirits) had been so mingled with the general mass belonging to the bankrupt, or with that belonging to other persons in his custody, as to be inseparable; or whose rude materials have been manufactured into a different species not reducible to their original state,—should be entitled to have them back as converted, or such a share of the common mass as should correspond with the quantity commingled.

3. Where the change takes place in the necessary course of the contract, which places the property with the bankrupt, the only situation in which the property can be supposed to be altered in consequence of the change, is where the evidence of identity totally [279] disappears, and the bankrupt's obligation resolves into a personal one merely as debtor. The occasion on which this change is most commonly produced, is where a factor is entrusted to buy and sell. But this case has already been fully considered, and may stand as an illustration of the whole doctrine.³

CONCLUSION OF BOOK II.

EFFECT OF RADICAL OBJECTIONS, AND OF CONDITIONS AND PERSONAL EXCEPTIONS ON THE DOCTRINES OF THE PRECEDING CHAPTERS.

In the three Parts into which this Second Book has been divided, Estates in Land, Incorporal Rights, and Moveable Property have been considered as forming the aggregate fund for the payment of debt. And in those several classes of subjects, the particular act of tradition, or completion of the right which the law has regarded as the badge of transference, has been seen to serve as the criterion of real right. It thus ascertains not only what shall

¹ *M'Knight v Bertram, Gardner, & Co.'s Crs.*, was a case attended with very peculiar hardship, and which seemed to involve the point now alluded to; but when analyzed, it was found to depend upon different principles. M'Knight had a cash account with Bertram, Gardner, & Co., who were bankers, on which a balance of £1200 having arisen against him, they desired it to be paid up, or a bill or other security to be given for it. A bill for this sum was accordingly drawn and attempted to be discounted at the national banks; but, in the alarmed state of the country at the time (March 1795), this could not be done, and the bill was placed in the bankers' hands as a security. In April Mr. M'Knight sent £1200 to the bankers, and desired them to return the bill, if not discounted, with a receipt for the payment. He called afterwards for the bill, and was told it was not at hand, but should

be sent. The truth was, it had been discounted by Bertram, Gardner, & Co. for their own use, and lay in the Royal Bank. Mr. M'Knight having entire reliance on the bankers, believed that the bill would be sent, and in this confidence went to London. Some months after he received notice of the bill being due at the Royal Bank, and his bankers stopped payment. He brought his action against the bankers for damages, in expectation of either being found entitled to a direct preference by restitution, or a judgment for a sum of damages which should cover his loss. The Court, however, decided that he was only a personal creditor for the amount of the bill, and the expense of the loan necessary for taking it up. Jan. 1797, n. r.

² See above, *Sir Thomas Plumer's case*, p. 286, note 1.

³ See above, art. 1 of this section.

be held as the divisible property of the debtor, but also regulates what preference shall be given to one creditor over another in the division of the common fund; or, in other words, what creditor shall be preferred as holding real securities; or who shall be ranked as general creditors, to take only a rateable share of the common fund.

As it is on this criterion that the distinction between real right or *Jus in re*, and *Jus ad rem* or personal right, depends, that distinction again regulates the two classes of real and personal creditors. *Jus in re* is that direct right which we have in a thing by which we call it ours, either entirely and unconditionally, or to a certain effect, and which entitles us to defend it or to recover it from any other person into whose possession it may have come. *Jus ad rem* is that indirect right which we have to a thing in consequence of an engagement—express or implied—by the person holding the real right to transfer or deliver it, and which entitles us only to an action directed personally against him for enforcing his obligation, and compelling him to deliver the thing if in his possession, or to indemnify us for the loss if it is gone. He who holds a right of the former description is a proprietor, or at least a real and preferable creditor on the particular subject; he whose right is of the latter species is a personal creditor, entitled only to demand payment of his debt, or satisfaction for it, as far as possible, out of the general mass of the debtor's funds.¹

[280] It has appeared, however, in the course of this inquiry, how greatly the simplicity of the doctrine has been disturbed by that necessity which, for the purposes of trade, so often requires that the possession of moveables should be separated from the property. It is further disturbed by the effect of objections to the right of the debtor, as not having been derived from the true proprietor; or as having been brought about by fraud; or as in its original constitution not absolute, but limited to the use of the person conveying it. Again, there are doubts, whether among personal obligations there are not some which truly are conditional of the right of property, and to which creditors must submit as burdens. In these circumstances, the difficulty of arriving at any uniform or satisfactory conclusion has been greatly increased by the frequent changes of opinion among our judges formerly, concerning the comparative pretensions of creditors and of purchasers. Sometimes it has been said that, the transaction of a purchaser with the seller being voluntary, the person who buys must take his risk of the seller's title, according to the maxim, '*Qui cum alio contrahit vel est vel debet esse non ignarus conditionis ejus*;' while creditors are purchasers or acquirers *ex necessitate legis*, and must be protected in the right which they have attached.² At other times it has been maintained that purchasers trust only to the property which stands or appears to stand in the seller, and not at all to personal credit; while creditors are, as it were, the representatives of the bankrupt, and take the property and funds of their debtor, '*tantum et tale*,' as they stand in him. Out of this phrase of '*tantum et tale*' a new host of difficulties arose: for, taking the sound instead of the sense of the phrase, it has sometimes been held, that creditors come precisely into their debtor's place, so as to be responsible for all his engagements relative to the subject in question, on a footing somewhat similar to that of an heir; and to be entitled to claim no benefit from it, without performing all the counter obligations of the transaction by which the property came into the hands of the debtor, or was allowed to continue with him.

¹ The essential distinction of real and personal rights was represented in the form of action under the Roman law. The *actio in rem* was thus conceived: '*Aio hanc rem ex jure Quiritium meum esse*.' The *actio in personam* was: '*Aio te mihi dare aut facere oportere*.' The former was not directed against any person, but against the property itself, in whose hands soever it might be; the possessors being called only for their interest. The latter was directed against a particular person, whether the property was with him or not. Lord Stair denies that any actions in our practice, except the

action of pointing the ground, are strictly of the nature of real actions. Spottiswood considers all reductions of infeftments and actions of redemption as properly *actiones in rem*. But although our actions are, in common practice, more in the nature of the '*actio personalis ad restituendam rem aut pretium*;' wherever the accurate discrimination of principle becomes necessary, we must recur to the distinction between the *actio in rem* and the *actio in personam*.

² See Dirleton and Stewart, whose opinions stand curiously opposed; *voce* Comprizer.

The only general doctrine which appears to be safe is, that in all competitions the right of the general body of creditors, or of an individual claiming a preference, is to be regulated strictly according to the criterion by which *real* right is contradistinguished from *personal*, unless it can be stated, either,

1. That there is a radical defect in the title by which the bankrupt holds, and on which the right of the general creditors must rest; or,

2. That his right is radically qualified or conditional, not absolute; or,

3. That the acquisition of the property on the part of the bankrupt was accomplished by fraud, of which creditors cannot, without participating, take advantage.¹

On the general rule, a very ample commentary has been delivered in the preceding chapters; in this concluding chapter the exceptions are to be considered.

SECTION I.—RADICAL DEFECT OF TITLE IN THE DEBTOR.

Where, in support of a claim as a Creditor *dominii* against the general body of creditors, for property alleged not to have been effectually transferred to the debtor, any radical defect can be shown in the title by which the property came to the debtor, the claimant will prevail. Thus it is a radical defect, that the person from whom the property was acquired was [281] incapable of consent; as being a pupil, a lunatic, or an idiot. It is also a radical defect in the title, that the thing has been stolen,² or obtained by violence; or that the transference has been procured by force and fear.³ In such cases there is no transference from the true owner. He retains his right as proprietor, and may vindicate that right against creditors.⁴

Such radical defect of title is, in general, available not only against creditors, but against purchasers also:—1. In heritable subjects, the records prove no safeguard against such radical defects; 2. Incorporeal rights, in such circumstances, cannot be effectually transferred, to the disappointment of the true owner; and, 3. Moveables can neither be effectually sold, nor impledged (much less taken by creditors on bankruptcy), where they are held by such defective or tainted title.⁵ Moveables sold by a thief, for example, may be claimed or *vindicated* by the owner, wherever he may find them. Even a sale in public market will not save the purchaser, whatever his *bona fides* may be, against such claim of restitution.⁶ He will be liable, even after he has parted with the goods, *si dolo desiit possidere*; or, at all events, *in quantum lucratus*.⁷ In England, great privileges are given to public market, the buyer in market overt being safe against the unknown owner, unless in the single case of theft, where the thief shall be prosecuted by the owners to conviction.⁸ But

¹ It is properly to the two first exceptions now enumerated that the maxim applies, 'Nemo plus juris alteri transfert quam ipse habet.'

² Stair iv. 40. 21. See also cases below. *Hay v Leonard*, 1677, M. 10286. The opinion of the Court extended this to cattle in custody for grazing, in *Alexander v Black*, 17 Jan. 1816, F. C. See below, p. 307, note 3.

³ *Cassie v Fleming*, 1632, M. 10279; *Woodhead v Nairn*, 1662, M. 10281. See also Dirleton's Report of *Stewart v Whiteford*, 1677, M. 16492. 'By the Prætorian Edict, and the custom of this and other nations,' says Lord Stair, 'such deeds and obligations as are by force and fear are made utterly void.' Stair i. 9. 8.

⁴ Deathbed has also been held as a *labes realis* in a conveyance, so as to affect singular successors purchasing *bona fide*. *Liviston v Burns*, 1697, M. 10287.

⁵ The decision *Beveridge*, 1583, M. 9111, carries this doctrine too far; the goods having been sold by judicial warrant. [In England, a person who purchases at a sheriff's sale pro-

perty which the sheriff had no right to sell, he acquires no title against the true owner of the property. *Farrant v —*, 3 Starkie 130; *Chapman v Speller*, 19 L. J. Q. B. 239; *Morley v Allenborough*, 3 Ex. 500.] See *Wright v Butchart*, 1662, M. 9112; *Ramsay v Wilson*, 1666, M. 9113, as to jewels impledged. *Semple v Givan*, 1672, M. 9117; *Pringles v Gribton*, 1710, M. 5970, 9123.

⁶ *Bishop of Caithness*, 1629, M. 9112; *Ferguson*, 1639, M. 4145. Both cases of restitution of horses stolen and sold in market.

Forsyth v Kilpatrick, 1680, M. 9120, where a horse was sold by one to whom he had been hired; but it is not said that the sale was at market.

Henderson v Gibson, 1806, M. App. Moveables, No. 1, where cattle stolen and sold in public market were found subject to restitution.

⁷ *Scott v Low*, 1704, M. 9123; *Walker v Spence & Carfrae*, 1765, M. 12802.

⁸ Lord Coke says: 'The common law did hold it for a point

in Scotland no such privilege is given to public market. The exception in favour of the owner in cases of theft and violence is admitted in all cases.

Bills of exchange, however, and bills of lading, acquired for full value, and *bona fide*, [282] by a third party, are not subject to challenge on account of any original defect in the right of the seller;¹ an exception introduced for the encouragement of trade.²

Fraud is not reckoned among the radical defects which annul the title of the acquirer. It is to be classed among those unjustifiable means of inducing consent, which, however effectual they may be in exposing creditors to the consequences of the fraud, as having adopted it, do not annul the right or affect purchasers; and it has been contended that cases of force and fear stand on the same footing.³

SECTION II.—RIGHTS HELD BY THE DEBTOR UNDER QUALIFICATIONS AND CONDITIONS.

A right, as it stands in the bankrupt's person, may be limited or qualified by certain conditions and stipulations; and, in general, the qualification, if inherent in the constitution

of great policy, and behoveful for the commonwealth, that fairs and markets overt should be replenished, and well furnished with all manner of commodities vendible in fairs or markets for the necessary substantiation and use of the people. And to that end the common law did ordain (to encourage men thereunto), that all sales and contracts of anything vendible in faires and markets overt should not be good only between the parties, but should bind those that right had thereunto.' 1 Inst. 713; 2 Black. 449.

A sale in market overt will not, however, avail the purchaser if the goods have been stolen, and the true owner prosecutes the thief to conviction. *Blacks. ub. cit.*

In London, the shops in which goods are publicly exposed to sale are market overt for such things only as the shopkeeper professes to deal in. But Wilkinson sent a quantity of lead to the wharf of one Ellit, in the borough of Southwark, there to remain till it should be sold. Ellit used to sell lead from this wharf; yet, not having authority to sell this lead, Lord Ellenborough ruled that a *bona fide* purchaser of the lead did not acquire the property; and observed that an opposite doctrine 'would give to wharfingers the dominion over all the goods entrusted to them; but that a wharf could not be considered, even in London, as a market overt for the articles brought there.' Ellit had no colour of authority to sell the lead, and no one could derive a good title to it under such a tortious conversion. *Wilkinson v King*, 2 Camp. 335. [See Smith, L. Ca., *voce* Market Overt.]

¹ *Graham v Gillespie*, 1795, M. 1453. See also the case of *Lickbarrow*, for illustration, above, p. 235; and *Collins v Marquis' Crs.*, p. 183, note 3.

² [See Merc. Law Amendment (Scotland) Act, sec. 15, as to bills lost, stolen, or fraudulently obtained from the true owner. Note that by 'original defect' in the right of the party transferring a bill to a third party for value, the author does not allude, as might be supposed from the preceding paragraphs, to nullities affecting the obligation or contract appearing to be constituted either by the original bill or the endorsement of it, such as exist where the drawer is compelled by force or fear to draw and endorse, or where any subsequent holder is compelled to endorse, or where these acts are done by one incapable of consent. The radical nullity of the obligation apparently created by the signature

of the drawer or endorser in such a case can never be transformed into a valid obligation by any number of transmissions to *bona fide* purchasers. (*Willocks v Callender*, 1776, M. 1519; *Wightman v Graham*, 1787, M. 1521.) The radical defect of title meant is where a person, in right of a bill transferable by mere delivery—as being payable to bearer, or blank endorsed—has parted with the possession of the bill either by losing it or by its being stolen, or by having been fraudulently tricked into surrendering the possession of it so as to enable the finder, the thief, or the trickster to appear to hold it by a good title, and to pass it on to others. The questions here are: How far can that true owner follow the bill and revindicate it from the thief, and from third parties? How far will payment by the proper debtor on the bill, to the thief or his successor, be good payment, so as to preclude the loser, as divested of the right to the bill, from claiming payment from the debtor? and, How far will the loser himself, if he has endorsed it in blank, be liable to the thief or his successors upon that endorsement? If the instrument is not so conceived or endorsed as to be transferable by delivery, but is assignable only by endorsement, neither a thief nor a finder can make a valid endorsement. *Johnson v Windle*, 3 Sc. 608; *Whistler v Forster*, 32 L. J. C. P. 161; *Bayley on Bills*, 6th ed. 138. As to cheques payable to order, see 16 and 17 Vict. c. 59, sec. 19. The author correctly states the rights of the onerous and *bona fide* endorsee of a bill of exchange in such cases. But a bill of lading is erroneously classed in the same category with a bill of exchange in this respect. It stands on quite a different footing. The holder of it acquiring possession by finding it, or stealing it, could transfer no better title to an onerous and *bona fide* endorsee than he has himself. It is a mere symbol of the goods; and the endorsement and transfer, even for value and without notice, of the found or stolen symbol cannot in this case operate more than the actual sale and delivery of the goods themselves, if they had been stolen or found, by the thief or finder would operate. A fraudulent purchaser of a bill of lading may, however, give to an onerous and *bona fide* endorsee as valid a right to the goods by the delivery of the bill of lading as he could by re-sale of the goods themselves, if already in his own possession. (See *ante*, p. 214, note 2 *in fn.*)]

³ *Brown on Sale*, p. 395 et seq.

of the right, and apparent on the face of it, is effectual against third parties. A great class of the cases under this head will be found to partake of the obvious difficulty of distinguishing between conditions which truly limit the right of the holder, and those which resolve into mere personal obligations, extraneous to the right. But wherever the right itself is qualified or limited, the condition is effectual; with the exception, 1. Of real rights to lands where the limitation does not appear in the infeftment; 2. Of *jura incorporalia ex facie absolute*; and, 3. Of rights to moveables, which must be allowed to pass current in trade.

I. LAND RIGHTS.—These are either real rights, completed feudally, or they remain still personal.

1. REAL RIGHTS.—The statutes relative to the records have the effect of protecting both creditors and purchasers against such burdens and qualifications of the real right of a proprietor infeft, as are not of the nature of a radical defect in his title. When the proprietor of land sells or conveys it to another, under the burden of the payment of a certain sum to a third person; or under the implied condition that the receiver is to apply the price to particular purposes; or that, after a particular period, or upon the accomplishment of a certain act, the estate is to be restored: Or where land or houses are vested in one individual, intending that he shall hold as trustee for a company; or in all the partners of the company, by name individually, intending the property to be with the company;—the condition of the right in all those cases, although undoubtedly effectual against the disponee himself and his heirs, is unavailing as a real burden on the property, if it do not appear in the record. And so the right vested in an individual in some of these cases will be available to those who purchase or adjudge from him; or where vested in several, each individual, and his singular successor, will take it as common property *pro indiviso*, the personal condition or qualification not being of force against third parties.

This doctrine, as with purchasers, has long been settled—as already observed in considering the case of conditions in feudal grants;¹ and a great number of illustrations are to be found in the Dictionary, under the title Personal and Real.²

But a distinction has sometimes been admitted in the case of creditors, as being entitled to take their debtor's property only as it stood in the person of the debtor; '*tantum et tale*' as he held it.³ The question, however, must always return to this, What was truly [283] the extent of real right in the debtor? And although he may be under a relative personal obligation, the real right legally constituted is that only which his sasine bears, and of which it gives assurance to the public; and, accordingly, it has at last been held that such personal exceptions have no effect against creditors.⁴

¹ See p. 25.

² *Workman v Crawford*, 1672, M. 10208. A backbond by a creditor binding himself on receiving payment to denude of an heritable subject, held not to affect purchaser.

Anderson v Sir John Dempster, 1702, M. 10532. A declaration of trust, that the subject was conveyed merely to give an election qualification, held ineffectual against a purchaser. Same held in *Thomson's* case in 1786. See next note. See also *Stair* ii. 10. 5.

³ *Thomson v Douglas, Heron, & Co.*, 1786, M. 10299; *Hailes*, p. 1002. Thomson, in consequence of a contract with his man of business, disposed his lands to him, 'heritably and irredeemably, that he might sell the same, and apply the proceeds for the disponent's behoof.' The disponee contrived to omit the declaration qualifying his right, and he used the estate as a fund of credit for himself, borrowing money on heritable security; while other creditors, who had trusted to his personal credit, finding his affairs going into disorder, adjudged. Thomson sought back his estate, in competition with both those sets of creditors; and he was found entitled

to this as against the adjudgers, not as against the holders of the heritable securities.

It was said on the bench: 'In the present case, the disposition imported absolute and unlimited property, although, as the counterpart of this grant, there arose a personal obligation on the disponee to render account; and whether this has been justly fulfilled or fraudulently violated, the right of property remains equally unaffected. A *bona fide* purchaser, therefore, might have effectually acquired such property from the disponee, and an heritable creditor by infeftment is held to be in the same situation. The adjudging creditors, however, stand in a different predicament; for as it has been found by decisions which, for the stability of the law, ought not to be departed from, they must take the right of their debtor *tantum et tale*, as it was in his person.'

Lord Braxfield, who concurred in this judgment, grounded his opinion in favour of a distinction between purchasers and adjudgers, on the case of *Gibb v Livingston*. See below, p. 302, note 1.

⁴ *Wylie v Duncan*, 1803, M. 10269. See the statutes 1469,

There are other questions which may arise, not from conditions in the right of the debtors, but from personal engagements and exceptions, which will demand attention hereafter.¹

2. The rule respecting PERSONAL RIGHTS to land is, that the conditions and qualities inherent in the constitution of the right are effectual against third parties, both purchasers and creditors, while the right is not made real by infestment. If, therefore, a person hold a conveyance to land, qualified by a limitation, as of trust; or a condition, as of pre-emption; and on which no infestment has taken place; his creditors must take the right as he has it. So, a person on receiving an assignation to a comprising, on which no infestment had been taken, having granted a backbond to denude on payment of debt, afterwards assigned the comprising, still uncompleted by infestment; and a competition arose between the assignee to the comprising, and one in the right of the backbond. The Court held that the personal right of the assignee was qualified by the backbond: so that this not being a personal debt, the first intimation of an assignation to which would have carried the right; nor a real right, the first sasine on which would have been preferable; but a mere personal right to heritage, —the person having first right in the competition, or, in other words, the title first in date, is preferable.² But the real right is freed from the condition, which becomes a personal obligation merely, when sasine is taken; nay, even where sasine is taken by a singular successor acquiring the right while it was yet personal.³

[284] II. JURA INCORPORALIA UNCONNECTED WITH LAND.—Rights of this description, debts, shares in a company, and the like, fall under the general rule, *Assignatus utitur jure auctoris*.⁴ But, in the construction of this rule, it is necessary to distinguish between such conditions as are incorporated with the right (*in corpore juris*), and such as are extraneous to it.

1. Conditions of the former kind, inherent in the nature of the right, or (in the case of debts) existing as exceptions or counter-claims by the original debtor against his creditor, are effectual both against creditors and purchasers coming in place of the original holder of the right.

2. Conditions of the latter species, collateral obligations, or latent trusts extraneous to the deed (*extra corpus juris*), and of which the new holder of the right has no notice, have given occasion to great diversity of opinion among our lawyers.⁵ It seems, however, now

c. 27, and 1617, c. 16. *Pactum de retrovendendo* contained in a backbond was held merely personal, and not effectual against creditors.

Russell v Ross of Kerse's Crs., 1792, M. 10300. See above, p. 47, note 4. Here the decision in Thomson's case was disapproved of and departed from.

¹ *Gibb v Livingston*, 1766, M. 909, Hailes 100. Here the reduction was on fraud, under the Act 1621, c. 18; and on a hearing in presence, the Court held a creditor adjudger liable to the challenge; and this was relied on by Lord Braxfield in Thomson's case, as fixing a point not to be altered.

² *Sir L. Gordon v Skene and Crawford*, 1676, M. 7167. The case is reported by Stair, Dirleton, and Gosford. Gosford's report will be found in Morison's Dictionary, p. 7167; but to make it intelligible, the fifth and sixth lines from the foot of p. 7168 must be delete.

³ *McCubbins v Ferguson*, 1715, M. 10215.

A distinction is made as to apprizings, grounded on the peculiarity of that diligence. See several cases of apprizings, conveyed before sasine, and held as limited in the purchaser's person.

Nay, the doctrine is held to apply to apprizings even after infestment, by a backbond granted previously. *Brown v Gairn*, 1673, M. 10209; *Gordon v Chein*, 1676, M. 7167.

In a case taken notice of above (*Thomson v Douglas, Heron, & Co.*, M. 10299), had no infestment been taken, the objection of trust would have been correctly found good against creditors, and also should have been made effectual against purchasers. *E. of Southesk v M. of Huntly*, 1666, M. 4712, 10203; *Kennedy v Cunningham*, 1670, M. 10205. See especially Gosford's report of it, Mor. 10206; *Sinclair v Sinclair*, 1685, M. 5324.

See *Sir R. Preston v L. Dundonald's Crs.*, 1805, M. 6569.

⁴ An heritable bond is liable to the same exceptions between the debtor and the creditor. The distinction between the exceptions competent to the debtor against the original creditor, and those arising from fraud or collateral obligation, are well explained in *McDowall v Carmichael*, 10 Nov. 1772.

⁵ Lord Stair is of opinion that all the possible injuries to commerce from the admission of those latent exceptions, must yield to the common rule of law. That the assignee *utitur jure auctoris in personalibus*; that this applies not only to mutual contracts, where the conditions appear in the deed, but also to backbonds and obligations in separate deeds; and that these, provided they make part of the same transaction, and are causes or considerations of each other, will be held mutually to qualify the rights even of assignees. Stair i. 10.

to be settled, 1. That such extraneous, collateral, and latent conditions and obligations [285] have no effect against third parties purchasing or advancing money on the right. This was determined by the House of Lords in a case relative to the effect of a latent trust, under which a person held a share in a company; and this trust was found to be ineffectual against an assignee who lent money in *bona fide*, relying on the right as absolute and unconditional. The reasoning on which this case was decided in the Court of Session, and on which the reversal proceeded, is stated in the note.¹ The Court of Session have since assented to this,

16. This passage, however, is one of those which seem not to have received the author's last corrections, for it is expressed with great obscurity; and, in particular, it is not very obvious whether he did not mean to speak only of the defences that might be made against a demand by the original debtor, not by a third person. Mr. Brodie, in his edition of Stair, has observed that this passage is not to be found in either of the editions published during Lord Stair's life (p. 120).

Stair's doctrine in this passage is followed by Erskine, iii. 5. 10.

The Court also have, on several occasions, given effect to such separate and latent conditions and qualifications of *jura incorporalia*. *M'Kenzie v Watson & Stewart*, 1678, M. 10188; effect given to a backbond of trust. The same in *Black v Sutherland*, 1705, M. 10189.

The like effect was given against assignees and purchasers, *Scott v Montgomery*, 1663, M. 10187.

See also *Monteith v Douglas*, 1710, M. 10192.

But this doctrine has been accompanied with expressions of sincere regret that no means had been taken to establish a record of backbonds.

On the other hand opposed stands, in the first place, the opinion of the minority of the Court in Crawford's case, as reported by Lord Dirleton, p. 183, where it is laid down that singular successors, taking not by representation, but by purchase of the individual right, are entitled to it unqualifiedly if no condition appear; that the analogy of reversions is applicable, the law with regard to which rests not on the statute merely, but on the common law; that obligations only bind the grantor to retrocess, and cannot operate more strongly than if a formal retrocession were made; and that the admission of such latent exceptions would be an irreparable prejudice to the public. Dirleton states the effect of co-respective obligations of one date, but not of one body, as doubtful; while Stewart seems to hold them as personal. Dirleton and Stewart, *voce* Obligants Co-respective. And among the older authorities there is one to which great weight seems to be due,—namely, the anonymous author of Annotations on Lord Stair (supposed to be Lord Elchies), who argues this point very fully; distinguishes justly between counter-engagements and those exceptions which are competent to the debtor in the obligation, extinguishing the debt; and protests against the decision in the case of Crawford, 'as sanctioning the greatest defect I have observed in our law in personal rights, entirely against the analogy of law, a great handle for fraud, and the greatest obstruction to trade and commerce that I know.' Annot. on Stair, p. 71 et seq. Recollecting the principles upon which assignations were originally admitted as procuratories *in rem suam*, it will not appear wonderful that persons acquiring by assignation the right to debts and other *jura incorporalia* should be considered as coming precisely into the place of the cedent, and as liable, of course, to

all the personal exceptions pleadable against him. In that way arose the maxim, '*Assignatus utitur jure auctoris*,' which has so often been misunderstood, and held to imply a responsibility like that of an heir. But this doctrine, in so far as it has been considered applicable to any other exceptions than those competent to the debtor in defence against the claim, should not be held good in the present day, when the whole aspect of the law relative to assignations is altered; and when, instead of being a mere procurator of the original creditor, the assignee is considered as a proper purchaser, holding by the *cessio in jure*, as against the defender, the full *jus obligationis*, transferred by intimation, as property is by delivery.

¹ *Sommervails v Redfearn*, 1805, M. Ap. Pers. and Real, No. 3. Stewart held a share in the Edinburgh Glass-house Co., apparently in his own right, but really in trust for a company of which he was a partner, but which, by the regulations of the Glass-house Co., could not hold it in the social name. Stewart having borrowed money for his own use, assigned, in security to the creditor, this share in the Glass-house Co., and the assignment was intimated. The question lay between a partner of Mr. Stewart's and the lender. The Court found 'the allegation, that the stock in question stood in Stewart's person, in trust for the company, relevant to exclude the assignment.'

Upon this question there was much difference of opinion among the judges in the Court of Session. While all of them acknowledged the inexpediency of admitting latent claims to affect purchasers, and expressed their regret in particular that there is no record for trusts, it appeared to some that this consideration ought to control the rule of law, and entitle a purchaser to take the benefit of the right, without any responsibility for the counterpart; by others this was held a very secondary consideration, the rule being, that in personal rights personal faith is followed; and that with intrinsic qualities in the constitution of the right, the public, whether creditors or assignees, are bound to lay their account. The main point of the argument turned upon these different views. On the one hand, it was held that tradition is the criterion of real right, and that this applies to heritage, moveables, and *jura incorporalia*; that nothing qualifies the right so constituted which does not affect the reality; that no obligation can qualify a real right; and that the mistake in supposing that it can, has arisen from a mistake in the history of the law, in which it has been held that *jura incorporalia inhxerent ossibus*, so as to make an assignee not so much a claimant in his own right as a procurator *in rem suam* for the cedent; that to follow this notion would be to bestow preferences on personal creditors, and to disturb the whole doctrine of real rights; that the sole principle on which any condition can be allowed to affect the right of an assignee is, that it forms a radical qualification in the constitution of the cedent's right;

as conclusively settling the question with purchasers, contrary to the general rule which [286] they regard as having till then regulated both sets of questions; the exception being established on grounds of equity and expediency, which are not now to be shaken. And the result is, that *jura incorporalia*, though liable even in the hands of a purchaser to those exceptions which the debtor may have to state against the claim, are not qualified by any collateral obligation or latent trust. 2. It has now also been determined (though not in the last resort) that a different rule applies to creditors. It was by some conceived that the rule adopted in the case of heritable subjects was, in principle, applicable to *jura incorporalia*; that where a bankrupt holds a pure and unqualified conveyance to the real right, or *jus in re*, of a debt transferable only by written titles, accompanied by intimation, and which in a question with purchasers is not held to be qualified by any collateral obligation, merely personal; such right ought to belong to creditors, as part of the fund of division, leaving the personal obligation to ground a claim to a dividend. But this opinion has been discountenanced, and the maxim *Assignatus utitur jure auctoris* declared to have been always applicable to such cases; the exception introduced by the House of Lords extending no further than to the case of purchasers and lenders of money in *bona fide*.¹

III. MOVEABLES.—There is here a distinction which, although not obvious perhaps at first sight, it is of great importance to attend to. Possession is the badge of property in moveables, the sasine by which their transfer is completed, and so is said in law to presume property. But this is not to be taken without qualification. For the possession of moveables is frequently unaccompanied by the ownership; since they are necessarily in the course of dealings entrusted to the custody and possession of persons who have no further concern with them than to keep them safely, or to perform upon them some operation of art, or to dispose of them in the character of factor for the true owner. Passing from hand to hand in transference, without the necessity of any written title to explain under what conditions they may be held, there being in consequence a presumption of ownership in the possessor,

and that trust does not appear to be a qualification of this kind. On the other hand, it was held that even if there were no clear principle, the series of authorities and precedents should settle the question: but that the principle is clear, '*assignatus utitur jure auctoris*;' that a trustee is not truly proprietor, but holds a limited right, which must pass with its limitations to his assignees and creditors; that trust forms an intrinsic quality in his right; and that, in the purchase of all personal rights, there is so much of personal credit, that the mere appearance of an unqualified right is not to be relied on to rear up a right where none exists.

In the House of Lords this judgment was considered by Lord Redesdale as not settled by previous authorities, but as establishing distinctly, and for the first time, a principle which their Lordships would not be desirous to recognise, viz. that a latent equity, however unjust in its application, should defeat the right of a *bona fide* assignee. He held all the authorities of text writers, and even all the cases, to be inapplicable, as truly relating to such exceptions or counter-claims as the original debtor may have against his creditor, and not to another title set up by a third party against the assignee, and that the principle of the law was in favour of the assignee, since the right set up in competition against him was only that of a person entitled to compel an assignation, which could be no better than if the assignation had been made but not intimated till after Redfearn's. Lord Chancellor Eldon marked clearly the same line of distinction. The question here, he said, was not between a debtor of Stewart's and his assignee, but between the assignee and one

possessing a secret equity. He would ask, then, How the authorities cited for the respondent could possibly apply? A assigns a bond to B, and B to C: C knew that he was taking that of which no part, or of which some part, or the whole, might have been discharged. *Utitur jure auctoris*. He took what interest B had in the bond, and no more, and this was no hardship; for it was his fault if he did not apply to the known debtor to ascertain how that matter really stood. His Lordship added, that he had looked very anxiously and carefully to see whether there were any cases where latent equities had prevailed against intimated assignations, and he had found none. See 1 Dow's Rep. 50-73, 5 Pat. 707.

See 2 S. 678, for observations from the bench on this decision.

¹ *Gordon v Cheyne*, 1824, 2 S. 675, N. E. 566. Here Saunders held a share of the stock of the Aberdeen Shipping Co. in his own name, but truly as trustee for the Rev. Mr. Gordon. This was proved by a letter acknowledging the trust, granted at the origin of it. Fourteen years afterwards Saunders became bankrupt, and Gordon's infant child claimed the share under the latent trust. The Court sustained this claim against the trustee for the creditors of Saunders, 'in respect he is trustee for general creditors who are neither purchasers nor special assignees.'

See also *Dingwall v M'Combie*, 1822, 1 S. 463, N. E. 431, and observations on that case in the above case of Gordon. [*Hume v Middlemass*, 1836, 15 S. 30; *Burns v Laurie's Trs.*, 1840, 2 D. 1348.]

and yet being so frequently in the hands of others than the owners of them, distinctions have arisen between the rights of purchasers and those of creditors.

1. As possession presumes property in moveables, the general rule is, that the purchaser of moveables at market or otherwise in *bona fide*, acquires the right to them,¹ although they may have been sold by one who is not the owner.²

¹ 'The reason,' says Lord Stair, 'is because moveables must have a current course of traffic; and the buyer is not to consider how the seller purchased, unless it were by theft or violence, which the law accounts as *labes realis*, following the subject to all successors, otherwise there would be the greatest encouragement to theft and robbery' (iv. 40. 21). [The authority of Lord Stair is here represented as sanctioning a doctrine to which neither he nor Mr. Erskine give any countenance. The words of Lord Stair are severed from their immediate context, which is, 'Yet in moveables purchasers are not quarrelable for the *fraud* of their authors, if they did purchase for an onerous equivalent cause. The reason is,' etc.; and the whole section treats solely of right and title acquired by *fraud* from the true owner, not of purchase *a non domino*. As to what Stair's doctrine was, there can be no doubt. See Stair i. 7, secs. 1, 4, 11, 13 ult.; i. 11. 8, 2d par.; ii. 1. 42; iii. 2. 7; iv. 30. 8, 9; iv. 21. 5.] Ersk. iii. 5. 10. See also Voet, l. 6, tit. 1, De rei vind. Nos. 8 and 12.

² [The doctrine advanced by the author in this and the two following paragraphs goes to unsettle the principles which regulate the transference of moveable property, and is contrary to the doctrine of the institutional writers, and to the decisions. This has been so well pointed out by Mr. Brown (Sale, Nos. 602-615), that reference to his observations is all that is necessary. The case of a factor selling goods consigned to him has nothing to do with the question: he sells by authority of the owner, who sent the goods to him for the purpose. The author's fundamental mistake is, that he confounds the maxim that the possession of moveables presumes property, with the doctrine of ostensible ownership. The maxim alluded to is merely a rule of evidence—a *prima facie* presumption regulating the *onus probandi* in any case where moveables are claimed by a non-possessor from a possessor; but it is nothing more. It does not operate as a *presumptio juris et de jure*: it does not estop the claimant from proving the verity, but cedes to the verity so soon as his title is established by proof. Ostensible ownership—to whatever extent it may be a doctrine of Scotch law (and there is some ground for thinking that Mr. Bell has pushed a favourite doctrine, in some parts of his work at least, to the extreme of what was warranted)—is quite a different thing from the presumption of property arising from possession. It is, in fact, an estoppel against the true owner proving his title; and proof or admission that the true title resides in another than the possessor, which is all that is needed to overcome the other maxim, is not sufficient or relevant to overcome this estoppel. It does not, like the *prima facie* presumption spoken of, cede to the verity, but prevails against it. But, as Mr. Bell himself has pointed out, this ostensible ownership is not grounded simply on the fact of the possession and the true title being separated. That bare fact is all that is needed to give room for the operation of the *prima facie* presumption; but it is not all that is needed for the operation of the estoppel.

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There must be, besides, a separation of the possession from the true title—fraud and collusion on the part of the true owner. There must be such a permission on his part of an enjoyment and disposition of the goods by another, such an allowed exercise of the rights of ownership, as are not necessary in the course of honest contract, and which have proved injurious by raising, and having been intended to raise, a false credit to the possessor, as if he were proprietor of the effects. 'In what is delivered of this doctrine by our institutional writers,' says our author himself (p. 272), 'they seem to place the doctrine *entirely upon fraud and collusion* on the part of the true owner; and there does not appear to be any ground for questioning that, in proper cases under the doctrine of reputed ownership, *this is the true principle*.' The principle of all estoppels or personal exceptions which go to bar a party from pleading a certain fact from which he would derive benefit in a question with another—of that, *e.g.*, which in this case bars the true owner from proving, what is the actual truth, that he and not the reputed owner is proprietor—the principle of all estoppels is, that the party estopped has by his words or conduct, amounting to a *representation, wilfully* caused the other, against whom he now attempts to set up the truth, to believe something different from that truth, and has *induced* him to act on that belief, so as to alter his own previous position. Estoppel or bar arises where such representation, whether active or passive, has been made *wilfully*—either fraudulently, or, if not with a morally fraudulent intent, yet at least *with the purpose of inducing the other to act upon it*—has been intended to bring about the result whereby loss has arisen to the other party, or his position has been altered. (See *Pickard v Sears*, 6 Ad. and El. 469; *West v Jones*, 20 Jur. Ch. 363; *Swan v North British Australasian Co.*, per Cockburn, C. J., 32 L. J. Ex. 279; *More's Lectures*, ii. 265-6.) It is plain that, if a man going to the country deposits his silver plate with some one for safe custody, there is no wilful misrepresentation, active or passive, intended to induce the public to believe that the depositary is owner of it, and to act on that belief so as to alter their position; nor is there any such thing in the case of a party pledging goods for an advance. To say, as the author does, that the owner has himself to blame for choosing an unfaithful depositary, or being obliged to borrow from an unfaithful pledgee, as if it were equivalent to a wilful and intentional holding the depositary or pledgee out as owner for the purpose of inducing the public to transact with them in that belief, is to confound things *toto caelo* different. Their neglect of what would be prudent conduct in relation to the depositor's own interest—the chance of his losing his property by the depositary's theftuous misappropriation of it—is not a misrepresentation to the public with regard to the ownership, and gives no ground for pleading estoppel against the owner asserting right to his property wherever he finds it. (See opinions in *Swan*, *supra*.) The presumption as to the property arising from possession may well throw the onus on him

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This rule, however, must be taken with the exception already alluded to,¹—namely, in the case of theft or violence. Under this branch of the inquiry, it may be doubted whether the breach of trust, and the obligation faithfully to restore property placed in the possession of another, will bring the case under the analogy of the exception. In one case very nearly approaching to theft, the judges seemed to think the exception would be so extended. But there is danger in admitting any arbitrary rule, and no very clear line of distinction appears to regulate the cases in which the exception should be admitted. Breach of trust has much the character of theft; but, at the same time, it stands distinguishable by this strong circumstance, [287] that the owner has exposed himself to the usurpation by which an innocent third party has suffered. When a person with whom goods have been pledged, or a depository of jewels carries them to a jeweller, and sells them, or raises money on them as a possessor, if the *bona fide* purchaser or lender in such cases be entitled to retain the goods against the true owner, there may be a hardship upon the owner; but an equal hardship would arise on the other side, and one against which there is no protection, if the fair purchaser were obliged to part with them to the owner, who has himself to blame for choosing an unfaithful depository. In cases of this kind, a sale at market in England would save the purchaser. And although in Scotland there is no such regard paid to public market, it is impossible to deny that a sale in open market should naturally induce a stronger *bona fides* than can accompany a private sale; the presumption of property grounded on possession being strengthened by the consideration, that without a full disposing power the holder would not thus publicly expose the goods. It has accordingly been maintained, that wher-

of proving his property against the depository or purchaser; but that is quite a different thing from saying that he shall not be allowed to prove it at all. The doctrine of the author, which confounds the presumption with the estoppel, and attributes to the former wherever it comes into play all the consequences flowing from the latter in the more limited sphere in which it operates—which would go far to make bars of pig-iron and bales of cotton carry their ownership along with them whithersoever they pass, like current coin—would put an end to most of the transactions of commerce, and many of the arrangements of common life. It will not escape observation that the ‘necessities of trade’—the reason so often assigned for attempting to estop a man from asserting, against a third party purchasing, his property in goods of which he has given another the custody or possession—lie all the other way. It was the same specious fallacy that was long urged to support the now exploded notion, that an endorsed bill of lading carried the property to the endorsee, whatever was the real intention of the endorsement; and it is the same that in certain cases seeks to ascribe to delivery orders and other documents of possession the imaginary effect and operation of which bills of lading have already been divested. See *Gurney v Behrend*, 23 L. J. Q. B. 265. The questions as to bills of lading, delivery orders, and the possession of moveables, are all at bottom one and the same question, both in regard to legal principle and mercantile convenience. The principle on which the estoppel is founded, which prevents a proprietor from rebutting the presumption of possession, and vindicating his property from a third party, is not mercantile convenience; nor is it that a man has no right to be imprudent in entrusting what belongs to him to others: it is fraud or wilful *culpa* towards the third party, in inducing him, by active or passive misrepresentations as to how the property stood, to alter his position in relation thereto. This is the true legal principle which must govern and restrain the

application of a loose maxim often quoted in questions such as those raised in the text, quoted *e.g.* by Ashurst, J., to support the old view as to the operation of bills of lading in *Lickbarrow v Mason*, that wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it. On that principle, certainly, a bill of lading would be equivalent to a bill of exchange, in regard to the rights of an onerous and *bona fide* acquirer from a fraudulent endorser who held without a lawful right to sell. But we know now that a bill of lading has not that quality, in spite of the maxim. It was quoted also (out of Salkeld’s Reports—*Hern v Nichols*—p. 289) in *Baring v Corrie*, 2 B. and Ald. 137. But there both Abbott, C. J., and Holroyd, J., pointedly stated that the rule was by no means universal, or to be received without qualifications, giving as instances wherein it failed those very cases of purchasers choosing to rely on what Mr. Bell characterizes as ‘the title implied in possession;’ and the latter observing in reference to them, that ‘the truth is, that in all cases, excepting where goods are sold in market overt, the rule of *caveat emptor* applies.’ Bayley, J., explained that the proprietor’s legal title must prevail, ‘unless by *improper conduct on his part* he has enabled some other person to appear as the proprietor of the goods, and by that means to impose upon a third person, without any fault on the part of that person. That is the true meaning of the rule laid down in *Heron v Nichols*.’ It is not enabling the depository, by the mere fact of making the deposit with him, to deceive a third party, that grounds the estoppel against the owner: it is the ‘enabling by *improper conduct*’ that does so. In short, it is to the test of the principle of estoppel, and not to that of any loose though plausible maxim of this sort, that any question between the true owner and a *bona fide* purchaser, from one possessing in the owner’s right, must be brought.]

¹ See above, p. 299.

ever the possession under which the sale is made is legitimate possession, it will validate the sale at market. This seems to be admitted in the case of tenants selling their hypothecated corn. Where one buys corn from a tenant at his farm, he must be aware of the possibility of interfering with the hypothec, and so he is held liable for the corn, or its price, to the landlord; but to carry this so far as to give restitution of goods sold in public market, though adjudged once,¹ has been since disapproved of.² In a late case it was pleaded that the custody which the tenant of a grazing farm has of cattle, ought to validate a sale in market. But the Court did not approve of the doctrine.³

A factor having goods consigned to him has power to sell, so as to give an unchallengeable right to a purchaser. But in England, at common law, such a person cannot pledge the goods of his principal for his own debt; and it has been necessary to provide by statute for such power as the necessities of trade require.⁴

2. But although purchasers of moveables, relying on the title implied in possession, are in Scotland freed from challenge by the owner where the goods have not been stolen, it is unquestionable that the creditors of a person possessing moveables in trust, or upon the footing of any of the known contracts requiring temporary possession, are liable to a preferable claim of restitution by the owner. This subject has already been fully discussed; and it is only necessary to observe further, that the question in such cases is, Whether the right vested in the bankrupt be truly an unqualified and absolute, or a limited and conditional right? In the former case, whatever may be the bankrupt's personal duties or obligations, the subject will make a part of the divisible fund: in the latter, the true proprietor's rights will prevail over those of the creditors, and he will be entitled to a preference.

IV. The CONDITIONS which operate as limitations of the original right, are not to be confounded with those personal engagements which the bankrupt may have undertaken, either at entering into the contract whereby the property was acquired by him, or subsequently to such acquisition. Where a person, for example, has bought goods and received delivery, he is bound to pay the price, as a counterpart of the right acquired; or where one has paid for goods of which he has not received delivery, the obligation to transfer the property is incumbent on the seller. But in all such cases, the right to the goods or to [288] the money is real and absolute; the obligation to pay or to deliver is separate and personal. The creditors of the person bound by such engagements are not otherwise responsible for them, than for performance of any of the other obligations which their debtor has incurred; for the restitution of money borrowed, or the payment of a bill of exchange.⁵ All obligations or personal engagements, whether express or implied, are of the same nature in law,

¹ Hay, 1639, M. 6219.

² Ersk. ii. 6. 60. [The corn, though hypothecated to the landlord, is the farmer's own corn—not the landlord's corn in the possession of the tenant. This is an attempt to extend the principle, that a hypothec odious to law should be held defeated by the removal of the crop from the farm—where the landlord may be supposed, as an adverse party, to be looking after his own interest—to the open market, where he is, or was in former times, as likely to be present as the tenant. The conclusion is that a sale, at least if it take place in open market, by a depository against whom the owner has no adverse interest, and whom he has not employed to keep watch over his goods, merely for the purpose of having a motive for keeping watch over him in turn, ought to defeat the owner's right of property, because he did not employ a more faithful custodier, or himself keep better custody over the custodier, to prevent him from carrying the goods into the public market (what is that, it may be asked, for jewellers' goods, or 1000 tons of pig-iron in bulk?). This

is obviously an extravagant analogy pressed to the help of a doctrine only a little less extravagant.]

³ *Alexander v Black*. The Court expressed an opinion, that if a person who has the possession of cattle for the purpose of grazing, carry them to market, and sell them to a *bona fide* purchaser, the owner can claim restitution. But the case was decided on special circumstances, 17th Jan. 1816, F. C.

⁴ See 4 Geo. iv. c. 83, and 6 Geo. iv. c. 94; [and 5 and 6 Vict. c. 39.]

⁵ [The creditors of a person who has received the price of specific goods sold, and in his custody, would not, if they took the goods, be liable in the obligation of delivery under the Merc. Law Amendment Act, sec. 1. But this proceeds rather on the principle that they are not entitled to prevent the buyer from getting delivery, than that they are bound by their debtor's obligation to make it. For example, if the bankrupt had maliciously destroyed the goods, instead of leaving them to come into the possession of his creditors, they would not be liable in damages in room of the delivery. The buyer would rank for the price.]

whether the object be the payment of money, the delivery of property, or the performance of any particular act. They give only a personal action to enforce performance, or to recover satisfaction in damages for the breach of engagement.¹ If one have lent money on the promise of the borrower that an heritable security shall be granted, or that goods shall be delivered to him in pledge, and the borrower fail before the pledge be given, or sasine taken on the heritable bond; still the lender is but a personal creditor, entitled to no preference, though the bankrupt, had he continued solvent, must have implemented the engagements he had undertaken, and action would have lain *ad factum præstandum*. If, again, the money have been given, not in loan, but as the price of goods which the proprietor sells and promises to deliver, and if bankruptcy take place before the contract can be fulfilled, there may be great dishonesty in the neglect; but the buyer is only a personal creditor, entitled to no preference over the rest. In one and all of those cases there is a reliance, greater or less, for a longer or shorter time, upon the personal credit and good faith of the bankrupt, without any qualification constituted over the real right of the bankrupt: the claimant has allowed himself to fall into the class of personal creditors, instead of securing to himself a place as a preferable and real creditor.²

Where a person sells property, and before the purchaser's right is completed sells it a second time, he is guilty of a crime known in Scotland by the name of *Stellionate*: he fraudulently fails to fulfil his original engagement to complete the transfer. But although the seller be liable to punishment, the right of the second purchaser, if first completed, is effectual. The property was complete in the seller; and it is only a dishonest use of that property with which he is chargeable. If a single creditor adjudging, or the general creditors of the seller, be substituted in the room of such second purchaser, and they be supposed to have completed their diligence before the real right of the first purchaser is completed, they will be precisely in the same situation with the second purchaser, and preferable, of course, to the original purchaser. The cases in the notes settle this doctrine.³

¹ An obligation, as defined in the Roman law, is: 'Juris vinculum quo necessitate astringimur alicujus rei solvendæ secundum nostræ civitatis jura.' Instit. Lib. iii. tit. 14, De oblig. pr. And it is said by the best of all the commentators: 'Solvere verbum generale quod dare et facere complectitur.' Pothier's ed. of Pand. vol. iii. p. 272.

² This consideration ought not to be lost sight of in such questions, under the Bankrupt Law, as that of *Bank of Scotland v Stewart & Ross*, 7 Feb. 1811, F. C. See below, Book vi.

³ *Mitchell v Fergusson*, 1781, M. 10296, where the disponent of a house not having been infert, the creditors of the disponent adjudged, and were infert, and were found preferable to a purchaser from the disponent. See the principle of the decision fully explained and illustrated by Lord Braxfield, Hailes 880.

This was a solemn decision; but it was thrown into some doubt by a decision pronounced in *Smith v Taylor*, Dec. 18, 1795, where a person, though his right was merely personal, borrowed money on heritable bond. Infertment was instantly taken on this bond, but of course no real right could be constituted in the lender till the borrower himself was infert; and the latter having become bankrupt, the trustee on his sequestrated estate made up titles without inferting the debtor, by dropping him out of the feudal progress. Thus the trustee came to hold a real right, while that of the person holding the heritable bond continued only personal. The only chance which the latter had for a preference was upon the general plea that the creditors could take no better right

than stood in their debtor. The Lord Ordinary repelled this plea, and sustained the right of the creditors; but the Court (erroneously) altered the judgment.

The erroneous opinion, however, which this judgment tended to sanction did not long prevail. Gordon assigned a bond of 3000 merks to Farquharson. The assignation was not intimated till the 4th of August, which ceremony is the legal completion of the real right of the assignee. In the interim, viz. on the 19th July, Gordon's estate was sequestrated, but the conveyance to the trustee was not granted till after this intimation. The question between the trustee for the creditors and the assignee was, Whether the real right of the assignee was first completed? and if not, Whether the creditors, as representing the bankrupt, could take advantage of the defect of the assignee's right, or were not rather bound to complete it, and of consequence excluded *personali exceptione*, as the bankrupt himself would have been? It was observed from the bench, upon the above case of *Smith and Taylor* being quoted as a precedent, that the Court ought entirely to disapprove of the decision, and of the principles on which it proceeded, and in this opinion the whole Court concurred. The notion, it was observed, of the estate of a bankrupt going *tantum et tale*, as it existed in his person, into the hands of the trustee, is erroneous when it is pleaded to exclude a competition between the trustee and creditors who have obtained a disposition only from the bankrupt, without having as yet completed it by sasine. While the deliverance upon the petition of sequestration is no bar, on the one hand, to such a creditor from going on to complete his right; yet if,

SECTION III.—OF THE EXCEPTION OF FRAUD AS IT AFFECTS CREDITORS.

The effect of fraud, in cases where the interest of creditors is concerned, may [289] occur to be tried in two situations: Either as invalidating the right of the debtor, and so hostile to the interests of the creditors; or as chargeable against persons who on bankruptcy insist on real rights, which have been concealed from creditors so as to mislead them, and give to the debtor a false credit.

1. In the class of cases in which the right of the bankrupt has been acquired by fraud or other unjustifiable means, there is a distinction to be observed between the objection of fraud and that of force or nonage. In the latter cases there is an absolute defect of consent: the possession is not given, but assumed, and may be retaken by virtue of the undivested real right which remains with the proprietor. In fraud it is different: consent has passed, though ill-founded and revocable; and the real right has been transferred, though action may lie, on the personal objection of deceit, for restitution or indemnification. The forms of our actions are so loose, that all the minor distinctions are confounded; but, in principle, the action applicable to the former case is a *rei vindicatio*; that which is proper to the latter is an *actio personalis ad restituendam*.

This distinction leads to a similar difference in the effect of fraud against third parties, with that which I had occasion to mark in the case of moveables. The objection of fraud has no effect against *purchasers*, who, seeing the buyer in possession of the property, give their money for the thing itself, trusting nothing to personal credit, but only to that property which the true proprietor has placed in the hands of another, together with the power of deceiving the public. Against *creditors*, fraud has been thought entitled to full effect, where it is of that kind which lawyers have distinguished as originating the contract *dans causam contractui*.¹ In all such cases, creditors, in taking the benefit of the property, are [290] considered as adopting the fraud of the bankrupt, by which he acquired the property.

Examples of the application of this rule are extremely frequent. Thus, in the case of *Prince against Pallet*, a hypothetical opinion was delivered by the Court, illustrative of the doctrine. The fraud alleged was not thought to be sufficiently established, and therefore the seller lost his cause; but the Court held, that if certain circumstances had been proved, they would have been sufficient 'to annul the contract of vendition, and consequently the decree of forthcoming:' that is to say, the diligence of the creditors would have been of no avail, 'though if, by way of commerce, the goods had been *bought* from the bankrupt, the parties would have been secure if noways partakers of the fraud.'²

The doctrine delivered hypothetically in this case was confirmed in the determination of the subsequent case of *Main against Maxwell*.³ In a still later case the same distinction was acknowledged.⁴ In the two subsequent cases of *Dunlop*, the Court sanctioned the

on the other, he neglect so to do till after the trustee has vested the property in himself by a complete feudal title, the subject must unquestionably be carried to the creditors at large, and the imperfect right of the earlier claimant superseded. *Buchan v Farquharson*, 1797, M. 2905.

Upon this decision being pronounced, containing so marked a disapprobation of the judgment in the case of *Smith and Taylor*, the creditors of *Smith* attempted, on the pretence of new facts having come to their knowledge, to open up the final judgment. This attempt was not successful. The Court thought the grounds for opening the decree insufficient; but all the judges were clearly of opinion, in point of law, that upon the original question the creditors were entitled to have succeeded. *Smith's Trs. v Taylor*, 5 Dec. 1797, n. r.

¹ See above, p. 262. Lord Stair has said that fraud is good against singular successors, because assignees are but

procurators in *rem suam*, and therefore in the same case with their cedents. And he limits his doctrine, as not extending to moveables, only on account of commerce (see above, p. 305, note 1). *Stair*, iv. 40. 21. But this doctrine may now be considered as obsolete, though Mr. Erskine has followed the authority of Lord Stair. *Ersk.* iii. 5. 10. Mr. Erskine has also laid it down, that a sale *ubi dolus dedit causam contractui* has no effect to transfer. *Ersk.* iii. 3. 8. But this is not law; and Lord Kilkerran, both in the case of *Dunlop*, to which Erskine refers, and in the case of *Forbes*, lays it down clearly, that notwithstanding the fraud, the property would be transferred. *Kilk.* 222 and 224.

² *Prince v Pallet*, 1680, M. 4932. See above, p. 265, note 1.

³ *Main v Maxwell*, 1715, M. 945.

⁴ *Christie & Co. v Fairholmes*, 1748, M. 4896. Lord

distinction. 'Most of us thought,' says Lord Elchies, 'that there was fraud even *in concilio* on Forbes' part, in the purchase of the spirits; and that had they been extant, though the property was transferred, yet the sale might be reduced, and the property brought back to Dunlop (the original owner), *notwithstanding any arrestment of Forbes' creditors*. But as the property was transferred to Forbes, so they were bought *bona fide* by Napier, *who could not be affected by Forbes' fraud*.'¹ In Kemp's case, the Court unanimously found 'that the sale of the goods in question was brought about by fraud on the part of Kemp, and therefore that the same was void and null; and that the sellers were entitled to restitution of their goods.'²

In the case of Thomson against Douglas, Heron, & Co., where a person fraudulently disappointed a trust, perhaps the judgment might have been justified on the rule that fraud passes against creditors; although, as a qualification of the right, the trust taken by itself was not (in a case of feudal property completed by sasine) sufficient to support the decision.³

2. But as fraud may in one situation be pleaded against creditors, so they may in another be entitled to found upon it as limiting or restricting what otherwise might as a [291] *jus in re* be the ground of preference. We have formerly considered the effect of that collusive possession of moveables which gives a false credit to a bankrupt, and on that account has been recognised as a ground on which moveables are made answerable for the debts of the ostensible owner. The principles on which the doctrine rests apply equally to conveyances of lands as to those of moveables: the doctrine holds in either case, so far as the other principles of the law admit or require its application. It is not, like the rule of the English statute, restricted to goods and chattels. There was of old more room for the application of this rule to heritable rights than at present; for the record now is the sole criterion and test of property in land.⁴ At the same time, there still is room for questions of this kind: 1. Where there is a competition with a single creditor, the completion of the feudal right is unquestionably, in the general case, the test of the competition; but if it can be proved that, after the conveyance was granted, it was kept latent, in order to accomplish the fraud meditated by the disponent, the person who receives the disposition shall, notwithstanding his having completed his real right, take no advantage from it against the person defrauded by his collusion and by the reputed ownership left in the disponent. And so, 2. Where the general creditors have been deceived into false credit by such concealment, even although the completion of the right has been so contrived as to be beyond the sixty days preceding the bankruptcy, the creditors will, on the principles of the doctrine

Elchies, after stating the case, says most of the Lords were of opinion 'that the property was not transferred, and that the fraud was a *vitium reale*: the President, that there was a difference betwixt arrestors and purchasers in the way of commerce; that arrestors are liable to the same exceptions with their debtor, and that their changing the bills of lading did not transfer the property. It carried to prefer Christie & Co. Remarked by Kilkerran and me, who approved that it was a fraud in Anderson, but that the property was transferred by sale and delivery; and though that sale might be reduced against Anderson, and even against his creditors, yet they having acquired the property by the new bill of lading, and sold it again, so that nobody knows now who has the property, or if the tobacco is not consumed, that Anderson's fraud could not affect them who were not partakers of it. And Kilkerran observed that their right, by having the tobacco transferred to them by the new bill of lading, would not be the worse for their having had an anterior arrestment. 7 Dec., and on 17 Dec. 1748 refused a bill without answers, and adhered.' Elchies' Notes, Fraud, No. 20. In his report, *voce* Fraud of Creditors, he reports the case, and says: 'The Court thought Anderson's fraud a

vitium reale, and that the property was not transferred; and the President distinguished between the case of arrestors and purchasers in way of commerce.'

¹ Elchies' Notes, No. 26. See also *Dunlop v Cruickshank*, 1752, M. 4879.

² *Sandieman & Co. v Kemp's Crs.*, 1786, M. 4947. The question was with creditors.

³ See above, p. 301, note 3.

⁴ Under the old law, base infeftments without actual possession were deemed fraudulent, till the Act 1693, c. 13, made the record the rule. And several cases are to be found, while the records were yet imperfect, and before the statute 1696, c. 5, relative to preferences within sixty days of bankruptcy, in which circumstances of 'simulation' for disguising the right were held to have the effect of depriving the real owner of land, and giving to the disponent the right as if still undivested.

See, for example, the case of *Duff & Brown v Forbes*, 1671, M. 12428.

See the doctrine well explained by Lord Stair, ii. 3. 27, pp. 215, 216.

now explained, be entitled to reduce the conveyance as 'simulate.' This doctrine may be rested on the authority of a case, prior indeed to the Act 1693, c. 13, by which registration was introduced as the criterion of preference; but the decision of which is, in principle, plainly applicable to the present state of the law, as well as to the rules then prevalent.¹

¹ A trader conveyed his house and shop to his brother and sister-in-law, and continued to possess for two years, carrying on his business as formerly. He then failed, and his creditors challenged the conveyance, which had been completed about six months before. The Court: 'In respect that the sasine upon the tenement was not taken for eighteen months after the date of the disposition, and that the common debtor continued in possession of the house, shop, and goods as formerly,

and kept an open shop, and the same being all the estate he had till he broke, reduced the disposition as simulate *ad hunc effectum*, to bring in all the creditors *pari passu* according to their diligence.' The Court had refused to reduce on the Act 1621, as the creditors had done no diligence, and as the disponent offered to establish the onerous cause of the conveyance. **Hamilton's Crs. v Hamilton**, 1682, M. 387.

BOOK III.

OF CREDITORS BY PERSONAL OBLIGATION OR CONTRACT.

[293] RECURRING to the distinction between *jus in re* and *jus ad rem*, it will be the object of this Book to inquire into the nature and effect of those obligations from which the *JUS AD REM* arises; the object of personal actions, and the ground of demands by creditors in bankruptcy. And the subject may be considered in this order:—*First*, The constitution of personal debts originally; and *Second*, The doctrine of passive titles, or the adoption of the debt by the representative of the original obligant.

PART I.

ORIGINAL CONSTITUTION OF DEBT.

IN this Part an extensive subject presents itself, which, after an introductory Chapter on the general principles of obligation and contract, may be taken in this order:—1. The constitution of debts; 2. Bonds, and unilateral obligations; 3. The various mutual contracts out of which debts may arise; 4. Maritime contracts; 5. The accessory debts of interest, penalties, and damages.

CHAPTER I.

GENERAL PRINCIPLES OF OBLIGATION AND CONTRACT.

THE essence of every obligation is, an engagement or undertaking to give or to do something, conferring on him to whom the engagement is undertaken a right of exacting performance.¹ Without following the elaborate divisions of the civilians, obligations may be distinguished into *EXPRESS*, or *CONVENTIONAL*; and *OBEDIENTIAL*, or *IMPLIED*. The former are in law perfect obligations, which may be judicially enforced; the latter are sometimes as perfect as a conventional obligation; sometimes imperfect, not requiring the interference

¹ Pand. Just. Pothier in Inst. De Oblig. Pr. vol. i.; Paulus in the 3d law of the Dig. lib. 44, tit. 5, De Oblig. Stair i. 10. 1; Ersk. iii. 1. 1.

of a court of justice, but more conveniently left to the jurisdiction and enforcements [294] of conscience alone.

SECTION I.

OF CONVENTIONAL OBLIGATIONS AND CONTRACTS.

In order to constitute a full and perfect obligation, there must, on the part of the obligor, be a deliberate consent and engagement to him who is to have the right of exacting performance. Of this deliberate consent Lord Stair distinguishes three acts: desire, or inclination to engage; resolution, or purpose; and engagement, or full obligation. Where the party stops short of the last of these, he has *locus pœnitentiæ*. 'The act of the will,' says Lord Stair, 'which is efficacious, is that whereby the will confirmeth or stateth a power of exaction in another, and thereby becomes engaged to that other to perform.'¹

It may be proper to consider, 1. The nature of consent necessary in conventional obligations; 2. The legality or illegality of the agreement; 3. The evidence of effectual obligations; 4. The effect of imperfections in point of evidence, and how supplied.

ART. I.—OF THE CONSENT REQUISITE IN CONVENTIONAL OBLIGATIONS.

The state of incapacity of minors, insane and interdicted persons, has already been considered,² and need not now be resumed. Assuming, therefore, that the contracting parties are capable of consent, the point of inquiry at present is, What circumstances are in law sufficient to invalidate the consent which a binding and effectual obligation requires?

It is necessary to an effectual obligation, that the contracting parties shall be agreed on all the essential points of the engagement. There must be no error in the substantial parts of the agreement destroying consent; no constraint such as to overmaster a mind of ordinary vigour; no fraud giving birth to the contract, and misleading the objector as to its true nature and substance.

I. ERROR.—There must be, express or implied, a mutual assent,—a contract on one side to accept; on the other to pay, or deliver, the same thing. And the rule is, that those who err in the substantials of the bargain contract not.³ Such errors vitiate the contract, whether they relate to the nature of the obligation to be undertaken, to the consideration or counterpart, to the subject of the contract, or even to some essential quality of it.

1. Error in substantials may be in the very nature of the contract; as, if a thing meant to be let is taken as sold, there is neither sale nor location. Or if one sends goods to another as sold, and he receives them only in consignment as factor, there is neither sale nor factory: the goods are not transferred, nor could the factor take them as under his general lien.

2. Error in substantials relates chiefly to the subject of the bargain. It occurs commonly in combination with fraud; but even without fraud, error as to the subject of the contract annihilates the consent. So, if one sell plated goods for silver; or an order for porter is mistaken for an order for port wine; or a purchase of St. Petersburg hemp, when the order is for Riga, there is a substantial and fatal error.⁴

¹ Stair i. 10. 2.

² *Supra*, p. 128.

³ Stair i. 10. 13; Ersk. iii. 1. 16. The text of Stair is a translation of the 16th law of the Pandects, De Reg. Juris: 'Non videntur qui errant consentire.' In the Roman law error is defined, 'Existimatio qua approbetur verum esse quod falsum est; vel falsum quod est verum; vel certum esse quod incertum est, aut contra.'

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⁴ Stair i. 9. 9; Ersk. iii. 1. 16. See also *Thornton v Kempster*, 1814, 5 Taunt. 786, 1 Marshall 355. Here Kempster, wishing to buy a quantity of St. Petersburg clean hemp, employed Riscoe & Paterson as brokers. They, mistaking the order, sent to him a bought note of Riga Rhine hemp, as bought from Thornton & West; and to Thornton & West, having discovered their mistake, they delivered a sale note bearing St. Petersburg clean hemp. Thornton & West

2 R

[295] 3. Error in the person affects the substantial of the contract, if personal identity is of importance, and may be supposed to have entered essentially into the view of the contract. So, in marriage, in donation, in the hire of labour (as of that of an artist), a mistake as to the person will annul consent. So, where personal credit enters into consideration: as, in agreeing to take the security of a particular person, there is no contract if the one party had in contemplation a person different from the surety intended by the other; or if, in a contract of sale, the order is understood to have come from one person, when truly it is from another of the same name: personal credit in those cases being a chief inducement to the consent.¹

4. Error as to the consideration or price will annul consent: as if goods were sold for a bank check which proves to be of no value, the bank credit being exhausted;² or if inadvertently a discharge is given to a debtor on receiving such a check; or if an error has been innocently committed as to the price or rate at which the goods were to be sold.³ But it will not be enough to annul a contract, that the motive which has remotely led to it proves to be a delusion, unless there shall be fraud in the party who profits by the contract.

5. Error as to quality, the thing itself being identically what the parties understood to be the subject of their agreement, may or may not be sufficient to annul the consent.⁴ If it be a quality touching the very object of the contract, and of which the seller must be aware, it will be held essential; and a manifest defect in regard to such quality, provided the defect be not open to observation, and such as would have prevented the bargain, will be fatal to the consent required to a valid contract. Thus, it is implied in mercantile bargains that the article shall be merchantable;⁵ and if it be found not so, there is no sale.⁶

II. CONSTRAINT.—Where one is compelled into a contract, there is no effectual consent, though ostensibly there is the form of it; and the remedy to which the party is entitled is a reduction declaring the contract to be ‘utterly void.’⁷ The constraint necessary thus to annul consent, ‘must, both by the Roman and Scottish law, be a *vis aut metus qui cadet in constantem virum*, such as would shake a man of firmness and resolution.’⁸ This rule, however, must be taken with some qualifications.

tendered the St. Petersburg hemp, and Kempster refused it, and it was sold at a loss. The question was, Whether there was a binding contract? It was held not, as the defendant was bound to accept one species of hemp, and the plaintiffs were bound to deliver another species. [A sale of a house which turned out to be in part built on another man's land was set aside on the ground of error as to subject; *Hamilton v Western Bank*, 1861, 23 D. 1033. See also *Grieve v Wilson*, 6 S. 454, aff. 6 W. and S. 543; *Keele v Wheeler*, 7 M. and G. 665; *Raffles v Wichelhaus*, 33 L. J. Ex. 160; *Phillips v Bistolli*, 2 B. and C. 511; *Bingham v Bingham*, 1 Ves. sen. 126.]

¹ See above, p. 263, the cases of *Christie & Co.*, of *Dunlop*, and of *Kemp*. In these cases fraud was mingled with the error, which indeed is the common case. Also *Mitchell v Lapage*, Holt's Rep. 254; [*Fellowes v Lord Gwyder*, 1 Russ. and My. 83; *Boulton v Jones*, 27 L. J. Ex. 117; *Higsons v Burton*, 26 L. J. Ex. 342; *Hardman v Booth*, 32 L. J. Ex. 105.]

² If it be a forgery, there is added to error the plea of fraud. See *Christies v Fairholmes*, below, p. 316, note 2.

³ *Sword v Sinclairs*, 8 Aug. 1771, M. 14241. Here a factor sold tea without observing an error, in writing out the note of prices, of 2s. 8d. instead of 3s. 8d. The factor communicated the mistake as soon as he observed it, and refused implemment. An action by the buyer was dismissed.

⁴ [*Scott v Littledale*, 27 L. J. Q. B. 201.]

⁵ See below, Of Sale, and the cases there cited. [The doctrine stated in the text is not affected by 19 and 20 Vict. c. 60, except in relation to specific goods. *Taylor v Macfarlane*, L. R., 1 Sc. App. p. 245.]

⁶ [When the mistake is that of one party alone, the general rule is, that whatever a man's real intention may be, if he manifests an intention to another party so as to induce the latter to act upon it in making a contract, he will be estopped from denying that the intention so manifested was his *real* intention. But if the other see that there is a mistake in what the first writes or says, or must be taken to know that from the nature or common sense of the transaction, and fraudulently lies in wait to take advantage of it, he will not be allowed to profit by the error or estop the party from showing it was error. See Lord Wensleydale in *Freeman v Cooke*, 2 Ex. 654; *Doe v Oliver*, and cases in notes, Smith's L. C. ii. 671; *Cornish v Abington*, 28 L. J. Ex. 262; *Alexander v Worman*, 30 L. J. Ex. 198; *Van Toll v South-Eastern Railway Co.*, 31 L. J. C. P. 241; *Sword v Sinclairs*, 1771, M. 14241. And see, on Error and Mistake generally, Kerr on Fraud and Mistake; Story on Contracts; Leake on Contracts; Benjamin on Sale, pp. 36–42, and 303–307; Brown on Sale, Nos. 211–224.]

⁷ Stair i. 9. 8.

⁸ Ersk. iii. 1. 16, and iv. 1. 26.

1. Where there is no peculiar weakness of age, or sex, or condition, law will require, in order to annul a contract, such fear and compulsion as may reasonably shake a mind of ordinary constancy and resolution, and will not listen to the pretence of every vain and foolish fear.¹

2. It seems that a distinction is, on the principle of the rule, to be made according [296] to the weakness of the person to be operated upon by the circumstances of intimidation. A young woman of lawful age, but ignorant of the world and of her lawful rights, without any natural protector, or where the persons who ought to shield her from oppression are themselves the oppressors; a person in the weakness of bad health, though of full capacity; an aged parent compelled by the apparent danger of a son; and in many other such cases of peculiar weakness, the state of the person will be taken, in combination with the circumstances of violence or threat, as sufficient to invalidate consent.

3. Imprisonment is one of the most usual instruments of intimidation in modern times. Unlawful imprisonment, as in a lunatic asylum, will be a sufficient ground of reduction *ex vi aut metu*. Even imprisonment which in itself is lawful, may in some peculiar circumstances perhaps be admitted to the same effect. Whether, if the intimidation produce only a settlement of the debt for which imprisonment is threatened, it would invalidate the transaction in any circumstances, may be doubted. But, at least, whenever this instrument of terror is applied to extort from a debtor something more than the debt for which imprisonment is competent, or from others advantages to which otherwise they would not have consented, there seems to be such a want of lawful consent as to give relief *ex vi aut metu*.²

4. There is a sort of terror, the operation of which in annulling consent may admit of distinctions. The threat of divulging a crime may frequently operate with the most irresistible force, whether the crime has been actually committed, or is of so shameful a nature that the least imputation of it is a serious evil. An obligation extorted by the threat of a shameful imputation, constructed with so much art that it may be difficult to refute it, would seem to be reducible *ex vi aut metu*; and yet it might be argued that a mind of ordinary constancy and manliness ought not to be moved by such an imputation.

5. The effect of compulsion as invalidating consent will not be limited to him who is the party to the contract, but a remedy will be given also against those who profit by the unlawful act. And,

6. Where the constraint is not of that violent or overwhelming nature which can be deemed of a character to influence a mind of ordinary constancy (as, for example, the terror of a lawsuit, or the necessity of a judicial oath, so revolting to some persons of weakly [297]

¹ In modern times this is seldom a ground of reduction, though in the case of married women it still may occur; such persons being subject to the domestic tyranny of their husbands, without any means of exposure or of protection. In our older cases there are many strange examples of violence exercised, while the vigilance of public justice was relaxed by rebellion, or the police of Scotland in no state of vigour to restrain the more remote inhabitants. Such are the cases of—

E. of Morton v Lochleven, 1543, M. 16479.

E. of Orkney v Vinfra, 1606, M. 16481.

M'Intosh v Farquharson & Spalding, 1671, M. 16485.

Stewart v Whiteford, 1677, M. 16492.

Grant v Anderson, 1706, M. 16509.

² See Ersk. iv. 1. 26. Heriot v Bird, 1681, M. 16496, where, by threats of imprisonment, one was compelled to grant a disposition of moveables for payment of a debt not in the caption. The Court held it effectual for the debt in the caption, not for the other.

Nisbet v Stewart, 1708, similar to the above, M. 16512.

Willocks v Callander, 1776, M. 1519. A bill was found ineffectual in the hands of an onerous endorsee, having been extorted by violence.

Wightman v Graham, 1787, M. 1521. Here Wightman paid a bill due by his father; and afterwards, on assignation from the bill-holder, took out a caption, and threatened the cedent himself with imprisonment, by the terror of which he extorted from him a bill for the original debt, with interest and costs accumulated. A reduction was raised, and the bill afterwards endorsed, and the endorsee brought an action for payment. The Court, holding that a bill impetrated like the one in question was of no validity, dismissed the action.

Frazer v Black & Knox, 1810. [See also cases in M. pp. 16481, 16505, 16687, 16494, and 16603; Arrat v Wilson, Roberts. App. Ca. 234; Monro v Bruce, *ibid.* 387; Wright v M'Gregor, 5 S. 794; Dickie v Gatzmer, 8 S. 147.]

scrupulous conscience), an admixture of deception or fraud will be required, and may be sufficient to invalidate the consent.¹

III. FRAUD is a ground of invalidity in obligations, where the direct misrepresentations or manoeuvres of the one party are such that the other party has thereby been induced to enter into an engagement to which he would not otherwise have consented. In such a case there is consent, but it is not such consent as can justly give the right of exaction to the person deceiving or adopting the deceit. And here lies the difference made by lawyers between that nullity which attends error or compulsion, both totally subversive of consent; and that invalidity which is produced by fraud inducing consent upon false grounds. Consent, it is said, may be predicated in the latter case, not in the former. The objection will be good against third parties in the former case; not in the latter, unless such third parties represent the defrauder.

The general rule is, that wherever fraud gives birth to the contract, it will not bind;² and it was well laid down in an English case, that where a purchaser has laboured under a deception, in which the adverse party has permitted him to remain, on a point which he thought material to influence his judgment, the contract is void.³

The general nature and operation of fraud upon transference has already been considered, and the two kinds of fraud as distinguished by lawyers—*fraus dans causam contractui*, and *fraus incidens*.⁴ It remains only to mark some of the cases in which fraud, less in

¹ See below, p. 317, notes 1 and 2. *Forman v Sheriff*, 1791, M. 16515; *M'Ilwham v Kerr*, 1823, 2 S. 240.

² *Christies v Fairholmes*, 1748, M. 4896. Tobacco sold on a bill with a forged name as co-acceptor. The vendor claimed the goods in the hands of creditors as not effectually sold, and the Court so held. See above, p. 309.

³ *Hill v Gray*, 1816, 1 Starkie 434. Here a purchaser of a picture as a Claude, was misled by the vendor's agent into a belief that it had formed part of a particular collection, which he thought sufficient evidence of its genuineness. It was not of that collection, but he was allowed to buy under that misconception. Lord Ellenborough tried the case.

[The case of *Hill v Gray*, as reported, seems not reconcilable with what is certainly the general rule as to concealment as distinguished from misrepresentation, viz. that it is only where a party is under some special obligation to reveal facts to another that mere silence will be regarded as fraud, entitling the other party to redress. Thus, where a fiduciary relation subsists between the parties, there is a positive duty of disclosure arising out of that relation. In insurance cases, the basis of the contract is that the insured shall disclose all material facts, shall state the elements of the risk he proposes that the insurer shall undertake; and this necessarily creates an obligation of disclosure. It is sometimes said—as, for instance, by Professor More, Lectures, i. 246—that suretyship being a contract of indemnity, like insurance, creates the same duty on the creditor receiving the cautionary obligation to disclose all circumstances known to him essential to the risk, which the cautioner is about to undertake, of the debtor's solvency. That, however, is too broad a proposition. See *Wythes v Labouchere*, 5 Jur. N.E. 499; *Lee v Jones*, 34 L. J. C. P. 131; *Way v Hearne*, 32 L. J. C. P. 34; *Owen v Homan*, 20 L. J. C. 314; *North British Insurance Co. v Lloyd*, 24 L. J. Ex. 14. He must not conceal any material matters of the transaction itself between him and the debtor to which the suretyship relates, if he undertakes to describe that transaction at all; but there is no legal obligation on him to

disclose to the intended surety matters affecting the credit of the debtor, or to keep him right as to any other circumstances of inducement not intrinsic to the particular transaction. In regard to sale, there is in general no duty of disclosure except as to latent faults known to vendor, and falling within the warrantice of quality: there is no obligation of disclosure with regard to extrinsic facts merely bearing on the contract, or operating as an inducement thereto. (See *Story, Sale*, sec. 382.) There may be a duty of disclosure created in sales with reference to particular matters by the usage of particular trades (*Jones v Bowden*, 4 Taunt. 847), or by special circumstances, where the seller expressly or by clear implication undertakes the duty of disclosing all the material facts. The active prevention of fair examination will no doubt avoid the sale, but that is not mere concealment (*Mellish v Motteux, Peake*, N. P. C. 115). There is no case at law, except *Hill v Gray*, which makes mere concealment by the seller, in regard to a matter of inducement, extrinsic to the subject sold, a ground for avoiding the sale. Probably the facts are not fully reported, and they may have amounted to something of the nature of misrepresentation, operated by a series of manoeuvres (which is what we understand by the expressions 'studious' and 'industrious' concealment of the equity lawyers) designed to create the belief which influenced the buyer. In *Keates v Cadogan*, 20 L. J. C. P. 76, the Common Pleas explained Lord Ellenborough's judgment as intimating that there 'had been a positive aggressive deceit.' Either this was the state of the facts, or the judgment was unsound. It certainly ought not to have been made the basis of an indiscriminating proposition as to passive fraud such as the text seems to countenance. A man shall indeed be liable for the slightest word or act which amounts to positive misrepresentation of a material thing; but he must be shown to have been under a positive duty to speak before he can be made answerable for having held his tongue.]

⁴ See above, p. 261 sqq.

degree than would be requisite if it stood alone, combined with other circumstances, also in themselves insufficient, will be held to make out a case subversive of that consent which is essential to contracts.

1. Where one, under the operation of some motive of alarm insufficient of itself to invalidate his contract, has been also deceived by the adverse party in the contract, no advantage can be taken of his engagement. Thus, in a case already alluded to, where a man was induced, by the terror of a lawsuit on account of a trespass by cattle, to grant a bill for an exorbitant and misrepresented amount of damages, he was found entitled to relief.¹ And again, the terror of a prosecution for criminal conversation having induced a weak person to grant a bill to the husband, it was found invalid, the husband having fraudulently connived at the intercourse.²

2. Lesion, or great inequality or inadequacy of price, has already been seen not to be of itself sufficient to reduce contracts or deeds;³ but combined with fraud and weakness of mind, it will afford a sufficient ground of reduction.⁴

3. Intoxication, as a ground of relief from an obligation, is in general to be set forth as a plea of fraud. It cannot, indeed, be said that there is consent where the mind is for the time destroyed by intoxication; and standing alone, it will be a good ground of reduc- [298] tion, that the party was so drunk as not to know what he did; or, according to Erskine, 'in a state of absolute drunkenness, and consequently deprived of the exercise of reason.'⁵ In general, intoxication only 'darkens reason,' and does not of itself invalidate a contract; but the advantage taken of this state of imbecility may infer the existence of fraud, or aid the force of the objection grounded on deceit or extortion.⁶ In England, accordingly, this degree of intoxication is taken as an ingredient of fraud, where the adverse party has led the person into intoxication,⁷ or where he is shown to have taken advantage of his weakness.

ART. II.—OF OBLIGATIONS AND CONTRACTS CONSIDERED AS LEGAL OR ILLEGAL.

The consent which forms the essence of all contracts and obligations must be not only deliberate, but the agreement must be of a description which law will sanction; otherwise no debt can arise out of it, and a court will not lend its aid to enforce it. The contract must be neither illegal nor immoral: it must not be a contract prohibited, or against the policy of the laws of trade, or prejudicial to the community.

The general rule of law is, that no claim or right of action can spring out of an illegal contract; that no court will lend its aid, and no trustee in bankruptcy is entitled to give sanction, to a claim grounded upon an immoral or an illegal act.⁸

¹ *Forman v Sheriff*, 1791, M. 16515.

² *M'Ilwham v Kerr*, 1823, 2 S. 240.

³ See above, p. 136.

⁴ In England, inadequacy of price alone will invalidate a contract, if so strong, gross, and manifest, that a man of common sense will start at the bare mention of it; such inadequacy being taken as evidence of fraud, according to Lord Thurlow. 1 Brown, Chan. Ca. 9. Or 'if there is such inadequacy as to show that the person did not understand the bargain he made, or was so oppressed that he was glad to make it, knowing its inadequacy, it will show a command over him which may amount to fraud.' *Heathcote v Paignon*, 1787, 2 Brown, Chan. Ca. 175.

⁵ Ersk. iii. 1. 16. 'Persons while in a state of absolute drunkenness, and consequently deprived of the exercise of reason, cannot oblige (bind) themselves.' See also iv. 4. 5; Stair ii. 3. *L. Halton v Northesk*, 1672, M. 13384.

In England, Sir W. Grant says that a deed obtained from a

man in such extreme state of intoxication as to deprive him of his reason would be invalid even at law. *Cook v Clayworth*, 18 Ves. 16. See also *Pitt v Smith*, 3 Camp. p. 34.

⁶ Erskine says: 'A lesser degree of drunkenness, which only darkens reason, has not the effect of annulling the contract;' *ubi sup.*

⁷ See *Johnson v Medlicot*, 3 P. Wms. 130, note (a), where Sir J. Jekyl at the Rolls said: 'The having been in drink is not any reason to relieve a man against any deed or agreement gained from him when in those circumstances, for this were to encourage drunkenness. *Secus* if, through the management or contrivance of him who gained the deed, and the party from whom such deed has been gained, was drawn into drink.'

⁸ Lord Mansfield says, in *Holman v Johnston*, Cowp. 343: 'No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.'

Mr. Justice Ashurst, in *Blambford v Preston*, 8 Term. Rep.

The acts which may be thus distinguished may be illegal, either on the principles of common law or by the force of statute. It may be convenient to consider these cases under the following heads: 1. Contracts and obligations immoral, or *contra bonos mores*. 2. Contracts and obligations against public policy. And, 3. The force of contracts thus exceptionable, when pleaded against third parties not participant in the offence.¹

SUBSECTION I.—OF OBLIGATIONS AND CONTRACTS IMMORAL, OR CONTRA BONOS MORES.

These, again, are reducible to several classes:—

1. INCENTIVE TO CRIME.—Agreements or obligations inductive to crime cannot be the foundation of a claim; for the law says, ‘You shall not stipulate for iniquity.’ Neither will a claim be sustained on a bond for compounding a crime; as, for example, a prosecution for [299] perjury,² or for procuring a pardon.³ And it is not enough that the document of debt has received the unsuspecting appearance of a simple and legal bill or bond. Whenever courts of law, said an eminent judge, see attempts made to conceal such wicked deeds, they will brush away the cobweb varnish, and show the transactions in their true light.⁴

A distinction is admitted between bonds given as the price of prostitution, and bonds granted subsequent to such a connection, as a provision due in honour and justice for an injury accomplished. On a bond of the former description no claim can lie;⁵ on one of the latter description the claim is admissible.⁶ But the favour indulged to bonds of the latter description is withheld where the grantee is a prostitute,⁷ or where she knew the granter to be married at the time of their connection.⁸ And a distinction, again, has been taken between

93, says: ‘It is a clear rule of law, that no right of action can spring out of an illegal contract.’

Lord Kenyon, in same case, says: ‘One who comes into a court of justice to enforce a contract, must come on legal grounds; and if he have not a legal title, he cannot succeed, whatever the private wishes of the court may be.’ [As to obligations partly legal and partly illegal, see *ex parte Mather*, 3 Ves. jun. 373; *Hamilton v Main*, 2 S. 313.]

¹ [In addition to the grounds of illegality noticed in the text, reference may here be made to the so-called ‘*ultra vires* doctrine’ established by modern decisions in relation to contracts entered into by incorporated companies for purposes not sanctioned by their charters or acts of incorporation. In order to bring the contract within the exception, it must appear by the express provisions of the statute, or by reasonable inference from its enactments, that the deed was *ultra vires*, that the Legislature meant that such a deed should not be made—per Lord Wensleydale in *S. Yorkshire Ry. Co. v Great Northern Ry. Co.*, 9 Exch. 85; or, as elsewhere stated, that the contract appears to be necessarily unconnected with the purpose of the company’s incorporation—per Chief Justice Erle in *Mayor of Norwich v Norfolk Ry. Co.*, 4 El. and Bl. 447; *Att.-Gen. v Great Northern Ry. Co.*, 1 Drew and Sm. 154. See also the opinions of the law Lords in *Hawkes v E. Counties Ry. Co.*, 5 H. L. Ca. 331. See *Hodges on Railways*, 4th ed. p. 63 et seq.]

² *Collins v Blantern*, 2 Wils. 341, 347.

³ *Stewart v Earl of Galloway*, 1752, M. 9465. A bond of £200 to one about the king’s person to obtain pardon for murder held bad.

Grant v Davidson, 1786, M. 9571. An agreement to pay a sum to the poor for quashing an action for penalties, held by Lord Hailes illegal. Court altered, on ground of usage as well as policy. See 2 Hailes 1001.

⁴ Lord Chief Justice Wilmot in *Collins v Blantern*, above, note 2.

⁵ It is doubtful whether, even to the children of such a connection, the bond would be good. See Lord Eldon in *Hamilton v Waring*, 1 Bligh 269.

[On the same principle, action is denied on a lease of premises let in the knowledge that they were to be used as a brothel. *Smith v White*, 1 L. R. Eq. 626, and cases there referred to. See also *Pearce v Brooks*, 1 L. R. Ex. 213, an action for the price of a brougham supplied to a prostitute.]

⁶ *Walker v Perkins*, 3 Bur. 1568. A promise, in consideration of future illicit connection, denied action.

March. of Annandale v Harris, 2 Peere Williams 432.

Gibson v Dickie, 3 Maule and Selw. 463.

See *D. of Hamilton v Scott Waring*, 21 May 1816, 19 Fac. Coll. 128. This part of the case given up in the House of Lords, 2 Bligh 197.

[*Nye v Moseley*, 6 Barn. & Cr. 133; *Friend v Harrison*, 2 Car. and P. 584; *Johnstone v Mackenzie’s Exrs.*, 14 S. 106.]

⁷ *Whaley v Norton*, 1 Vernon 483; *Matthew’s case*, 2 Vernon 187.

⁸ *Durham v Blackwood*, 1622, M. 9469. Here the Court of Session denied effect to a bond, even to the unlawful issue of the connection. But the distinction is correctly taken in a subsequent case—*Sir W. Hamilton v Mary de Gares*, 1765, M. 9471—where action was denied on a bond to an adulteress, but sustained on a bond to the child of the connection.

See the case of *Priest v Parrot*, in England, 2 Vesey 160, where a girl came to live as a companion to Parrot’s wife, and Parrot seduced her, and gave her afterwards a bond. Action denied.

the person with whom the connection was formed, and the children of such connection; the claim of the latter being admitted in cases where the former was rejected.¹

2. **INDECENT OR MISCHIEVOUS CONSIDERATION.**—An obligation or stipulation is void which is prejudicial to the feelings or interests of a third party, or offensive to decency or morality, or which has a tendency to mischievous and pernicious consequences: as a contract of sale of obscene and indecent publications;² or an obligation to induce an immoral action, as a violation of chastity, or personal injury to another; or a contract which gives a subject of this country an interest in the life of an enemy;³ or which resolves into an inquiry concerning personal defects or blemishes.⁴ The cases in the English books which illustrate this rule are chiefly cases of wagers, which on another ground would be dismissed in Scotland.⁵

3. **GAMING.**—Gaming was prohibited by statute as a most pernicious vice as early as James VI.'s time—1621, c. 14. By this Act, the winnings above 100 merks to go to [300] the poor. 9 Anne, c. 14; 18 Geo. II. c. 34. By an ordonnance of Louis XIII. of France in 1611, winnings were limited to a small sum, the excess being given to the poor. This probably suggested the remedy provided in our Act of 1621. In England there are three principal statutes; one in the time of Henry VIII., another in the dissolute reign of Charles II., and a third in Queen Anne's time.⁶ By the last of these Acts, which has received effect in Scotland,⁷ 'all bonds or other securities given for money won at play, or money lent at the time to play with,' are declared utterly 'void;' and 'all mortgages or encumbrances of lands made on the same consideration, are ordered to be made over to the use of the mortgagor.' This objection was held to affect any one holding a bond or bill as trustee for the winner;⁸ but not onerous and *bona fide* endorsees, without notice of the objection.⁹ The Act of 1621 is not, however, in desuetude, as might be supposed from one case,¹⁰ but only effectual to the poor, not to the winner.¹¹

4. **WAGERS.**—By the law of Scotland, a rule has been followed on the subject of wagers which is opposite to that of the English law, but which English judges of the highest name have regretted that it is almost too late to adopt in England.¹² The view which has been

¹ See the cases in the preceding note.

² *Fores v Johnes*, 4 Espin. 97, where an order for *all* prints was held not to oblige the orderer to take *obscene* ones; and an action is not maintainable for the value of such prints.

See also *Du Bost v Beresford*, 1810, 2 Camp. 511, where, in an action for the value of a picture which the defendant had cut in pieces, held that, being libellous, law cannot consider it valuable as a picture.

[*Poplet v Stockdale*, Ry. and M. 337.]

³ *Gilbert v Sykes*, relative to a wager on the life of Bonaparte. 16 East 150.

⁴ *Da Costa v Jones*, a wager as to the sex of the Chevalier D'Eon. Cowp. 729.

⁵ See below, Of Wagers.

⁶ 33 Henry VIII. c. 9; 16 Charles II. c. 7; 9 Anne, c. 14.

[By 8 and 9 Vict. c. 109, sec. 17, it is enacted that 'all agreements by way of gaming or wagering' shall be null and void. See *Foulds v Thomson*, 1857, 19 D. 803.]

⁷ *Neilson v Bruce*, 1740, M. 9507; *Sir R. Pringle v Biggar*, 1740, M. 9509.

⁸ *Sir R. Pringle v Biggar*, *supra*.

⁹ *Neilson v Bruce*, *supra*.

[By 5 and 6 Will. IV. c. 41, bills, notes, and mortgages in the hands of purchasers for value shall not be void, but only held as for an illegal consideration; and if on such instruments the grantor or maker shall pay to the holder the money so secured, he shall be entitled to recover it as money paid to the

original payee, as on an illegal consideration. See *Edwards v Dick*, 4 Barn. and Ald. 212; *Ferrier v Graham's Trs.*, 6 S. 818, 5 Mur. 92.]

¹⁰ *Straiton v Laird of Craigmiller*, 1688, M. 9506.

¹¹ *Maxwell v Blair*, 1774, M. 9522. The Act 1621 held not in desuetude, but available to the poor; and notice given to the kirk-treasurer to appear for the interest of the poor.

¹² This regret has been expressed by Lord Mansfield, who says: 'Whether it would have been better policy to have treated all wagers originally as gaming contracts, and so have held them void, is now too late to discuss' (Cowp. 729). Mr. Justice Ashhurst has said: 'In my opinion, the Courts have gone far enough in encouraging impertinent wagers. Perhaps it would have been better for the public if the Courts had originally determined that no action to enforce the payment of wagers should be permitted' (2 Term. Rep. 615). And Mr. Justice Buller has said: 'Such a wager is not permitted by the laws of other countries: it is not allowed by the civil law, nor by the law of Scotland; and a determination on that point which came from the Court of Session in Scotland was affirmed here in the House of Lords on an appeal' (*Ib.* 616). And again, in alluding to Lord Mansfield's opinion, above quoted, he says: 'With great deference to that very high and respectable authority, I doubt whether it be too late to consider that question or not; for in *Bruce v Ross*, Dom. Proc. 14 April 1788, a decree in Scotland was affirmed on the ground that all idle wagers were void. In the

taken in Scotland is, that the laws of the country and its judicatures were instituted to determine adverse rights, and not the idle or impertinent doubts and inquiries of persons not interested in the matter. In a case determined in 1799, the Court, proceeding not on the statute against gaming, but on the common law, held 'that courts were instituted to enforce the rights of parties arising from serious transactions, and can pay no regard to *sponsiones ludicræ*.'¹

This doctrine may now be held as the settled law of Scotland; for not only was it applied in the Court of Session to rule a case decided some years before the case above mentioned, but the judgment was affirmed in the House of Lords.²

[301] If a sum has been paid to receive a larger sum on a certain event, there seems to be no doubt that a claim will lie, at least for the sum so paid, as a debt.³

5. LIQUOR ACTS.—By 24 Geo. II. c. 40, in order to prevent the pernicious effects of dram-drinking, no action is maintainable for money, etc. for spirituous liquors, unless *bona fide* contracted at one time to the amount of 20s. or upwards. And the claim is not even valid as an item in an account where the liquor at once delivered, and mentioned in the item, is not to the amount of 20s. On this statute, action has been refused on a bill granted for the amount of an account for spirits furnished.⁴

SUBSECTION II.—CONTRACTS AGAINST PUBLIC POLICY.

The private interests and stipulations of individuals must yield, and their natural rights and powers suffer restraint, wherever they are inconsistent with the public interest. This great consideration furnishes the ground of several important restraints on the freedom of contracting obligations; and they may be considered as connected, 1st, With internal policy; and 2^d, With the policy of foreign relations.⁵

printed cases, which is all we have to go upon, it is stated that the rule and principle of the civil law relative to the *sponsiones ludicræ* were early adopted as common law in that kingdom, and have been constantly adhered to; and the great and laudable pains which on all occasions have been taken to preserve an uniformity between the laws of that country and of this, make that case of considerable authority here' (3 Term. Rep. 697).

[To the principle under consideration may probably be referred the restrictions on the making of contracts for the sale and transfer of public stocks and securities contained in the now repealed Acts, 7 Geo. II. c. 8, and 10 Geo. II. c. 8, commonly called 'Sir John Barnard's Acts.' These statutes are repealed by 23 and 24 Vict. c. 28.]

¹ *Wordsworth v Pettigrew*, 1799, M. 9524; [*Harvey v Miller*, 7 D. 398; *O'Connell v Russell*, 1864, 3 Macph. 89.]

² The consequence of not having followed the same course in England is, that it has been necessary to enter into many distinctions in determining what wagers deserve support, and what are to be rejected. See *Jones v Randolph*, Cowper 37; *Foster v Thackeray*, 1 Term. Rep. 57, note (o), and many others.

Bruce v Ross, 1787, M. 9523, 2 Hailes 1016. There were two grounds of judgment commingled in this decision: 1. That a wager is not actionable; and, 2. That a wager relative to the election of a member of Parliament is against public policy. In the House of Lords the decision was affirmed on the former ground, 14 April 1788, 3 Pat. 107.

See, for the grounds of that judgment, above, p. 319, note 12, Mr. Justice Buller's opinion in *Atherfold v Beard*, 2 Term.

Rep. 616, and in *Good v Elliot*, 3 Term. Rep. 697. [See also 19 Geo. II. c. 37, 14 Geo. III. c. 48, as to 'gaming policies' of insurance.

³ [See, as to wager policies, Arnould on Marine Insurance, by MacLachlan, pp. 109–117.]

⁴ *Russell v Russell*, 6 July 1808, F. C.

[This statute, commonly called the Tippling Act, has been amended by 25 and 26 Vict. c. 38, which leaves the old Act in force, except in cases where the liquors are sold to be consumed elsewhere than at the place of sale, and delivered at the residence of the purchaser in quantities not less at one time than a reputed quart. By 30 and 31 Vict. c. 142, sec. 4, no action lies to recover any money alleged to be due in respect of the sale of any ale, porter, beer, cider, or perry consumed on the premises where sold or supplied, or in respect of any money or goods lent or supplied, or of any security given for obtaining said articles. See, on the Tippling Acts, *Hughes v Dove*, 1 Q. B. 294 (overruling *Jackson v Attil*, Peake 181); *Spencer v Smith*, 3 Camp. 9; *Burnyeat v Hutchinson*, 5 B. and Ald. 241; *Proctor v Nicholson*, 7 Carr. and P. 67 (Query—whether overruled by *Hughes v Dove*?); *Owens v Porter*, 4 C. and P. 367; *Crookshank v Rose*, 5 C. and P. 19; *Philpot v Jones*, 2 Ad. and E. 41; *Gaitakill v Greathead*, 1 Dowl. and Ry. 359; *Dawson v Remnant*, 6 Esp. 24; *Gilpin v Rendell*, 1 Selwyn N. P. 10th ed. 55; *Alexander v Boyd*, 2 S. 652; *Johnstone v Law*, 5 D. 1372; *Maitland v Rattray*, 11 D. 71. Spirits mixed with water are within the Act. *Scott v Gilmore*, 3 Taunt. 226.]

⁵ [On the unwarrantable latitude assumed in many cases by the Courts in declaring contracts illegal at common law,

I.—CONTRACTS INCONSISTENT WITH INTERNAL POLICY.

This class of restraints frequently combines the consideration of immorality, already taken notice of, with those of general policy, as in bribery in elections; sometimes no other consideration operates but the general policy of the law in securing the freedom of the subject from undue restraint.

1. DOMESTIC RELATIONS.—The law is jealous of all contracts which restrain the freedom or taint the purity of the domestic relations.

RESTRAINTS ON MARRIAGE.—All contracts imposing restraints on marriage, though clear of direct fraud, are to be looked on with great jealousy, and generally it may be laid down that they are void.¹ A bond not to marry is bad, as encouraging irregularity, and as devoid of proper interest to the obligee. But where the bond has relation to the party, distinctions have been contended for. 1. If there be a subsisting engagement to marry the obligee, in relation to which the obligation is granted, it has been greatly doubted whether the sum in the bond being the price of reciprocally abstaining from engagement, a woman holding such a bond, and in reliance on it, avoiding other engagements and suffering injury, has not a good ground of action for the sum. But, taking the matter on broad grounds, this has been held a dangerous and illegal sort of traffic; all that is beneficial in the subsisting engagement being demandable on the obligation to marry. 2. Where, on the other hand, there is no subsisting obligation to marry, or only an implied contract, such obligations to pay forfeits are bad, as savouring of improper restraint. It is held, that where there is a proper impediment, the parties should continue free; where there is none, they should marry: [302] and law ought not to sanction what may encourage illicit connection or improper advantages taken in delicate circumstances.²

MARRIAGE BROUAGE CONTRACTS are agreements or bonds promising a reward to one who, by reason of the influence he may have over one of the parties, shall procure a marriage between them; and are void on account of their pernicious tendency to unhappy marriages, the infamous profit derived, disobedience to parents encouraged, the destruction of the peace of families, and the ruin and unhappiness of the parties themselves.³ The first case which occurred 'moved laughter.'⁴ The next seems to have suggested more serious reflections on the dangerous tendency of such agreements;⁵ and at last, in a case where the point came

on the ground that they contravene, or are supposed by the Courts to contravene, public policy, see the observations of the judges in *Richardson v Mellish*, 2 Bingh. 242; and of Lord Campbell, in *Hilton v Eckersley*, 24 L. J. Q. B. 353. Burroughs, J., said that argument upon public policy was 'a very unruly horse; and when once you get astride it, you never know where it will carry you. It may lead you from the sound law.']

¹ [As to conditions in wills against the marriage of the testator's widow, see *Newton v Newton*, 31 L. J. Ch. 690. As a general rule, a legacy or annuity given to the testator's wife *dum vidua manserit* is good. Observe, however, that where a legacy is given on an illegal condition, the legatee takes the gift free from the condition.]

² See these views illustrated in two English cases under Lord Hardwicke and Lord Mansfield: *Woodhouse v Shepley*, 2 Atk. 540; *Lowe v Peers*, 4 Burr. 2225. See *Gibson v Dickie*, 3 Maule and Selwyn 463.

[On a kindred question, the validity of the class of agreements in which an annuity or pecuniary consideration is stipulated between husband and wife as a condition of voluntary separation, the authorities on the law of England are inconclusive. On the one hand, it was ruled that a husband

cannot legally sell his consent to a separation (*Jones v Waite*, 5 Bingh. N. C. 341). On the other, the Courts of law and equity have enforced contracts of separation where the terms were fair, and the circumstances such as to render separation inevitable. In the case of *Wilson v Wilson*, a decree of Vice-Chancellor Shadwell, restraining the husband from taking proceedings contrary to the agreement, was affirmed in the House of Lords, 1 H. L. Ca. 538; but the judgment in this case was not accepted as settling the principle, and in *Hunt v Hunt* an appeal was taken to the same tribunal against an injunction pronounced by Lord Westbury as Chancellor, restraining proceedings for restitution of conjugal rights. After a hearing had taken place before seven law Lords, with the assistance of the judges, one of the parties died, and no judgment was delivered; 1 Sm. L. Ca., 6th ed. 343.]

³ Comyn's Dig. vol. ii. p. 631, and the cases there cited.

⁴ *Campbell v Barns and Stewart*, 1678, M. 9505.

⁵ *El. of Buchan v Cochran*, 1698, M. 4546, where the bond was first sued on in England, and the plaintiff nonsuited, as the bond was *contra bonos mores*. The action here was for the expenses of Sir John Cochran in England while negotiating the marriage. The case does not appear to have come to a decision.

fairly to trial, the Court held the engagement undertaken to be *contra bonos mores*, and the contract to afford no ground of action.¹

2. RESTRAINTS ON NATURAL LIBERTY may to a certain extent be effectually imposed. Thus, although it is unlawful to bind oneself to perpetual banishment or perpetual service,² an engagement or mutual contract of service, and wages for a long term of years, or even for life, seems effectual.³ Again, it not unfrequently happens that an engagement is undertaken, by which one, in entering to the service of another, restrains himself from that particular line of trade within a certain district, for the purpose of avoiding rivalry and disadvantage to his master. On this subject several distinctions have been admitted; and, 1. A general restraint extending to the whole country is void, whether with or without a consideration given for it, on the ground not only of injury to the one party by loss of livelihood and the subsistence of his family, without a corresponding advantage to the other, but of injury to the public, by depriving it of a useful member. 2. Particular restraints are effectual, on the principle that a man may by his own consent give over his trade, and part with it to another in a particular place.⁴ And so agreements have been sustained restraining the grantor from particular trades within the same parish,⁵ or within half a mile,⁶ or within ten miles,⁷ or within the same city.⁸

[303] 3. INVASION OF FREEDOM OF ELECTION.—This has not been left to the common law. The Act of 49 Geo. III. c. 118 proceeds on a preamble, that giving or promising money to procure a seat in Parliament is not bribery, if the money is not given or promised to a voter or returning officer, but that such gift or promise is contrary to the ancient usage, right, and freedom of election, and laws and constitutions of the realm; and therefore, if any person give, directly or indirectly, any sum, etc., on an engagement, etc., to procure, or endeavour to procure, the return of any person to serve in Parliament for any county, etc., the consequences shall be: 1. Forfeiture of £1000 by the person so offending: 2. If returned,

¹ *Thomson v Mackaile*, 1770, M. 9519, 1 Hailes 339, where, by a series of manœuvres, a young woman was led into a marriage, and action was brought by the manœvrer, who held a bond for a sum to be paid if the marriage should be accomplished. The Court held this an obligation which could not be enforced.

² *Wedderburn v Monorgan*, 1612, M. 9453; *Caprington v Geddie*, 24 March 1632, M. 9454.

³ *Ersk. i. 7. 62*. See the case of *Reid v Scott*, 1687, M. 9505, where a very odd contract of apprenticeship to a mountebank was sustained. [*Allan v Skene*, 1728, M. 9454.]

⁴ See a very elaborate argument of Parker, Chief Justice, in *Mitchell v Reynolds*, 1 Peere Williams 181. [*Smith's L. C. i. 356*, 6th ed., and notes.]

⁵ *Mitchell v Reynolds*, preceding note.

⁶ *Chesman v Nainby*, 2 Strange 739, 2 L. Raymond 1456, 1 Br. Par. Ca. 234.

⁷ *Davis v Mason*, 5 Term. Rep. 118, where one so agreed on being taken as assistant to a country surgeon. [*Homer v Ashford*, 3 Bing. 322; *Homer v Graves*, 7 Bing. 735.]

⁸ *Stalker v Carmichael*, 1735, M. 9455, where two persons entered into partnership as booksellers in Glasgow for three years, and with a stipulation that, 'after the expiration of three years, either of them refusing to enter into a new contract upon the former terms, should be debarred from any concern in bookselling within the city of Glasgow.' 'The Court found this debarring clause in the contract a lawful paction, and not contrary to the liberty of the subject.' [*Hitchcock v Coker*, 6 Add. and El. 438, where the Court sustained an agreement to endure for the lifetimes of the

parties. *Idem* in *Watson v Neuffert*, 1863, 1 Macph. 1110, the restriction being limited to a particular trade in a particular place. See also *Macintyre v MacRuid*, 1866, 4 Macph. 571. In England it is held to be settled by the case of *Hitchcock v Coker*, *supra*, that the Court cannot inquire into the extent or adequacy of the consideration for such agreements. Per Lord Wensleydale in *Leighton v Wales*, 3 M. and W. 551; per Alderson, B., in *Pilkington v Scott*, 15 M. and W. 657.

It is to be regretted that the English courts of equity have given a latitude to the doctrine of partial restraint which virtually abrogates the rule against general restraints, and it is to be hoped that their decisions will not be followed in this country. As examples, we cite *Whittaker v Howe*, 3 Beav. 383, where the agreement was by attorneys and solicitors not to practise in Great Britain for the space of twenty years without the consent of the gentleman to whom they had sold the business; and Lord Langdale, 'having regard to the nature of the profession, to the limitation of time, and to the decision that the distance of 100 miles does not describe an unreasonable boundary,' upheld the agreement. In a recent case, an agreement by a manufacturer not to carry on trade within 200 miles of Birmingham was held binding (*Harms v Parsons*, 32 L. J. Ch. 247). Where the condition is limited by distance from a specified place, the better opinion seems to be that the distance is to be measured in a straight line, and not by road or rail. *Leigh v Hind*, 9 B. and C. 774—per Parke, B.—*Smith, L. Ca. 6th ed. 371*. See the cases collected in *Smith, L. C. loc. cit.*, and Benjamin on Sale, pp. 390-7; *Parson's Contr. ii. 747 et seq.*; *Leake, Contr. p. 387.*

incapacity to serve in that Parliament: 3. Forfeiture to the Crown of the gift, etc., by the receiver, besides a penalty of £500.

No action is maintainable at common law on bonds of this description;¹ and this principle, combined with the rule against sustaining wagers, was fatal to an action on a wager respecting the result of an election.²

II.—CONTRACTS AGAINST PUBLIC POLICY AND THE REVENUE LAWS.

The public interest requires, both in peace and in war, the imposition of customs and other taxes to furnish the necessary revenues for the use of Government. In war, the hands of Government must be strengthened to the utmost, that with the greatest possible efficacy the operations of this great engine of justice amongst nations may be directed to the accomplishment of the policy at which the wisdom of Government aims. Individual rights or contracts, where they interfere with public interest, must suffer limitation; and in peace, nothing must be done by individuals to diminish the public revenue; in war, nothing to cripple the resources of the country, or to aid the operations of the enemy.

Out of these considerations arise two classes of restraints upon contracts: one relating to the policy to be pursued during war; the other relating to contraband goods, or the commercial restraints for protecting the revenue.³

I. OF WAR POLICY.⁴—The great principle which regulates this department of law is, that war is the operation of the great governing power of the state, aiming at the attainment of national good, or the avoidance of national evil; and by the infliction of such inconvenience and distress on the enemy as may induce them to grant the terms of peace for which it is thought expedient to insist. It implies that individuals (who are necessarily without the information which directs the policy of the state) shall not be permitted to interfere. And the rule is, that there is not a war for arms, and a peace for commerce. It is a necessary consequence of this, that no contract entered into against the war policy can receive effect in a court of law. Whatever individual suffering may arise, the result of the general policy is a benefit to the whole community; and the result of that comprehensive view which Government is enabled to take of the national relations and policy, is not to be disturbed by the officious interference, and narrow or selfish views, of private men, not having before them the materials of a wise deliberation.

1. NEUTRALS.—The operation of this great principle is to a certain extent impeded [304] by the rights of Neutrals. By their interposition, trade between the belligerents continues open. For although the subjects of the belligerent powers cannot carry on direct intercourse, there is nothing in their hostility against each other to affect neutrals.

Neutrals may carry on with belligerents a trade which is beneficial to the one belligerent

¹ *Glen v Dundas*, 1822, 1 S. 256. This action was for arrears on a bond of annuity, given as a bribe to secure the vote of a brother of the obligee. The Court, being satisfied that the bond was granted for an illegal purpose, refused action.

² *Bruce v Ross*, 1787, M. 9523. See above, p. 320, note 2. [So also, an agreement to withdraw an election petition, in consideration of a sum of money, was held void. *Coppock v Bower*, 4 M. and W. 361. But agreements to buy off opposition to proceedings in Parliament which affect patrimonial interests merely are valid, the consideration not being held to be illegal. *Scottish N.-E. Railway Co. v Stewart*, 3 Macq. 382; *Hare v London and N.-W. Railway Co.*, 2 Johns. and H. 80, 30 L. J. Ch. 817. So held where the landowner was a Peer of Parliament, it not being proved that the money was promised as a consideration for his vote being given or withheld. *Simpson v Id. Howden*, 9 Clark and Fin. 61. See the Ameri-

can cases on Contracts which tend to corrupt legislation and appointments to public office, in *Parson's Contr.* ii. 754-5, and the English cases in *Leake on Contracts*, p. 381.]

³ [An obligation to make payment of an annuity without deduction of income-tax is void under 5 and 6 Vict. c. 35, sec. 103, and 16 and 17 Vict. c. 34, sec. 5. *Blair v Allen*, 1858, 21 D. 15.]

⁴ On this subject it may be sufficient to state the great outlines of the doctrine. The authorities to be referred to are, in the first place, the series of determinations by Lord Stowell, preserved by Dr. Robinson in his *Reports of Cases in Admiralty from 1797 to 1808*, in six volumes; by Dr. Edwards in his *Reports from 1808 to 1811*; by Dr. Dodson from 1811 to 1817. Reference may also be made to *Horne on Captures*, *Baring on the Orders in Council*, and *Dr. Phillimore on Licences*.

state, and hurtful to its antagonist. Or even they may carry on trade indirectly between the belligerents themselves; although the effect may be, that in mitigating the present evils of war, they protract its duration. This right of neutrals, however, is subject to certain operations of the war policy of the belligerents which may entirely interrupt their commerce. For, 1. The ships of neutrals are liable to search, in order to prevent any contravention of the necessary regulations of the war policy; 2. They are also subject to prohibition against trading in certain articles called contraband of war; and, 3. Their trade with the belligerent may be entirely cut off and prevented by blockade.

2. LICENCES.—As Government is entrusted with the ruling power and sole direction of the war policy of the country, it has necessarily a right to relax the great rule of prohibition of trade, even with the enemy.

Licences are granted by a high act of sovereignty, proceeding on all the considerations of commercial and political expediency by which such an exception from the ordinary consequences of war must be controlled. They are granted either to a merchant of this country to trade directly with the enemy, or to an enemy to import goods into this country.

Two circumstances are required to give due effect to a licence: 1. The fair intention of the granter must be pursued; and, 2. The licence must be used with perfect *bona fides*.

Great doubts have been entertained as to the rules according to which licences are to be construed; and there appears to have been a change in the spirit of construction arising from the extraordinary and unprecedented events of the late war. It may be sufficient, in the general view of the subject, to say, that the eminent judge who has in these extraordinary times presided in the British Court of Admiralty, seems to have entertained these views:—In former wars, the general prohibition of intercourse between belligerents being attended with little inconvenience, the greater part of the countries of Europe remaining neutral, and affording various indirect channels of communication, licences were granted only in very special cases, where there appeared to be a necessity for direct communication with the enemy. And they were construed with the greatest strictness, as matter of special indulgence; not, however, so as to exclude a rational exposition and liberal interpretation of the granter's intention. But there arose in later times a very extraordinary course of public events, which had great influence on the character of licences. The power or the influence which Bonaparte acquired over all those continental states which in former wars had remained in neutrality, enabled him to impose on neutrals a total interdiction of trade with the enemy, as a part of the policy by which he hoped to injure the commercial power of Britain. In this interruption to foreign commerce, the alternative seemed to be, either that Britain should relax the old principle, and permit to her subjects unlimited intercourse with the ports of the enemy, or that a greater extension should be given to licences. To the former the consent of both parties is always required; and if at any time given, there is danger of going beyond what might be safe in policy. Licences, therefore, came to be extended, as the best expedient to be adopted by this country to support its trade, in defiance of all the obstacles which the enemy might interpose. They were granted, therefore, with great liberality to all merchants of good character, were expressed in very general terms, and received an enlarged and liberal interpretation.

[305] These are the general principles which regulate this important department of national policy; and on these principles the following rules may be laid down:—

1. The subjects of the belligerent powers cannot trade with one another; their vessels or goods are lawful prize; and no action lies for enforcing their reciprocal obligations. The limitations of this rule are, 1. That the obligation is good if hostilities have not commenced at the time of the contract, or if their commencement was not known at that time to the parties; and, 2. That if war should thus intervene, no demand can be effectual during the subsistence of hostilities; the obligation, however, reviving on the termination.

2. The subjects of the belligerent states may trade with each other under licence.

The limits of the trade prescribed in the licence must with *bona fides* be fairly observed; for if they be exceeded, the contract is exposed to the hazard of being annulled, and the cargo or goods to confiscation.

3. Neutrals, who trade with both belligerents, must observe a strict and rigid neutrality; and with that observance, the trade is permitted under certain exceptions:—

(1.) *Contraband of war* is the first exception, including all the implements of war. These vary according to the mode of conducting the war, and the progress of invention in such implements; but, generally speaking, they include arms, ammunition, timber for the navy, naval stores, and provisions, going direct to the enemy—whatever, in short, is directly instrumental in carrying on the war.

But, on the other hand, there are relaxations in the description of contraband of war. For example, *first*, the raw material, in its natural state, is not a commodity falling under this prohibition; nor, *secondly*, are commodities intended, not for ships of war, but for domestic use, or for trading ships; nor, *thirdly*, the natural produce of one of the belligerent countries.¹

(2.) *Blockade* imposes another obstruction on the trade of neutrals. This is either directed, for some particular purpose of the war, against a particular port, proclaimed by competent authority; or against part of the coast; or even against whole coasts. The last use of blockade was an extension of power reserved for the extraordinary manoeuvres of the last war, in which, at one time, the whole ports on the Continent of Europe were declared by this country to be under blockade. In such a case, neither neutrals nor any other vessels can trade with the blockaded ports, without danger of capture.²

(3.) In its colonial and coasting trade, during peace, every country gives a monopoly to its own subjects.³ During war, this exclusive trade is thrown open to neutrals, with a view to protect it, or to allow it to proceed without interruption from the enemy. But neutrals so interfering are held to depart from the strict duties of the neutral character, in stepping in to aid the depressed party, and enable it to carry on safely a trade which the war would have effectually destroyed. For the duty of a neutral is, '*non interponere se bello; non, hoste imminente, hostem eripere.*' Such interference on the part of neutrals being against the war policy of nations, it is not to be permitted under the right of neutrality, unless where there has been the same permission to neutrals during peace.⁴

The right assumed by Great Britain of visiting neutral ships, the object of so warm a contest in Europe, had for its object to furnish evidence on the points now enumerated. Neutrals contend that free ships make free goods, and object to the right of search. And on this question Great Britain has long been at variance with the continental states; the power assumed by her being one which her naval superiority gives her the means of enforcing, with an advantage which they cannot enjoy.⁵

In insisting on the right of visitation and search, our cruisers call, 1. For the [306] passport; 2. For the manifest; 3. For proofs of the property; 4. For the charter-party; 5. For the bills of lading and invoices; and, 6. For the log-book.

These are proofs by which to ascertain whether the voyage be honestly neutral and impartial, or intended to assist the belligerent in the conduct of the war; and according to the result, taking this criterion, questions of this kind will be adjudged in a court of international law, and vessels or goods condemned or otherwise.

¹ This, of course, however, must always be a question considerably influenced by the particular circumstances and existing policy at the time.

² [By the Treaty of Paris (April 1856), blockades to be effective must be maintained by a force actually sufficient to prevent access to the coast of the enemy, and the right of granting letters of marque to privateers is renounced by the contracting powers.]

³ See above, Of the Navigation Laws, p. 147. [The British Navigation Laws are repealed by 17 Vict. c. 5.]

⁴ *Emanuel*, 1 Rob. 296; *Immanuel*, 2 Rob. 197.

⁵ [By the Treaty of Paris (April 1856) it is agreed by the contracting powers: 1. That the neutral flag covers enemy's goods, with the exception of contraband of war. 2. That neutral goods subject to the same exception, although under the enemy's flag, are not liable to capture.]

ALIEN ENEMY'S DEBT.—Connected with this subject is the inhibition or prohibition of the payment and recovery, during the subsistence of war, of debts due to alien enemies, that the arm of the enemy may not be strengthened by money paid to its subjects. Unless a debt arise under a licence (as to which no war exists), the aid of a court will not be given for recovery of it. Although originating during peace, and however trifling the amount, the principle is general, that the enemy is not to be benefited even to the smallest extent. Execution is on this ground suspended until the conclusion of the war. The person employed to recover a debt of this kind may perhaps take steps, however, to *secure* it until the issue of the war. In England, on bankruptcy, dividends have been set apart for debts in this situation;¹ and there seems to be no doubt that in Scotland such a debt might be claimed in bankruptcy, to the effect of having a dividend set apart as for a contingent debt.

II. **CONTRABAND OF TRADE, OR SMUGGLING CONTRACTS**, form the next class of contracts falling under the principle of public policy, as controlling the private rights of individuals.

This doctrine is grounded on the commercial policy of the nation during peace, as the other is grounded on its war policy. It is the right of a nation to regulate, for the public interest, the conduct of its trade; and, in particular, to encourage certain lines of industry by means of prohibitions or bounties, and to impose high duties on the importation or exportation of particular commodities.

The contempt and breach of those laws is called **SMUGGLING**; the goods as to which the evasion is attempted, **CONTRABAND**: and the great rule is, that no action is maintainable on the contract, or for the price of the goods purchased, in contempt of those laws. In the one case, '*Potior est conditio possidentis*;' in the other, if an action is brought for money, '*Potior est conditio defendentis*.' In other words, courts in such circumstances allow the parties to remain just as they were.²

Contracts may be distinguished as, 1. For smuggling; and, 2. For goods smuggled.

1. In cases of the former description, the party bringing the action is participant in the smuggling contract; and no action lies. This comprehends: 1. Natives settled abroad, who are not entitled to the aid of a British court of justice to assist in their breach of the laws of their country.³ 2. In cases also where *foreigners* have a direct accession, action has been denied to them, on the ground that they ought to know the law of the country with whose regulations they presume to interfere.⁴ 3. In certain cases the rule has been enforced [307] generally both against natives and foreigners, there being direct participation.⁵ In the proof of accession to the smuggling transaction, several cases may be distinguished. Where the goods have been sold abroad, it has been held that the packing of the goods in a particular way, so as to facilitate the *running* of them, is one indication of accession;⁶ that the managing and preparing of the papers of the ship, so as to evade detection, is also a proof of accession; that corresponding with the parties concerned, detailing the plan of operations, and concerting the accomplishment, is sufficient to establish accession; that actually sending

¹ *Ex parte Boussmaker*, 13 Ves. 71. See 1 Montagu's Bankrupt Law, 163. [As to the opinions of American jurists on the duty of the state to give notice, see 1 Kent, Com. 55.]

² [See 6 Geo. iv. c. 108; 2 Will. iv. c. 16; 3 and 4 Will. iv. c. 53; 4 and 5 Will. iv. c. 13; 8 and 9 Vict. c. 87; 13 and 14 Vict. c. 95.]

³ *Cantley v Robertson*, 1790, M. 9550, 2 Hailes 1077; *Young & Co. v Imlach*, 1790, M. 9553; [and cases cited in 1 Bell's Ill. p. 67.]

⁴ *Nisbet v Robertson*, 1791, M. 9554, Bell's Ca. 349. Here an heritable bond was granted for the price of smuggled goods by a person in this country to his correspondent in Holland, who was accessory to the smuggling. The bond was assigned

to a third party, who took infetment; and in an action at the instance of the trustee for the creditors of the granter, it was set aside as *pactum illicitum*.

See also the English case of *Waymell v Reid*, 5 Term. Rep. 599, where a foreigner at Lisle sold a quantity of lace which he knew was to be smuggled and packed in a particular way to facilitate its clandestine importation. *Clugas v Penaluna*, 4 Term. Rep. 466; similar as to brandy packed in ankers for smuggling. [*Pellecat v Angell*, 2 C. M. and R. 311; and see, for further cases of the same nature in America, Story on Sale, secs. 505-9.]

⁵ *Cullen & Co. v Philp*, 1793, M. 9554; *Reid & Parkinson v M'Donald*, same date, M. 9555.

⁶ [*Isaacson v Wiseman*, 1806, Hume 714.]

the goods to this country is also sufficient, for a person doing so ought to be acquainted with our importation laws.

2. In contracts for the purchase of smuggled goods, where the vendor has no accession to the breach of the revenue laws, action is not denied. 1. If the sale is abroad by a foreign merchant, although he may suspect or even know that the goods are to be smuggled, but has not been actually concerned in the smuggling, an action will lie. And even to a native settled abroad action will not be denied, if he has dealt as a vendor merely. In both cases, the law of the country where the contract was made is to be administered.¹ 2. Where the goods have come into this country, the criterion of decision to sustain or to dismiss the action, is knowledge of the contraband nature of the goods.² The decisions have varied; but it would seem, 1. That where the goods are *prohibited*, no *bona fides* can justify the contract; 2. That where the goods are not prohibited, but may lawfully be sold, provided the duties have been paid, action is denied where the party knows the duties to be unpaid;³ 3. That after the goods are in the circulation of this country, the *bona fide* purchaser has action for their delivery although smuggled.⁴

Although at first the Court seems to have held action or diligence competent on bills for the price of contraband goods, they afterwards refused to sustain them; the bills being in the hands of the original parties, or of their trustees.⁵

III.—CONTRACTS USURIOUS.⁶

The doctrine of the interest of money, considered as the hire of the use, or as the [308] damage for non-fulfilment of the obligation to pay, will be explained afterwards. It has seemed expedient to the Legislature to restrain the rate of interest within certain limits. To take a higher rate of interest than is thus limited, is usury; and the offence of so taking usury is punished by certain penalties, while even the stipulation of it has the effect of annulling a security of which it forms a part.

There are many statutes in both countries on the subject of usury. Those of Scotland worthy of notice are, the Act of 1597, c. 247, and that of 1621, c. 28. By the former, the

¹ *Holman v Johnson*, Cowper 341. Holman, residing at Dunkirk, sold tea to Johnson's order, knowing it was to be imported into England. But he had no concern in the smuggling scheme himself, and merely sold the tea to Johnson as he would to any other person in the course of his trade. Action was brought in King's Bench for the price, and it was sustained. Lord Mansfield said: 'There can be no doubt, that any action tried here must be tried by the law of England; but the law of England says, that in a variety of instances with regard to contracts legally made abroad, the laws of the country where the cause of action rose should govern.' 'The gist of the whole turns upon this, that the conclusive delivery was at Dunkirk. If the defendant had bespoke the tea at Dunkirk, to be sent to England at a certain price, and the plaintiff had undertaken to send it into England, or had any concern in the running it into England, he would have been an offender against the laws of this country. But upon the facts of the case, from the first to the last, he clearly has offended against no law of England.'

The same doctrine has been held in Scotland. The opinion of the Court in *Cullen & Co. v Philp* is thus expressed: 'When a merchant settled abroad, whether a foreigner or native of this country, simply sells goods to a smuggler *tanquam quilibet*, and makes delivery on the spot, he can maintain action for them in our Courts, though he suspected,

or even knew, that they were meant to be smuggled into Britain; but if he is accessory to the smuggling, and thereby to an infringement of the law of the land (which he is bound to know as far as concerns his trade), he cannot demand the aid of the British Courts for the recovery of his debt.'

See also *Hodgson v Temple*, 1813, 5 Taunt. 181.

² *Scougal v Gilchrist*, 1736, M. 9536, Elch. Pact. Ill. 7; *Cockburn v Grants*, 1741, M. 9539.

³ *M'Lure & M'Cree v Paterson*, 1775, 5 Brown's Sup. 532. The Court at first was inclined to sustain action, as there is no criterion of the payment of duties, but afterwards altered, and action was denied. *Duncan v Thomson*, 1776, M. App. Pact. Ill. No. 1, 5 Brown's Sup. 632, Hailes 683; *M'Lure & M'Cree v Paterson*, 1779, M. 9546. See opinions of judges, Hailes 829.

⁴ *M'Lean v Sword*, 5 Dec. 1788, M. 9549.

⁵ See cases in note 3, above.

⁶ [The laws against usury have been entirely repealed by 17 and 18 Vict. c. 90. Sec. 3 provides, that 'where interest is now payable upon any contract, express or implied, for payment of the legal or current rate of interest, or where upon any debt or sum of money interest is now payable by any rule of law, the same rate of interest shall be recoverable as if this Act had not been passed.']

usurious contract is annulled, the sum lent forfeited, and the debtor to have restitution of exorbitant profits. By the latter, it is declared lawful to take a bond at the term of payment for principal and interest; but usury to take interest before the term of payment. These statutes have not been abrogated, but are superseded by an Act of Queen Anne, which is now the law of the empire; the law of England and of Scotland in this respect being the same. In this Act there are two distinct provisions: one directed against the persons guilty of usury, and imposing penalties; the other pointed against the usurious obligation or contract.¹

It is of some consequence to observe the distinction between these two parts of the Act, and their effects:—

To ground an action for penalties, the offence to be proved must be the *taking* of usury. The *stipulation* is of no avail in sustaining such an action, further than as it may be a circumstance in the evidence; nor is it any defence against the penalties, that there is no stipulation of usury. But in its effect in the avoidance of the security under the annulling branch of the Act, the stipulation is as effectual as the taking; while the taking, if relied on, must be a part of the bargain. Under the words '*whereupon* or *whereby* there shall be *reserved* or *taken*,' it is held, that to the effect of annulling the security, either there must be an agreement to take the higher rate previous to or at making the security; or that, at the time of the agreement, the higher rate shall be taken. If the usury be stipulated, the bond will be void, although the creditor should do diligence, or claim in bankruptcy, only for the principal and legal interest. If the bond be unexceptionable in its terms, but by a collateral stipulation at the time of the contract usury is bargained for, the bond is null.² If the bond or security be given partly for a usurious debt, the whole will be tainted.³ If the usury be [309] taken by a subsequent act, without being agreed to be taken at the time, it is not truly reserved on the security, and makes no part of it to taint and injure it. By such after act there may be the crime of usury personally, and to the effect of grounding a prosecution for penalties, but not to annul the contract or security.⁴

The general Limitation Act of 31 Elizabeth, c. 5, applies in Scotland, so as to restrain all prosecution for the penalties within the space of twelve months. But the Act of Limitation has no application to the annulling clause. The *contract*, once illegal, is so beyond remedy; and this character depends in no degree on the action for declaring it, or the time at which such action is brought. But the personal *act* of criminality in usury consists in the taking of usurious interest, and the penalty must be demanded within the limited time.⁵

It is essential that the higher interest be taken with usurious intent, in order to ground an action for penalties. This does not by the words appear necessary for the annulling of the instrument; but, to a certain extent, the same principle rules decisions even respecting nullity: for where it can be shown that there has, in the conception of the bond or other instrument, or in the calculation of the loan, been a *mistake*, so as to relieve from the imputation of usurious intent, the bond will be sustained.⁶

It is usury, to the effect of annulling the instrument or contract, if the creditor either stipulates or takes interest before it becomes due, although the *rate* is no higher than the law allows.⁷ The custom of trade allows this to be done in discounting a bill; and without

¹ 12 Anne, c. 16. In the first section there is a general description of usury. 'No person upon any contract made after 29th September 1714, shall take, directly or indirectly, for loan of any moneys, wares, merchandise, or other commodities whatsoever, above the value of £5 for forbearance of £100 for a year; and so after that rate, for a greater or lesser sum, or for a longer or shorter time.'

² See Comyn on Usury, 166, and cases there cited.

Strachan v Graham, 1823, 2 S. 391, 3 Murr. 434.

³ *Harrison v Hannel*, 1814, 1 Marsh. 349.

⁴ *Ferral v Shaen*, 1 Saunders 295.

⁵ It may be doubted whether the law had full effect given to it in the case of *Meal v Thoms*, 27 Nov. 1810, 16 Fac. Coll. 50; although there the doctrine was clearly held, that the elapse of the period of limitation did not bar the reduction. The deed should have been annulled.

⁶ See Comyn on Usury, 16, and cases there quoted. *Glasfuir v Laing*, 1807, 1 Camp. 149.

⁷ 1621, c. 28. 'No person who lends or gives out money, and receives annual therefor, shall retain the time of the

this no merchant could get his bills converted into cash. But it has been held, that the rule must be strictly confined to transactions within the usage of trade.¹ Although, therefore, a discount of a bill would not probably be held as usurious, merely because it exceeded a little the ordinary discountable date of the time, any great and uncommon length of credit and discount would not be sustained. If carried to a great extent, the interest would annihilate the principal.²

In discount within the ordinary limits, it is usury if a higher interest than five [310] per cent. is taken, unless in so far as the additional sum can be justified as not for forbearance of money, but as a fair compensation for trouble, or an usual allowance for a banker's interference, the keeping up an establishment for such transactions wherever the money is to be paid, and the expense of remittance.³ Country bankers are held entitled to commission on bills sent to them from London to be discounted, unless there is collusion.⁴ And a charge of ten shillings commission by a bill-broker in the country on a bill payable in London, has been held not usurious.⁵ Not bankers only, but also merchants, may charge commission; but the *onus probandi* of corresponding and trouble is laid on merchants, though not on bankers.⁶

It is usury to take the full discount of a bill, and to give in part payment as cash another bill which has some time to run.⁷ But in such a transaction, complicated with a remittance, the delivery of bills for cash is not held usurious, as the surplus of interest may be ascribed to the expense of remittance.⁸

Whether the commission is a fair remuneration for trouble, expense, etc., or a mere colour to obtain the accommodation and secure a higher interest, is for a jury to determine upon the view of the whole transaction. At one time it was the opinion in England, that a commission should not exceed one-fourth per cent.; but certainly there is no rule of law to that effect: no such rule is judicially entertained; but the jury is left to decide.⁹ And in the English books we find examples of juries finding verdicts against the direction of [311] a judge forming his opinion on the nature of the transaction.¹⁰

It is not usury, in discounting a bill, to substitute goods for money at a fair though high price, provided it is not so extravagant that it appears to be for the purpose of reserving exorbitant interest under cover of it.¹¹ But if, instead of goods of ascertained value, goods or articles be given at an arbitrary and exorbitant valuation, it will be usury.¹² The *onus probandi* is held to lie upon the lender, who gives goods in discount, that the goods were reasonably worth the price fixed upon them.¹³ But evidence that the borrower accepted the goods in hope of a distinct profit on them, has been thought to turn the presumption.¹⁴

lending, exact, crave, or receive from their debtors the annual of their lent sums, until the term of payment appointed by their bonds be first come.' *Johnston v the Laird of Haining*, 1 Dec. 1680, M. 16414. If the lender deduct and retain from the sum in the bond or bill legal interest to the term of payment from the time the money is advanced, the sum really forborne is not the whole sum mentioned in the bond or bill.

¹ *Marsh v Martindale*, 3 Bos. and Pull. 154.

² See case in preceding note.

³ See *Winch v Fenn*, before Mr. Justice Buller at Westminster, 2 Term. Rep. 52, note; *Auriol v Thomas*, *ibid.*; *Sir B. Hammet v Sir J. Yea*, 1 Pull. and Bos. 144. Below, note 7.

This was also the doctrine of the House of Lords in *Walker v Allan*, 2 March 1802, 4 Pat. 303.

Harris v Boston, 2 Campb. 349.

Contrast with this the case of *Masterman v Cowrie*, 3 Camp. 488.

See also *Pitcairn's Crs. v Foggo*, 1768, M. 16433, 1 Hailes 259.

Playfair v Hotchkis, 1797, M. 16438.

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⁴ *Ex parte Jones*, 1810, 1 Rose's Cases 29.

⁵ *Ex parte Hanson*, 1815, 1 Madox 112.

⁶ See *Marsh v Martindale*, note 1.

⁷ *Parr v Elleason*, where the chief question was, Whether this was a taint which affected an innocent third party afterwards becoming endorsee of the bill? 1 East 92. See *Matthews v Griffiths*, cited 1 Bos. and Pull. 153.

⁸ *Sir B. Hammet v Sir J. Yea*, 1 Bos. and Pull. 144.

⁹ *Carstairs v Stein*, 1815, 4 Maule and Selw. 192.

¹⁰ See, for example, *Brooke v Middleton*, 1 Camp. 448; *Harris v Boston*, 2 Camp. 348.

¹¹ *Rich v Topping*, 1 Espin. 176.

¹² *Pratt v Willey*, 1 Espin. 40, where a diamond was so given at an exorbitant valuation.

¹³ *Davies v Hardacre*, where a landscape in imitation of Poussin was given in the discount at a value of £150. 2 Camp. 375.

¹⁴ *Coombe v Miles*, 2 Camp. 553.

It is held as a cover for usury, that one has lent his acceptance on an agreement to have a commission for doing so. Under the direction of Lord Ellenborough, a verdict was given on the principle, that such commission is to be allowed only in *discounting* bills,¹ and that it was here a mere cover for usury. The same has been held where one took a commission of three and a half per cent. at discounting a bill, for *being allowed* to guarantee the solvency of an acceptor in undoubted credit.²

It is a usurious contract, if a trader stipulate to give to one who shall advance to him money from time to time, a commission beyond the legal interest upon all goods purchased with those moneys, although it may be covered by the pretence of a compensation for trouble in making the purchases.³

Where the creditor or lender runs any part of the risk of the employment of the money, such as bottomry, partnership, or joint adventure, it is not held usury. The Court, however, [312] still exercises its discretion to discover whether the contingency be a mere shift to evade the Act, or a lawful contract, and fair and reasonable risk. The above rule holds, 1. Where the principal sum and interest are both put in hazard; 2. Where the principal sum is so hazarded; but, 3. Where the interest alone is hazarded, the contract is usurious if exorbitant interest be stipulated.⁴ Where the interest only is hazarded, the party being sure of his principal whatever may happen, it will be held a mere device to cover usury.

To establish usury as an objection to a bond or contract, it is necessary that there should be either a loan, with a taking of more than the legal interest for the forbearance of repayment; or some device contrived for the purpose of concealing or evading the appearance of a loan and forbearance, where in truth it was such. But under this description the practice of acceptors paying by anticipation, or receiving a premium, does not fall.⁵

But it is to be observed particularly, that although the statute annuls the bond or other assurance, it does not necessarily forfeit the debt. The benefit of the security and of the evidence it affords is gone; but the party may use any other competent evidence to prove the debt. So, 1. If the debt has been paid, repetition cannot be demanded on proving usury.⁶ 2. If the debt has existed before, independently of the usurious bond, the creditor may rest his claim on the evidence of that debt, and will recover.⁷ 3. It has been questioned whether a debt originating in a usurious contract can be placed subsequently on the footing of a legal contract, by cancelling the original documents and granting new ones? Such a case having occurred in bankruptcy in England, a feigned issue was directed to try the question. It came first before Mr. Justice Chambre, who held the subsequent contract void;⁸ but the Court of Common Pleas reversed that judgment.⁹

IV.—EFFECT OF ILLEGALITY OF DEBT AGAINST THIRD PARTIES.

It is an important question, How far bills, which have originated in transactions prohibited by law, and so are null in the hands of the parties themselves, will be effectual in the hands of third parties, acquiring them in *bona fide*, and without notice of the illegality? In England, the nullity declared in the statutes is held a nullity to all intents and purposes, to the effect of reaching *bona fide* holders of the bills, as well as the original parties themselves. [313] Very serious doubts have been entertained on this subject, and an inclination strongly expressed to follow the same spirit of construction which has been adopted in Scotland.¹⁰ But notwithstanding these doubts, it has been judicially held that the statutes are

¹ *Kent v Lowen*, 1 Camp. 177.

² *Lee v Cass*, 1809, 1 Taunt. 511.

³ See *Barnes v Headley*, 1 Camp. 157.

⁴ Comyn on Usury, and the cases cited by him, p. 34 et seq.

⁵ *Barclay v Walmsley*, 4 East 57.

⁶ *Nisbet & Buchan v Cullen*, 1 Feb. 1811, F. C.

⁷ *Gray v Fowler*, 1 Hy. Blackst. 462; *Phillips v Cockayne*, 3 Camp. 119.

⁸ *Barnes v Headley*, 1 Camp. 157.

⁹ Same parties, 2 Taunt. 184.

¹⁰ In *Jones v Davidson*, 1816, Holt. Rep. 257, 258, Gibbs,

too clear to be denied; that the doctrine as against third parties rests on cases which cannot now be questioned;¹ and that the innocent party can only resort to the party from whom he received the bill or other document, as for a debt on the original contract or consideration between them. The hardships arising from this state of the law, and the doubts and regret expressed by the judges, have led to an alteration in respect to usurious debts, not probably because these were more entitled to favour, but because they more frequently, and with less possibility of detection, get into the daily course of trade.² In Scotland, we have been accustomed to a different line of determinations from that adopted in Eng- [314] land. Thus, a bill for a gaming debt has been held effectual to a *bona fide* endorsee,³ although it would not be available against persons holding as trustees for the party concerned in the offence, or holding it without value.⁴ The statute (which I have no doubt is to be held applicable to both countries) settles the matter as to all objections of usury. As to other nullities, should the question occur again, it will deserve serious reconsideration whether the English determinations are not more strictly correct than ours, and how it is possible to hold bills, etc. to be null as to some effects, and valid as to others.

However this difference of decision between the two countries may be reconciled, at least the consideration given for the bill may be proved as sufficient to ground a claim on the part of a stranger. Nay, in England, a distinction has been taken between the case of money lost at play, and money borrowed to play with: in the former case, the debt or contract as well as the security being held null; in the latter, the security being null by the force of the statute, but the contract effectual in so far as money has been lent.⁵

Chief Justice, says: 'The construction upon the 12th of Anne, which avoids all usurious contracts, has been fixed and settled by many cases; but I must say I could never understand the equity of the rule which has so long obtained under this statute, that an innocent endorsee shall be prevented from recovering upon a bill of exchange which has been contaminated in its creation with usury by means to which he is not privy, and of which, when he receives the bill, he can know nothing. I own I have serious doubts upon this construction; and if the case renders it necessary, I will reserve the point, Whether a bill of exchange can be void, except for usury committed by the parties who originally create the instrument? If the parties who create the instrument and agree to put their names upon it commit usury, it is reasonable that they should answer for the consequences. But I do not understand why the security should be avoided in the hands of one who takes it for a valid consideration in the common course of business, and without anything to awaken his suspicion. He cannot tell, upon looking at the outside of the bill, whether usury has been committed or not: he receives it upon the credit of the names which he sees upon the instrument, and has no other means of judging of it. Can law, and the interests of commerce, avoid a security thus taken? These are my reasons for doubting the old rule which has obtained, and I should wish upon a fit occasion to have it discussed again.'

¹ *Bowyer v Bampton*, 2 Strange 1155.

Lowe v Waller, Douglas 716. Here the question was raised of the effect of usury against a *bona fide* holder of a bill. Lord Mansfield said: 'We have considered this case very attentively, and I own, with a great leaning and wish on my part that the law should turn out to be in favour of the plaintiff. But the words of the Act are too strong. Besides, we cannot get over the case on the statute against gaming,

which stands on the same ground. This is one of those instances in which private must give way to public convenience. It is less mischievous that the law should be as it is with respect to bills and notes than other securities, because they are generally payable in a short time, so that the endorsee has an early opportunity of recurring to the endorser if he cannot recover upon the bill.'

Lowes v Mazzaredo, 1816, 1 Starkie 385. Here the payee of a bill of exchange endorsed it for a usurious consideration; and in the course of trade Lowes discounted the bill on an endorsement from him who had so acquired it, but without notice of the objection. Lord Ellenborough was of opinion against the bill-holder, as not entitled to recover, being obliged to claim through an endorsement vitiated by usury. But on former cases being pressed on him, he put the case into a course for trial. 'But the Court were of opinion that the case of *Parr v Elleason*, 1 East 92, was distinguishable from this, and might be supported upon other grounds, and that the endorsement was utterly voided by the statute of usury, and could not be dismissed for one purpose and retained for another; and that after the case of *Lowe v Waller* had been acted upon so long, its foundation could not now be inquired into.'

² 58 Geo. III. c. 93.

³ *Neilson v Bruce*, 1740, M. 9507, where the Court 'repelled the reason of suspension founded on the Gaming Act, in respect the bill in question was purchased by the charger for onerous causes; and that there is no evidence offered of his being in the knowledge that the bill was granted for a game debt.'

⁴ So held in the above case of *Sir R. Pringle v Biggar*, 7 Nov. 1840, M. 9509, *supra*, p. 319.

⁵ *Robinson v Bland*, 2 Burr. 1080.

V.—DEBT PARTLY ILLEGAL.

If the debt for which an obligation has been granted be partly illegal, the legal part of it may be proved in bankruptcy. 'The equity is, that where the consideration consists of two parts, one bad, the other good, the bill should stand as to what is good.'¹

SUBSECTION III.—OF OBLIGATIONS ONEROUS OR GRATUITOUS; PURE, FUTURE, OR CONTINGENT.

There are characters distinguishing obligations which it is often of importance to mark as attended with particular effects.

1. GRATUITOUS OBLIGATIONS.—Obligations are called gratuitous in Scotland, which are granted spontaneously, and without an adequate consideration.

In England, a voluntary and gratuitous bond, though effectual against the debtor himself, is not to be set up against creditors.² In Scotland there is no such distinction. The case must either be brought within the statute 1621, c. 18, by which gratuitous grants or bonds to confidants or relations are challengeable by prior creditors, on account of the granter's insolvency at the time of granting, or the bond must be collusive and fraudulent at common law. Every person who is solvent may effectually give away his property, or bind himself to pay a sum gratuitously. Gratuitous bonds and other obligations may therefore be ranked in competition with the claims of other creditors, without any preference to the latter, in respect of the consideration on which the obligation has proceeded.³

[315] 2. DEBTS, PURE, FUTURE, AND CONTINGENT.—Debts are either presently due; or due at a future day certain; or due provisionally, in a certain event. The first are called pure; the second, future; the last, contingent debts.

There is a remarkable difference between the jurisprudence of England and that of Scotland respecting future and contingent debts. Previous to certain statutes, no debt could by the law of England be either the ground of an action or the subject of a demand under a commission of bankruptcy, unless it had actually become a debt at the date of the proceedings. In bankruptcy, the commission is regarded as a statute execution; which, as it cannot proceed upon, so it cannot include, any claim which has not already become a proper debt. On the other hand, the creditor had process against the bankrupt, notwithstanding the certificate or discharge, when his debt did not accrue till after the bankruptcy; for the privilege of creditors to prove, and of bankrupts to be discharged, was held to be co-extensive and commensurate.⁴ 1. This law excluded from an English commission all contingent debts; 2. It also excluded all future debts; and, 3. Claims for damages were excluded, where both the right to damages, and the amount, were questions for a jury; and the claim was of course uncertain and contingent. In these points, except the last, there are remarkable changes, to be immediately explained.

By the Scottish law, for the purposes of security to the creditor, proceedings are competent on debts not only future, but contingent; and on the bankruptcy of the debtor, whatever be the form according to which his funds are to be distributed (whether a ranking

¹ *Ex parte Mather*, 3 Ves. jun. 373.

² *Pillans v Van Miérop*, 3 Burr. 1663.

But see, in House of Lords, *Rann v Hughes*, 7 Term. Rep. 350.

Lord Redesdale, though he would not order such a bond to be expunged, would not allow it to be set up against creditors, admitting it to come in if there should be a surplus. *Assignees of Gardner v Skinner*, 2 Schoale and Lefroy's Irish Chan. Rep. 228. ['A contract, not under the seal of the obligor, is incapable of being enforced by legal proceedings, unless it be supported by a consideration; the rule of the civil

law, *Ex nudo pacto non oritur actio*, being a maxim of the law of England and Ireland. A consideration is presumed when the contract is under seal, and the want of consideration cannot be alleged by the obligor against this presumption.' Report of Mercantile Law Commission, 1855.]

³ [But an authority to a servant or agent to sell goods and sign obligations to deliver will not make the principal liable for obligations granted without consideration, even in a question with an onerous assignee. *Colvin v Dixon*, 1867, 5 Macph. 603.]

⁴ Cullen, p. 83. See also 49 Geo. III. c. 121, sec. 17.

and sale, with multiplepointing, as applicable to ordinary bankruptcies; or a sequestration in the case of a merchant; or a voluntary trust), every claim is admissible against the estate, to the effect of drawing a dividend, or having it laid aside, which forms, or may form, against the bankrupt himself, during his life, a proper debt, whether due presently, or at a certain future day, or depending on a contingency which may emerge during the bankrupt's life. As the creditors in all these various descriptions of debt are entitled to claim upon the divisible funds, either for payment and satisfaction, or at least for security, they are all equally restrained by the bankrupt's discharge.

It may be useful to explain shortly the grounds of this distinction between the laws of the two countries.

In Rome, a creditor might attach the funds of his debtor not only for a pure, but also for a future or contingent debt.¹ It was also established in the civil law, that in the distribution of the attached fund a future creditor was entitled to a share proportioned to his debt, after the proper discount; and a contingent creditor, to security for payment, when his obligation should be purified.² This law was followed in Holland, as Voet informs us; and in France, where an enlightened system of jurisprudence was established on the foundation of the Roman code, the rule was similar.³ The future creditor was allowed a share proportioned to his debt, after the proper discount; the contingent creditor was [316] entitled to security for payment of the share accruing to him, should the condition be purified.⁴

In Scotland, the same general principles have always been recognised. Creditors may arrest or adjudge, in security of debts, though only future, or even contingent.⁵ But doubts have been entertained concerning the effect of such diligence, when standing in competition with creditors entitled to *parata executio*. It has, for example, been supposed that a creditor in a future or contingent debt, arresting a fund of the debtor, is to be postponed in a multiplepointing to arresting creditors on bills, the terms of payment of which are past. This is consistent with the notions of our older lawyers;⁶ and although Erskine corrects this doctrine in part, he still expresses himself so as to give countenance to it in some very material points.⁷ His authority, and the analogy of English law, may mislead a careless observer as to the true doctrine of Scottish jurisprudence. But while Mr. Erskine has not sufficiently discriminated the case of insolvency, the English law proceeds on a peculiarity quite unknown in Scotland.

There is no express law or decision in Scotland which condemns future or contingent creditors to exclusion, in competition with creditors having *parata executio*; and therefore the question is left open to decision on general principles. It may be admitted, that where insolvency is not presupposed, neither a future nor a contingent creditor can insist instantly to be paid, to the effect of preventing a creditor in a debt which is due from recovering payment out of his debtor's funds; and so far, undoubtedly, the rule of preference of a creditor having *parata executio* is well founded. But where the debtor is insolvent, another principle comes to operate. A debtor who fails, or who by his own fault lessens the security of his creditor, is no longer entitled to the benefit of any stipulated term of forbearance, or of the condition suspensive of the claim; and if so, neither can his creditors, who come

¹ Voet, lib. 2, tit. 4, sec. 20.

² Voet, lib. 3, tit. 1, sec. 28.

³ The principle is well explained by Pothier. Of future debts he says: 'Le terme accordé par le créancier au débiteur, est censé avoir pour fondement la confiance en sa solvabilité; lors donc que ce fondement vient à manquer, l'effet du terme cesse. De là il suit, que lorsque le débiteur a fait faillite, et que le prix de ses biens est distribué entre les créanciers, le créancier peut toucher, quoique le terme de sa dette ne soit pas expiré.' *Traité des Oblig.* vol. i. p. 99, Nos. 234-5. Of contingent debts he speaks thus: 'Quoique le créancier conditionnel n'ait encore aucun droit avant l'accomplissement de

la condition, néanmoins il est reçu à faire tous les actes conservatoires du droit qu'il espère avoir un jour.' *Ib.* No. 222.

⁴ Pothier, after the above passage relative to future debts, says: 'C'est encore une différence entre le terme et la condition: car le créancier conditionnel, en ce cas, n'a pas droit de toucher, mais seulement d'obliger les autres créanciers qui toucheront, à s'obliger de rapporter à son profit, si, par la suite, la condition existe.' Pothier, *ut supra*.

⁵ Dirleton & Stewart; *voce Debitum in diem*.

⁶ Stair iii. 46; *Charteris v Nicholson*, 1670, M. 811.

⁷ Ersk. iii. 6. 18.

into his place, be entitled to claim the benefit of such suspension, so as to defeat the right of the future or contingent claimants. The competition on the attached fund is of the nature of a general distribution, from which, if any one is excluded, he is for ever deprived of his debt. If Mr. Erskine's opinion be supposed applicable only to the case where there is no insolvency, it is unobjectionable; if to the case of insolvency, it seems to be unsound. But an arrestment, or other diligence in security, presupposes insolvency, since that alone can justify it; and it may be loosed or removed on proof of solvency. And if the law means anything in providing a remedy for the security of future and contingent creditors in such cases, it must protect that remedy against the right of other creditors.

The law of England has not acknowledged these principles. There are not in England, at common law (as in Scotland, and in other countries where the Roman jurisprudence has been followed), any remedies for intermediate security during the dependence of an action, or prior to the term of payment. The writ of execution *follows* the judgment, and therefore must abide the emergence of 'a cause of action,' which may *found* the judgment. This peculiarity has been fatal to the claims of future and contingent creditors in England at [317] common law. When the statute execution of a commission of bankruptcy was introduced, it was intended to come in place of the ordinary execution; and therefore could not, without an express declaration, be held to include creditors who at common law were entitled to no judicial interference in their favour.¹ It sometimes happens that a general admiration of the great system of English law operates so strongly as to prevent one from distinguishing in particular cases whether the rule proceeds from a peculiarity in the system, or is a point of the mercantile law, fixed by the decisions of juries of merchants, with the assistance of enlightened judges. Perhaps something of this kind has happened in the case we are now discussing. But no one can read the preamble of the statute 7 Geo. I. c. 31, and observe how inconsistent the peculiarity of the English common law with respect to future debts was found to be with the best interests of commerce, and the plainest principles of mercantile jurisprudence, without learning to trust less to such analogies, and to have greater reliance on the principles of the law of Scotland.

Many of the great judges of England—Lord Hardwicke, Lord Mansfield, Lord Kenyon, Lord Chief Justice Eyre—seem to have regretted the peculiarity of the English law which excludes from the commission contingent debts. Lord Hardwicke in particular expressed a wish 'that such debts were provided for by Act of Parliament, and a hope that some gentleman who heard him would consider how to rectify this by a future statute;' and in this wish Lord Eldon concurred.² The evils were great: To the *bankrupt*, insomuch that a debtor in an annuity bond, for example, was excluded from all the benefit of a discharge; and instances have occurred of men being confined for years in prison on such debts, after all their funds had been given up, and all their other debts discharged. To a *contingent creditor* also the hardship of this state of the law was very great; for he had no right to demand that any share of the effects of his debtor should either be paid over to him, or set apart for his security, although the condition on which his debt depended might be purified in the course of a few hours. These evils were in part removed, as to debts payable *in futuro*, by 7 Geo. I. c. 1; as to annuities, by Sir Samuel Romilly's law, 49 Geo. III. c. 121, sec. 17; and the remedy is now completed, and all the distressing cases which fill the English books on bankruptcy, in relation to the consequences of the old doctrine, removed by the late statute consolidating and uniting all the provisions made for cases of this description, and improving the system of English legislation with regard to them.³

In Scotland, the principle of justice is happily unopposed by any legal or formal impediment. The creditor in a debt depending on a contingency which may emerge in the debtor's

¹ See *Caldwell v Clutterbuck*, 2 Strange 867; *Taylor v Mills*, Cowp. 525.

² 1 Atk. 115; 9 Ves. jun. 110.

³ 6 Geo. IV. c. 16, secs. 51, 56. [See 12 and 13 Vict. c. 106, sec. 177.]

life, is as truly a creditor as the holder of a bond not yet due. Where the debt is certain in its amount, he is a creditor for a security to that extent. Where it is uncertain, he is a creditor for a security to the extent of the probable debt; and in either case, he is in law, as well as in justice, entitled to be ranked to the effect of having a contingent dividend set apart.

ART. III.—OF THE VARIOUS WAYS IN WHICH OBLIGATIONS AND CONTRACTS ARE CONSTITUTED.

In most codes of jurisprudence, with a view to the sure establishing of that consent which is of the essence of all contracts and obligations, there have been appointed certain requisites and solemnities, as at once evincing the deliberate act of consent and the authenticity of the contract. These commonly vary with the importance or insignificance of [318] the transaction, or with the plain or elusory nature of the agreement. It has appeared fit that some contracts, called Consensual, may be proved by witnesses swearing to the words that were used, and are to be held as perfect from the moment that those words are deliberately used to bind the parties. In others, called Real Contracts, there is required to their completion some overt act, without which the contract is not held to be concluded; but the agreement, and the real act which perfects the contract, may be proved by witnesses. In others, again, more exposed to misapprehension, as being of no recognised character, or having no defined object and extent, it is held that without some special ceremony, calling on the witnesses for particular attention, and clearly expressing the agreement, or without writing delivered to testify both the fact and the words, the contract or obligation is not binding.

1. The Consensual contracts of the law of Scotland comprehend a class of well-known and very common agreements; the parts of which, and the obligations arising from them, are so simple and so well defined, that the witnesses being once satisfied of the nature of the contract and of its subject, there can be no mistake of importance enough to forbid the proof of such agreements by parole evidence. Such are Sale, Location, Society, and Mandate.¹ The binding words being proved, either by writing or by witnesses, to have passed between the parties conclusively, the contract is complete. It forms the *titulus transferendi dominii*,² if the transference of property be the object; or confers the power and raises the reciprocal obligations involved in the contract.

2. REAL contracts require an act of delivery, or payment, or performance on one part, to bind the bargain. The evidence may be parole, but its object is twofold,—the agreement, and the act of real intervention. 1. This class of contracts comprehends the nominate contracts of loan, commodate, pledge,³ and deposit; and the innominate contracts of *do ut des*, *do ut facias*, *facio ut des*, *facio ut facias*, to which lawyers have been unable to assign any appropriate name. In the nominate contracts, unless evidence be given of the delivery of the thing lent, or pledged, or deposited; or in the innominate, unless it be proved that the thing to be given or done has been actually given or done; the special contract has no existence. There may be an obligation incurred to lend, or to pledge, or to do or to give something, which, if lawfully proved, it will be competent to enforce. But wherever the point is the constitution of the particular contract, as loan or pledge, the delivery of the thing, the real act which is the badge of the contract, is indispensable.

3. Obligations and contracts which fall under neither of these classes were, in the civil

¹ With regard to Sale and Location, there is an exception to this rule where the subject is land or other heritage. The importance of this species of property in the law of Scotland, and the permanent nature of the rights relative to it, have led to the rule that written evidence alone shall be received in proof of such contracts concerning heritage.

² The passing of the property, or *modus transferendi dominii*, depends on tradition, of which above, p. 181 sqq.

³ [On the question whether actual or corporal possession is necessary to the constitution of the contract of pledge, see note to vol. ii. ch. 2, sec. 2.]

law, constituted by stipulation; consisting of a solemn question and distinct answer, in words appropriate, accompanied by ceremonies fit to excite attention and impress the transaction on the memory. With us, writing delivered is requisite for matters so elusory. So, a promise to pay money, or a cautionary obligation, must be established by written evidence, and accompanied by delivery of the document.

4. The written evidence which is necessary in the description of cases now stated, is useful, and easily applicable to all sorts of contracts, and now forms the usual evidence of all contracts and obligations. But it is, further, in many cases made absolutely requisite for the purposes of revenue that contracts shall be in writing, bearing a stamp; although in point of evidence writing might not otherwise be necessary. In all questions concerning the evidence necessary for particular obligations and contracts, the stamp laws in this way form an important point to be attended to.

[319] COMMENTARY ON THE STAMP ACTS.—The rules of the Stamp Acts interfere with the ordinary rules of law relative to the application of written and parole evidence; and on some occasions so imperative is the requisition, that the want of a stamp is fatal, and cannot afterwards be supplied. But although intended only for the purposes of revenue, they often add an unforeseen auxiliary to the checks against fraud, by circumscribing the means of forgery, and exposing unskilful attempts to detection, by incongruities in the paper or stamp, as relatively to the assumed tenor and date of the deed.

The Stamp Acts, which reach back about a century and a half, have till lately been in a state of great and distressing confusion, from the variety of statutes to be referred to. But the Acts were consolidated by the 44 Geo. III. c. 98, and the 48 Geo. III. c. 149, and afterwards by 55 Geo. III. c. 184, by the schedules annexed to which all the details are distinctly settled as from August 1815.¹ Without entering into details, the following points are important:—

1. The general rule is, that agreements, whether relative to real or personal property, require a stamp, where the matter of the agreement shall be of the value of £20 or upwards.² But, 1. If the agreement be of a nature not to admit of pecuniary calculation, it may be proved by unstamped letters.³ 2. An agreement for the hire of a servant or labourer is exempted;⁴ but an agreement for an assignment of an apprentice from one master to another must be stamped.⁵ 3. A memorandum, letter, or agreement for or relating to the sale of goods, wares, or merchandise, requires no stamp; as, for example, the correspondence of merchants relative to sales and bargains of goods. But the sale of goods must form the *primary* object of the instrument, in order to entitle it to exemption.⁶ It was once held, that an agreement for the future manufacture of goods, not the simple sale of existing goods, was not within the exemption; but this is not now held to be the construction of the

¹ [See also 1 and 2 Geo. IV. c. 55; 3 Geo. IV. c. 117; 6 Geo. IV. c. 41; 9 Geo. IV. c. 13, 23, 27, 49; 3 Will. IV. c. 23, 97; 4 and 5 Will. IV. c. 97; 5 and 6 Will. IV. c. 64; 13 and 14 Vict. c. 97; 16 and 17 Vict. c. 59; 17 and 18 Vict. c. 83.]

² 55 Geo. III. c. 55, Schedule title Agreement. [See 13 and 14 Vict. c. 97, as to the duty chargeable on agreements.]

³ *Orford v Cole*, at Lancaster, 1818, 2 Starkie 351. This was a promise of marriage, to prove which letters were produced. Want of stamp held no objection by Mr. Justice Bayley. Add. 6th ed. 865.

⁴ [17 and 18 Vict. c. 83, sec. 21. And see the provisions of 7 and 8 Vict. c. 112, and 13 and 14 Vict. c. 93, exempting certain maritime agreements.]

⁵ *Rex v The Inhabitants of St. Paul's Bedford*, 6 Term. Rep. 452. [*Ivison v Edinburgh Silk Co.*, 8 D. 236.]

⁶ *Smith v Cator*, 1819, 2 Barn. and Ald. 788. *Laing & Co.* having oats ordered from *Cator, Hunt, & Co.*, of Russia, sent

invoices and promised bills of lading to Smith, together with bills for acceptance, engaging by the letter in which they were transmitted to provide funds should the oats remain unsold when the bills should fall due. The bills were accepted, and the bill of lading endorsed to Smith, who now brought his action for the oats, grounded on the letter. Lord Chief Justice Abbot received the letter in evidence, reserving leave to move a nonsuit. The Court of King's Bench held this not to be a case exempted, the primary object here appearing to be the obtaining of money upon a pledge of goods expected to arrive in England, and intended to be placed in the hands of Smith upon arrival. The Court held the sale to be made by Smith, if they had been placed with him, to be a secondary or collateral object. [*In Southgate v Bohn*, 16 M. and W. 34, where a sale was held to be the primary object, the document was exempted from stamp duty. See also *Dimmack v Dixon*, 1856, 18 D. 428.]

Act.¹ 4. Where an agreement is contained in a series of letters, it is by the Act sufficient to have the agreement stamp affixed to any one of the series.

2. Bonds for repayment of a definite sum of money, or for security of a definite sum, or for payment of any annuity, or any sum of money at stated periods, bear a stamp duty after certain rates *ad valorem*.² But, 1. A bond for a rent reserved or payable on a lease is excepted in the Act. 2. A bond for a yearly sum on farming tolls, payable by quarterly instalments, has been held to fall under the first branch, as a definite sum payable at [320] future periods.³ 3. A bond to secure the performance of certain conditions by a penalty, is not within the rule of *ad valorem* stamp.⁴ 4. A bond for an annuity for a certain number of years, for the relinquishment of a business and the use of premises, is not a conveyance of the property subject to *ad valorem* stamp as such.⁵

3. Bills of exchange and promissory notes are liable to a rateable stamp duty, so absolute, that besides the penalty for breach of the Act, it is expressly declared not to be in the power of the commissioners of stamps to supply the defect.⁶ And, 1. Not only every instrument which is drawn in the form of a bill, note, or order, falls under the statute; but whatever is substantially an order for payment of a certain sum of money out of a fund, which may or may not be available, requires a stamp as a bill, before it can be given in evidence.⁷ But where the order is not for a definite sum, the Act does not apply.⁸ In that case, or where the money is payable to representatives after death, the instrument truly is an agreement, and the stamp proper to agreements is required and sufficient.⁹ It might be

¹ *Wilks v Atkinson*, 1815, 1 Marsh. 412, 6 Taunt. 11. This was an agreement to furnish a quantity of linseed oil, for the manufacturing of which the plaintiff had the seed, but it was not then crushed. The Court held it clearly within the exemption.

But an agreement between merchants that one shall take a share in the outfit of a ship and in the adventure, is not an agreement for the sale of goods within the exception. *Leigh v Banner*, 1 Esp. 403. Nor is an agreement for the making and putting up of machines in the party's house exempted. *Buxton, etc. v Beddal*, 3 East 808. [*M'Gregor v Turnbull*, 10 D. 1520; *Brown v Michie*, 11 D. 1131; *Gray v Sutherland*, 12 D. 438; *Melrose v Hastie*, 12 D. 665; *Fisken v Glasgow Gas Co.*, 12 D. 757; *Davidson v Swanson*, 16 D. 991. By 19 and 20 Vict. c. 81, the stamp duty on proxies for voting at meetings of joint-stock companies, or of heritors of a parish, is 6d.]

² 48 Geo. III. c. 149, Schedule, Branch 1 and 2.

[By 13 and 14 Vict. c. 97, the duties are as follows, for a bond given for any certain sum of money:—

	s.	d.
Not exceeding £50,	1	3
Exceeding £50 and not exceeding 100,	2	6
„ 100 „ 150,	3	9
„ 150 „ 200,	5	0
„ 200 „ 250,	6	3
„ 250 „ 300,	7	6

And where the sum shall exceed £300, then for every £100, and also for every fractional part of £100, 2s. 6d.]

³ *Attree v Anscomb*, 1813, 2 Maule and Sel. 88.

⁴ *Hughes v King*, 1815, 1 Starkie 119. The stipulation was not to convert a public-house into a wine vault, under a penalty of £500. A twenty shilling stamp held sufficient by Lord Ellenborough.

⁵ *Lyburn v Warrington*, 1816, 1 Starkie 162. Deed of mutual covenants, the one to relinquish the trade of butcher with house and fixtures for ten years, the other to pay down £1000, and £1000 a year for ten years.

⁶ An unstamped bill is a nullity, and imposes no obligation

to present it. *Wilson v Vysan*, 2 Taunt. 288. [See 55 Geo. III. c. 184, secs. 11–29; 9 Geo. IV. c. 23; 9 Geo. IV. c. 49, sec. 15; 16 and 17 Vict. c. 59, sec. 3; *Ettles v Robertson*, 7 W. and S. 176, reversing 11 S. 397.]

⁷ *Firbank v Bell*, 1817, 1 Barn. and Ald. 36. Here, to prove a payment in pursuance of directions previous to bankruptcy, the defendant gave in evidence a letter desiring him, 'when the mahogany per the Roquet is sold, to pay over £1500, in such bills as you receive at the sale, to Peace, Harrison, & Watson.' P., H., & W. also wrote to the defendant, sending a copy of the order; and he acknowledged the letter, and promised to attend to the order. One of the letters was stamped with an agreement stamp. The objection was to the production of the bankrupt's order, not being stamped as a bill-draft or order. Baron Wood admitted the evidence. On a rule *nisi* for a new trial, Lord Ellenborough said: 'It was the object of the Legislature, in forming this provision, to treat as promissory notes and bills of exchange, and to subject to a stamp duty, such instruments as, being payable on a contingency or out of a particular fund, could not in strictness fall under the denomination. This order appears to me to come as well within the spirit as the letter of the Act of Parliament, and therefore ought to have been stamped with the appropriate stamp.' A new trial.

Butts v Swan, 1820, 2 Brod. and Bing. 78. Case almost precisely the same, only the correspondence was not confined to a single letter, but consisted of several.

⁸ *Jones v Simson*, 1823, 2 Barn. and Cress. 318. The order was, on a consignment of woollen goods, 'to pay to N. the proceeds of a shipment, etc., value about £2000.' The undertaking was 'to pay over the full amount of the net proceeds.' The question was sent for trial from Chancery, Whether the two instruments, or either of them, required such a stamp as the Stamp Act imposes on bills? The Court of King's Bench were unanimous in the negative.

⁹ *Barlow v Broadhurst*, 4 Moore 471. Note for a sum pay-

a distressing question, Whether there would be power under the statutes to the commissioners to stamp an order of this kind? But it would rather appear that they can have no such power, if the letter is to be held as strictly under the rule of the Act, whatever it may be as a mercantile document. 2. The addition of interest, from the date of the bill to the term of payment, does not raise the sum for which the bill is held to be drawn, so as to require a higher duty than the Act appoints for the sum mentioned in the bill.¹ 3. The duty rising with the time, a note at two months after *sight* is different from one at two months after *date*; and as exceeding sixty days, it is not good on a stamp appropriate to that instrument.² 4. The duties are meant to affect only British bills and notes: therefore bills drawn abroad are not liable; and bills in Ireland are under the Irish stamp law. But they must truly be [321] foreign bills in order to be exempted; and bills drawn in Britain, though dated abroad, are under the Act.³ It is, however, sufficient if drawn abroad (as in Ireland), though sent to Britain in skeleton to be filled up and used.⁴ But although a British stamp is not necessary on foreign bills, they are not receivable in evidence if not stamped according to the foreign law.⁵

4. Policies of insurance require certain *pro rata* stamps, as fully laid down in the Act. And, 1. The slip that precedes a policy cannot be received in evidence unless stamped; but it is not stated in the Act what stamp is necessary.⁶ 2. The policy may, on certain conditions, be altered before notice of the risk being determined.⁷ 3. The alteration may

able to representatives three months after his death, under deduction of sums due, held an agreement.

¹ *Pruessing v Ing*, 1821, 4 Barn. and Ald. 204. A note at three months for £30, with lawful interest from the date, was written on a stamp applicable to a £30 note. Objection, it is a note for £30, 7s. 6d. Holroyd, J., directed a verdict for plaintiff, with liberty to move a nonsuit. The Court of King's Bench refused the rule affirming the direction.

² *Sturdy v Henderson*, 1821, 4 Barn. and Ald. 592. Note, 7th July 1818, for £400, at two months after sight, on a 6s. stamp. Objection, that it is a note exceeding two months after date, and requiring a stamp of 8s. 6d. Abbot, Ch. J., directed a nonsuit. Court confirmed it, 'as the two months after sight do not begin to run from the day of the date, but from the day of the note being presented for sight.' [See also *Upstone v Marshall*, 2 Barn. and Cress. 10; *Williams v Jarrett*, 5 Barn. and Ad. 32.]

³ *Jordain v Lashbrook*, 7 Term. Rep. 601. Evidence that a bill, dated Hamburg, was drawn in London, was held good to require a stamp.

Abraham v Dubois, 1815, 4 Camp. 269. Bill dated at Paris. Proof offered of drawer being in London two days after, held competent by Lord Ellenborough to infer the bill to be really drawn in England; but the proof insufficient.

Robertson & Co. v Routledge, 1 S. 600. Bill dated Hamburg, and bearing to be drawn by Elliot, Page, & Co., merchants there. Objection, that it was drawn in London on unstamped paper, and proof offered. Bill in hands of endorsee. Lord Ordinary held it good as bearing the name of a Hamburg house as drawers, dated Hamburg, and in hands of onerous endorsee. Court passed bill of suspension.

⁴ *Snaith v Mingay*, 1813, 1 Maule and Selwyn 87. A copperplate impression with Irish stamp was signed at Waterford, blank in everything but the subscription of the drawer, and sent to be used in London, where it was filled up with the sum appropriate to the stamp. Endorsed for accommodation; dishonoured by acceptors; and the defendants, the endorsers, defended themselves on want of English stamp.

Verdict subject to opinion of Court, who were clear that the bill was Irish, and that the moment it was filled up it became the bill of the party in Ireland.

So, where a bill of exchange was drawn in Jamaica upon a stamp of that island, with a blank for the payee's name, and transmitted to England, where a *bona fide* holder filled in his own name as payee, it was considered that no English stamp was necessary. *Crutchley v Mann*, 1 Marsh. 29.

⁵ *Clegg v Levy*, 1812, 3 Camp. 166. [According to modern practice, the courts of this country do not consider it incumbent on them to enforce foreign stamp laws. *James v Catherwood*, 3 D. and R. 190; *Wynne v Jackson*, 2 Russ. 352. See *Parsons on Contracts* ii. 753-4, and cases. The rule is otherwise as to the revenue laws of British colonies or possessions; *Alves v Hodgson*, 7 T. R. 241.

The duties now payable on inland and foreign bills are fixed by 17 and 18 Vict. c. 83, and 23 and 24 Vict. c. 111. As to bank drafts, see *M'Lellan v Turner's Exrs.*, 1864, 2 Macph. 845. The exemption from stamp duty of drafts on bankers residing within fifteen miles of the place of issue is repealed by 21 and 22 Vict. c. 20. Such drafts are now chargeable with a duty of one penny.]

⁶ *Marsden v Reid*, 3 East 512. The ship was stated to be American to the first underwriter. Reid's name stood first on the policy. To prove that he was not truly the first, the slip was offered in evidence. Lord Ellenborough, and afterwards the Court, refused to receive it for want of a stamp.

See 1 Marshall on Insurance, 347. [The stamp duties are now regulated by 7 and 8 Vict. c. 21.]

⁷ *Kensington v Inglis*, 8 East 273. Policy dated February 1800; altered, to extend the time, on 11th June 1800; loss of ship, 18th July. Held good without a new stamp.

Ridsdale v Sheddin, 1814, 4 Camp. 107. Policy dated June 1810; altered by memorandum, 29th November 1810; ship lost some time subsequent to 31st October, on a voyage from Quebec. Held this a memorandum only to modify a subsisting contract, and good.

See also *Ramstrom v Bell*, 5 M. and S. 267.

be of the marks of the goods,¹ or for the correction of a mistake in declaring a wrong ship, under a policy on goods by ship or ships.² But there must be no alteration of the subject, or of the right of property. It is not, however, an alteration of the subject in an insurance on goods, that the cargo is changed in the course of a trading voyage.³ 4. If a policy has been originally effected on unstamped paper, it cannot afterwards be stamped; and even if a stamp should be adhibited to it by the commissioners of stamps, evidence will be received that it had no such stamp when effected, in which case it is null.⁴

5. Conveyances and transmissions of property bear an *ad valorem* duty.⁵ But a trust-deed for the payment of debts, with a resulting trust for the truster, does not require such a stamp.⁶

6. A single stamp is sufficient, if the interest of the parties, however numerous, [322] relate to one subject-matter. So, in a composition with creditors, it may be said that each creditor compromises his separate debt; but being one transaction, one stamp is sufficient. So in a subscription to a common fund; so also in a reference by the underwriters in a policy.⁷ The same rule (as, indeed, is sanctioned by daily practice) will apply to a trust-conveyance by creditors to do common diligence for saving expense. If several persons bind themselves respectively in a penalty by one bond, conditioning the performance by each and every of them *of the same matters*, such bond requires only *one stamp*.⁸ But where there are several transactions, distinct as to the several parties, it is not a single deed, and the stamp will maintain the action only as to the person to whose name it is affixed.⁹

7. The extent of alteration admissible in one species of instrument has been stated. It may further be observed, 1. That to correct a mere mistake, and in furtherance of the original intention, it is permitted to make an alteration.¹⁰ What shall be deemed an alteration of this kind may be a difficult question in various cases, which will more properly be discussed under each head. 2. If the original intention be altered, and a new instrument be substituted different from the first, a new stamp will be necessary; so a bill of exchange cannot be altered after it is perfected in date, sum, time of payment, and drawer.¹¹

8. The consequences of not having a stamp, or having an improper one, are: 1. That no action can proceed, nor instrument be received in evidence, till the defect be supplied, if suppliable;¹² and it is *pars judicis* to refuse sanction to any evasion of the Act.¹³ 2. That if the instrument be lost, it cannot be supplied by proving the tenor, this being one of the

¹ *Hubbard v Jackson*, 4 Taunt. 169.

² *Robertson v Touray*, 3 Camp. 158.

Sawtell v Loudon, 1814, 5 Taunt. 359. The words 'on ship' struck out, and 'on goods, as interest may appear,' inserted, the assured having no interest in the ship. Held new stamp not necessary.

³ *Hill v Paten*, 8 East 373. The insurance on ship and outfit not allowed to be changed to ship and goods. But in insurance on goods, though they are not all co-existing, but successive and dissimilar, yet the adventure is the same, and the subject-matter retains its original denomination of goods.

See also *French v Patton*, 9 East 351.

⁴ See *Roderick v Hovil*, 3 Campb. 103.

⁵ [The stamp duties on conveyances are regulated by 13 and 14 Vict. c. 93. See the Schedule. *Wilkie v Flowerdew*, 1850, 12 D. 818.]

⁶ *Coates v Perry*, 1821, 3 Brod. and Bing. 48.

⁷ See *Goodson v Forbes*, 1815, 6 Taunt. 171, in Common Pleas, as to a reference by underwriters.

Davis v Williams, 13 East 232, in King's Bench, as to a subscription for constructing a dock. [*Johnstone & Co. v Attwell*, 1801, M. App. Writ, No. 5.]

⁸ *Bowen v Ashley*, 1 N. R. 274; *Goodson v Forbes*, 1 Marsh. 531.

⁹ *Perry v Bouchier*, 1814, 4 Camp. 80. A release to the master and three others, the crew of a ship which ran down another, having only one stamp, was admitted by Lord Ellenborough as good to admit the master first mentioned. See cases cited.

¹⁰ *Sanderson v Symmonds*, 1819, 1 Brod. and Bing. 426; and *Robinson v Pouray*, 1 Maule and Selw. 215.

¹¹ *Bayley* 159 et seq.; Thomson on Bills of Exchange. The general rule of the revenue law is, that there can be no alteration of a stamped instrument after it has been used for one purpose. Per Le Blanc, J., *Batlie v Taylor*, 15 East 416.

¹² [As to the admissibility of unstamped instruments in evidence of matters collateral to the purpose of the writing, see *Ross v Matheson*, 6 Bell's App. Ca. 374; *Mackintosh v Pitcairn*, 14 D. 188.]

¹³ [By 31 and 32 Vict. c. 100, secs. 41, 42, where a document is objected to on the ground that it is insufficiently stamped, the party tendering it may pay into Court the sum which the judge may determine to be payable thereon; and the deed is then to be sent to the Commissioners of Inland Revenue to be impressed with a stamp denoting the duty paid.]

risks which the party runs by breach of the law.¹ 3. That the want of the stamp only destroys the instrument, leaving the party to resort to other evidence; and so, where a party admits on the record the fact which the instrument might have been necessary to prove, it is sufficient.² So also, of course, a reference to oath is competent with us.

SUBSECTION I.—OBLIGATIONS AND CONTRACTS CONSTITUTED BY WRITING.

The peculiar advantage of written evidence is, that, provided the writing be authentic, it presents the very words which, at the time of the contract, the parties themselves have selected to express their obligation, and is subject to no ambiguity which they themselves have not left in their agreement. The chief points, therefore, in the law of written evidence of contracts are: 1. The authenticity of the writing as truly that of the obligor. 2. The solemnity and deliberation with which it has been prepared and recognised as a contract [323] meant to bind. And, 3. The final act which makes it binding against the one party, and available as a *jus quæsitum* to the other.

In England, all contracts are by specialty or by parole. The former require a seal; the latter are either agreements merely verbal, or such as are evidenced by a note or memorandum in writing signed by the party, but not under seal. Agreements by parole were of old generally entered into without writing; but in the reign of Charles II. a statute called the Statute of Frauds and Perjuries was passed, whereby certain agreements required a memorandum in writing signed by the party, or by his authorized agent: such as a promise to answer for the debt, default, or miscarriage of another; a sale of lands or hereditaments, or of an interest in them; an agreement to be performed at the distance of more than a year, etc.; and contracts for sale of goods, wares, and merchandise, to the value of upwards of £10, require either delivery, or earnest, or a written memorandum.³

The written evidence admitted judicially in Scotland to serve the purposes already enumerated are either SOLEMN or PRIVILEGED: the one being used in conveyances, deeds, settlements, and more solemn contracts; the other being those writings of daily mercantile intercourse on which men rely in their ordinary dealings.⁴

I.—SOLEMN WRITINGS.

The law relative to solemn writings is established by certain statutes, on which it would be out of place here to deliver a commentary. A very general statement of the import of the rules will suffice.

Solemn deeds are of two kinds. 1. Such as are written by another hand than that of the granter, and for proof of the authenticity of which the law trusts to the attestation of witnesses. And, 2. Holograph deeds written wholly, or in the principal and binding parts, by the granter, in which the proof of authenticity is by comparison of handwriting.

1. ATTESTED DEEDS.—The proof here, at once of deliberation and of authenticity, depends on the subscription of the parties and witnesses, on the disclosure of all the information that can be necessary to check fraud relative to the preparation of the deed; and on

¹ *Rippiner v Wright*, 1819, 2 Barn. and Ald. 478. Defender proposed to give parole evidence of an agreement, which had been written on unstamped paper, to pay a certain value for a crop. The plaintiff had taken an opportunity of snatching it from the hands of the defender's attorney and destroying it. The Court held the evidence to be properly rejected. See also *Rex v Inhabitants of Castle-Morton*, 3 Barn. and Ald. 588.

It will be presumed that the instrument was stamped till the contrary appear. *Crisp v Anderson*, 1815, 1 Starkie 35.

² So laid down by Lord Eldon in *Huddleston v Bristoe*, 11 Ves. 596. See also *Thyme v Protheroe*, 1814, 2 Maule and Selw. 553.

³ See 1 Comyn on Cont. 47; 1 Selwyn's *Nisi Prius*, 43 et seq. The English action of Assumpsit is confined to agreements by parole, the action of Covenant or Debt being the proper remedy for non-performance of contracts by specialty.

⁴ [See, as to minutes of meetings, and the obligations incurred by attending, *Johnston v Scott*, 1860, 22 D. 393, and cases there cited.]

the disclosure also of the names and designation or description by which the witnesses who have seen it subscribed may be found.¹

The rules are : 1. That the party shall with his own hand subscribe the writing ; or if he cannot, that two notaries shall subscribe for him, his warrant for their doing so being given not merely by word of mouth, but also by the marked symbol of touching the pen. 2. That this subscription shall be attested by the subscription of two witnesses where the party signs ; of four, where notaries subscribe for him. This is in token of their having been present at the ceremony, and having seen the subscription, or of their having heard the party acknowledge the subscription to be his ; or, where notaries sign, of their having seen and heard the warrant given, and seen the notaries subscribe. 3. That the witnesses shall be named and designed in the deed. 4. That the writer shall also be named and designed. And, 5. That where there are more pages than one, the number shall be mentioned in the deed.² Where these requisites are complied with, the deed is held to be at once the [324] genuine act of the party, and to have been framed and sanctioned with due deliberation and solemnity ; and if challenged, the *onus probandi* lies on the objector to prove the want of due solemnity, or the falsehood of the attestations or subscriptions.

2. HOLOGRAPH WRITINGS.—The uniformity of handwriting, so difficult to be imitated throughout a whole deed, has been supposed to furnish a safe substitute for the proofs afforded in attested writings by the attestations of witnesses ; and this both in respect of authenticity and of solemnity. By usage (sanctioned by 1669, c. 9), holograph deeds are as effectual to bind the granter as deeds authenticated according to the strict rules of the statute, with this only difference, that by the statute now quoted holograph missives and bonds without witnesses subsist only for twenty years instead of forty, which is the period of negative prescription of regularly attested deeds.

It is important to observe with respect to holograph deeds, 1. That although to the proof of the authenticity it is not essential that they should be attested by witnesses, yet wherever the date forms an essential point it cannot otherwise be established than by following the same rules of attestation which are appointed for proving the authenticity of deeds not holograph.³ Such proof, for example, is required in deathbed.⁴ 2. That, to give to holograph deeds the benefit of that presumption of authenticity which we have seen to belong to deeds regularly attested, the rule of the Act 1593, c. 175, which requires the name and description of the writer to be mentioned in the deed, must be duly complied with, by stating the deed to be written by the hand of the granter, the falsehood of which, if untrue, may be proved *comparatione literarum*, or otherwise.⁵

¹ In England a seal is necessary, and so it was by our early law, but not now. The seal is not in English law a proof of authenticity, for it is not only by his own seal that a man attests a deed. It is a mark of solemn deliberation, like the touching of the notary's pen in our notarial subscription.

² This is the general result of the statutes 1540, c. 117 ; 1579, c. 80 ; 1593, c. 175 ; 1672, c. 21 ; 1681, c. 5 ; and 1696, c. 15.

See M'Kenzie's Observations on these several statutes ; St. iv. 42. 1 ; Ersk. iii. 2. 5 et seq. ; Bankt. i. 11. 24 ; and a very full commentary on the Acts in the late Mr. Robert Bell's Lectures on the Testing of Deeds. See also Tait's Law of Evidence, p. 56 et seq. (of which I understand a new edition is nearly ready for the press).

[Since 19 and 20 Vict. c. 89, it is no longer competent to challenge the validity of a deed on the ground that the pages are not distinguished by numbers. On the subject of the authentication of deeds, which does not fall within the scope of Professor Bell's treatise, the reader is referred to Dickson on Evidence, secs. 636 sqq.]

Much discussion, very important in this department of law, took place both in the Court of Session and Jury Court, and in the House of Lords, in the *Fife* cause. See 1 Mur. 88, 3 Mur. 497 ; 30 Nov. 1819, 20 Fac. Coll. 38, 1 S. App. 498, 1 W. and S. 166.

³ Ersk. iii. 2. 22.

⁴ See above, p. 84.

⁵ *E. of Rothes v Lealy*, 1635, M. 12605, where a writing, bearing to be holograph of the granter, was held authentic to throw the *onus probandi* on the objector.

Donaldson v Walker, 1711, M. 11512. Here the granter said, 'As witness my hand.' It was held so far a compliance with the Act as not to infer a nullity under the Act ; but it was not held sufficient to confer the benefit of the presumption, or to throw the *onus probandi* on the challenger. [See *Robertson v Ogilvie's Trs.*, 7 D. 236, as to presumption arising from the writer's statement that the deed is holograph ; *Waddell v Hope*, 7 D. 605, 1017, as to presumption of sanity at the date of the deed.]

II.—PRIVILEGED WRITINGS.

In testamentary deeds, to prevent the inconvenient and overwhelming effect of the presence of many witnesses in the last hours of life, there is an exception to the rule requiring four witnesses in notarial subscription. Two are declared sufficient, while a clergyman is empowered to act instead of a notary.¹ The ordinary rules of holograph or attested deeds are also dispensed with in mercantile writings, both in respect of authenticity and of date.

WRITINGS IN RE MERCATORIA are effectual, though not written by the obligant, provided they are subscribed by him.² And so, although in ordinary cases an obligation will not bind the grantor, even should he acknowledge his subscription, if the requisites of the statute have not been complied with,³—it is otherwise with mercantile obligations: unless the authenticity of the subscription be challenged, the writing will bind the party. This [325] exemption of mercantile writings is a privilege conceded to the necessary rapidity of the operations of trade, and to the confidential methods of transacting business, which, amidst numerous dealings between traders, are necessary or unavoidable; fortified by the additional circumstance, that they often regulate transactions between subjects of different states, among whom the peculiarities of municipal law cannot be admitted.

The writings which are held to be comprehended under this privilege, are bills, notes, and checks on bankers; orders for goods; mandates and procurations; guarantees; offers and acceptances to sell, or to buy wares and merchandise, or to transport them from place to place; and, in general, all the variety of engagements, or mandates, or acknowledgments, which the infinite occasions of trade may require. In the productions of the modern French lawyers who comment on the Code de Commerce, will be found much acute and much absurd discussion relative to the mercantile character of particular acts and transactions. It is not necessary to enter into such inquiries: the matter may be left on the broad ground, that this privilege is peculiar to what are properly mercantile dealings,⁴ adding only in illustration the discussion which took place in a case relative to this distinction.⁵

¹ Ersk. iii. 2. 23. Tait's Evid. p. 96 et seq.

² Ramsay & Hay v Pyronon, 1632, M. 16964. [Gilkison v Thomson, 9 S. 520.]

See also below, note 5.

³ M'Farlane v Grieve, 1790, M. 8459, Hailes 1080.

Park v M'Kenzie, 1764, M. 8449, 5 Br. Sup. 539.

Muir v Wallace, 1770, Hailes 340, M. 8457.

⁴ Gordon v M'Intosh, 1710, M. 16974, as to a letter acknowledging payment of a bond.

Strachan v Farquharson, 1728, M. 16978, where a letter not holograph was found not binding, though in a very favourable case for the obligee, this not being a mercantile transaction; and the rule of this case, though doubted at one time, is now fixed.

⁵ Paterson v Wright, 31 Jan. 1810, 13 Fac. Coll. 545. The question arose on a letter of guarantee thus expressed: 'Sir, I hereby bind myself to see you paid for whatever purchases of cotton yarn Messrs. J. Simpson & Co. have made or may make from you for twelve months to come from this date.' This letter was subscribed by Wright, but was not holograph. A distinction was taken between furnishings already made prior to the date of the obligation, and those made subsequently. Lord Newton, before whom the case came, found: 1. That the letter founded on by the pursuer is not a letter *in re mercatoria*, in so far as regards the furnishings made to Simpson & Co. prior to the date of it, but is a proper cautionary obligation for payment of a debt already due; 2. That

the letter is a sufficient guarantee for the subsequent articles of the account, which were all furnished within twelve months of the date thereof. This distinction might perhaps hold respecting two separate writings, but here the missive was one and the same, and the Court reversed the judgment. Lord Meadowbank said: 'The law of Scotland bends to the *lex mercatoria* for the facility of commerce, and on this principle there is strong reason to doubt the judgment. A letter of guarantee is as often given on account of a transaction finished as on account of future furnishings, because a person will often furnish no more unless he is guaranteed for payment of what he has already advanced. This is done every day by bills, and by ordinary letters *in rebus mercatoriis*, and it would be detrimental to commerce to require regular writings in transactions of frequent occurrence. By a bill which is neither holograph nor tested, a cautionary obligation might undoubtedly have been undertaken; and there is no very good reason why it should not by a missive-letter. But this case is still stronger: of two obligations (one of them confessedly valid), both are contained in the same sentence. The second never would have been acted upon without the first. It extended credit to the future transactions. There is therefore a *rei interventus*. The guarantee of the first was relied upon when credit was given for the future.' Lord Glenlee held it a writing *in re mercatoria*. Lord President Hope (then Lord Justice-Clerk) admitted the distinction on which the judgment was grounded, but held that in this case,

The privileges granted to these writings are : 1. That although not holograph, witnesses are not necessary to prove the authenticity ; 2. That witnesses are not required, as in holograph deeds, to prove the date ; 3. That even subscription by initials, or by a mere mark, provided it be proved or admitted to be genuine, and to be the accustomed mode of the person transacting business, is sufficient.¹

Contracts in mercantile dealings are not so frequently formed by solemn deeds as by letters of correspondence. One merchant gives an order to another at a distance by letter, which that other agrees to perform, or he makes an offer which the other accepts. And even between parties in the same place, mercantile contracts are most commonly formed in this way. The *consensus in idem placitum*, by the exchange of the letters, makes [326] the contract.

It is dangerous to rely on a long correspondence from which to collect the terms of a contract. The engagement should be so distinct and specific, that the party may be enabled at once to put his finger on it and say, 'Here is my agreement.' And in courts of law nothing short of this can be relied on as the ground of an action.

*Offer and Acceptance.*²—An offer is a resolution or engagement, provisional on acceptance, and as such proposed to the adverse party. By acceptance it becomes a contract ; and this acceptance may be either in words, or by writing, or by doing what is required as the counterpart of the offer. Thus one offers so much for a cargo of corn, and it is sent ; or to guarantee a loan, and the money is advanced ; or one offers to become cautioner for a composition, and the creditors accede.³

An offer is necessarily under the condition of acceptance, and this must take place *debito tempore*. There may either be a time implied, or a time limited expressly. 1. Where an offer is made simply, the general rule at common law is, that it may be accepted at any time till withdrawn, and that an action to enforce performance will be a sufficient acceptance. The necessary rapidity of mercantile transactions, however, has introduced an exception in the case of commodities offered to sale, or of an offer to purchase commodities in the ordinary course of trade. For every dealer must know, that commodities offered are lying in wait for a market, that the price is subject to fluctuation, and that opportunities for disposing of such goods may open and be lost by delay ; or that the person who makes an offer for goods may lose by delay some other opportunity of procuring them. Unreasonable delay in the answer being therefore inconsistent with the spirit of trade, it is an implied condition of a mercantile offer to sell or to purchase, that it ought to be instantly accepted, or at least without any undue delay. And therefore the person to whom the offer is made has no reason to complain of disappointment, and no ground of action for implement, should the offer be withdrawn after such delay. As another exception to the rule, it is held that acceptance must take place while yet there is no alteration of circumstances detrimental to the offerer.⁴ 2. Where there is an express appointment of time for acceptance, it must be correctly observed. Thus, an offer which bears that an answer is expected in course of post,

the two obligations were so blended that they could not be separated.

¹ The effect of the difference of requiring evidence to these points, instead of holding the document *prima facie* as authentic, is important in bills and notes. They cannot produce summary execution. See below. [The privilege of transmissibility by endorsement seems to be confined to bills and notes, and bills of lading. As to delivery orders and receipts for goods, see *MacEwan v Smith*, 6 Bell 340 ; *Commercial Bank v Kennard*, 1859, 21 D. 864 ; *Scottish Central Ry. Co. v Ferguson*, 1863, 1 Macph. 750.]

² [On offer and acceptance, see the English and American decisions collected in Leake on Contracts, pp. 12-23, 602 ; Benjamin on Sale, pp. 28-35, 45-56 ; Duer on Insurance,

vol. i. p. 116 et seq. ; Parsons' Elements of Mercantile Law, 19-21 ; Do. Maritime Law, vol. ii. 22, note 4 ; Do. Contracts, vol. i. 476-485, vol. ii. 12-15 ; Story on Sale, Nos. 126-136 ; Addison on Contracts, pp. 15, 16.]

³ *M'Intyre v Tweedie*, 1823, 2 S. 361. [*Wilson v Walker*, 18 D. 673.]

⁴ *Allan v Colzier*, 1664, M. 9428, where one offering to guarantee a debt, and requiring an answer whether this offer was to be accepted, and no answer having been made till after the death of the debtor whose obligation was to be guaranteed, the offerer was held entitled to resile. [As to the effect of delay resulting from the fault of the offerer, see *Higgins v Dunlop*, 6 Bell 195, affirming 9 D. 1407.]

is no longer binding than till the arrival of that post.¹ A letter by the first mail packet from abroad is in time, although private ships may have sailed previously.²

It is the act of acceptance that binds the bargain, and in the common case it is not [327] necessary that the acceptance shall have reached the person who makes the offer.³ An offer to sell goods is a consent provisionally to a bargain, if it shall be accepted within a certain time fixed by the offer or by the law. Until the expiration of that time, the consent to the sale is held to subsist on the part of the offerer, provided he continues alive and capable of consent at the time of acceptance. From the moment of acceptance there is between the parties '*in idem placitum concursus et conventio*,'⁴ which constitutes the contract of sale. To this, however, an exception may be made by the offerer, limiting it so that the arrival of the acceptance only shall bind the bargain. Thus, a merchant in Leith offers 500 quarters of wheat to a merchant in London at a certain price, 'receiving your answer at Leith in course.' He by this form of answer stipulates absolute freedom if it should in any way happen, though by no fault or neglect of the other party, that the acceptance does not arrive by that post.

The acceptance must precisely meet the offer; and so, if it be provisional only, or if it include a counter offer, the bargain is not complete till the offerer assent to the qualification.⁵

If a mutual agreement is proposed, and provisionally assented to, and signed by several (as in agreements with creditors in bankruptcy), it is an implied condition that all shall be bound before any is bound.

An offer is revoked by death or incapacity before acceptance; but if it should happen that, while yet it is not too late to accept, the person to whom the offer was addressed should in consequence of, and relying on it, have lost an opportunity of supplying himself, or have proceeded *bona fide* to form arrangements which cannot be recalled, or in any other way should have suffered loss, this may be a bar to revocation of the offer; and in case of death, insanity, or bankruptcy, it may ground a claim against the representative or estates of the offerer for damages.⁶

If a merchant has sent, not an offer to purchase, but an order for goods, it is so far of the nature of an offer, that it may be rejected; but the person to whom it is addressed binds the bargain, by proceeding with all due diligence to execute the order. Nor is it necessary for him to accept it, in order to bind the bargain. It is an equitable part of this rule; however, that if he do not mean to execute the order, he must instantly communicate his refusal; and should he neglect to do so, he will be held to have engaged himself to the performance of it.⁷

Mercantile obligations are in another respect privileged. A minor cannot bind himself

¹ *Farries v Stein*, 1799, M. 8482. Farries on 7th November wrote to Stein, expressing his desire to have an addition to a quantity of spirits he had purchased, and asking the lowest price. To this Stein agreed by letter, 10th November, and noted the prices, in which he says: 'Expecting your answer in course, I am,' etc. On the 17th November Farries assented; but on 19th Stein rejoined, 'that not having had your answer in course to my letter of the 10th, I have since disposed of the spirits, and cannot now accept of your offer.' The Court of Session found Stein liable in damages. Reversed 24 March 1800, 4 Pat. 131. Lord Eldon, Ch., said the condition on which the offer was made not having been complied with, Stein was entitled to consider it as at an end; that it would place the offerer on very unequal terms were it to be left to the person to whom an offer is made to accept it after a rise perhaps had taken place in the price of the commodity; that it was incumbent, in this case, upon Farries to use due diligence in answering Stein's letter, which he had not done;

and that an apology, attempted on the ground of the former course of dealings, had no place in the question, which depended entirely on the latter making the offer and the answer to it.

See the distinction in *Jaffray v Boag*, 2 Dec. 1824, 3 S. 375.

² *Watson v O'Reilly & Co.*, 1826, 4 S. 475.

³ [*Thomson v James*, 18 D. 1. An offer sent through the post was accepted by a letter posted on the same day on which a letter retracting the offer was posted. Held that the contract was complete.]

⁴ Dig. de Pactis, lib. 2, tit. 14, l. 1, sec. 2; et De Pollicit. lib. 50, tit. 12, l. 3.

⁵ [*Johnston v Clark*, 18 D. 70; *Jack v Roberts*, 1865, 3 Macph. 554.]

⁶ Pothier grounds this doctrine on the maxim, *Nemo ex alterius facto prægravari debet*. Tr. du Cont. de Vent., No. 32, vol. i. p. 472.

⁷ [*Van Oppen v Arbuckle*, 18 D. 113.]

effectually in ordinary contracts, without the consent of his curators; or if he have no curators, still his acts and deeds are challengeable on minority and lesion;¹ but when a minor acts as a trader, and holds himself out to the world as such, his dealings are on the same footing with a major.²

DOCTRINE OF LOCUS PŒNITENTIÆ, REI INTERVENTUS, AND HOMOLOGATION.

I. The doctrine of *locus pœnitentiæ* is a corollary from the law which appoints particular evidence or solemnities for the constitution of obligations. Till the final purpose to undertake an engagement be declared, and the pledge of faith conclusively given, there is no binding obligation; there is *locus pœnitentiæ*.

The plea of *locus pœnitentiæ* is grounded not merely on the want of evidence of a [328] bargain, but on the want of that perfect and full consent which stands contradistinguished from imperfect resolution or intention. The want of evidence may be supplied by a reference to oath; the want of the badge of full and perfect consent never can be so supplied. Such evidence may supply the loss of the document, after it has been completed as an irrevocable engagement; but it will not destroy the privilege of resiling, where the irrevocable obligation has not been legally declared.³

This principle rules all the cases, and the points of the doctrine may be thus stated:—

1. Faith is not irrevocably pledged, and so there is *locus pœnitentiæ*, while an offer remains unaccepted, or while a mutual agreement has not been acceded to by all the proposed parties.

2. Where a writing is *de solennitate* necessary to bind the party, there is no engagement till the writing be completed.⁴ Cases falling under this rule are, conveyances of land,⁵ leases of land,⁶ constitutions of servitude,⁷ assignations of written obligations.

3. Where writing, though not by law required, is stipulated by the parties, there is *locus pœnitentiæ* till it be completed.⁸ But here it must be carefully distinguished whether an agreement preceding a more solemn deed is meant to *suspend* or to *bind* the bargain;⁹ whether the parties meant, agreed, and understood that they were to stand free till regularly bound in writing; or, on the other hand, meant to engage and pledge their faith to each other, so that the time necessary for completing the solemn writing should not give *locus pœnitentiæ*.¹⁰

4. Where the agreement is reduced to writing, but the writing is defective and informal, there is *locus pœnitentiæ*, and a reference to oath will not bar it.¹¹

II. The privilege of resiling from an incomplete bargain may be barred by two personal exceptions, REI INTERVENTUS and HOMOLOGATION. The doctrine of homologation has already been considered:¹² that of *rei interventus* is proper to this place.

¹ Ersk. i. 7. 34.

² Galbraith v Lesly, 1676, M. 9027; Craig v Grant, 1732, M. 9035.

³ Muir v Wallace, 1770, M. 8457, Hailes 340; M'Kenzie v Park, 1764, 5 Br. Sup. 539; Grieve v M'Farlan, 1790, M. 8459, Hailes 1080.

⁴ Lord Stair places this on the same footing with the Roman *stipulatio*. Stair i. 10. 9.

Maitland v Neilson, 1779, M. 8459, Hailes 840. In this case Lord Braxfield says: 'The writing by which this bargain is constituted is informal. The subscription is not denied; but that is not enough in this case. It is enough where writing is only necessary *in modum probationis*, but not so where writing is necessary to the constitution of the obligation.'

⁵ Oliphant v Monorgan, 1628, M. 8400; Sir P. Walker v Sir D. Milne, 1823, 2 S. 379, N. E. 338.

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⁶ Buchanan v Edgar, 1773, M. 8478; M'Farlan v Grieve, 1790, M. 8459.

⁷ Kincaid v Stirling, 1750, M. 8404.

⁸ Campbell v Douglas, 1676, M. 8470; Cathcart v Holland, 1681, M. 8471.

See Instit. lib. 3, tit. 24, De Emp. Vend., and Cod. lib. 4, tit. 21, l. 17; Pothier, Traité des Oblig. vol. i. p. 9, No. 11. See Stair i. 10. 3.

⁹ An obligation to grant a lease is as effectual as a lease. Ersk. ii. 6. 21. Dirleton and Stewart, *voce* Locus Pœnit. 198.

¹⁰ Rutherford v Feuars of Bowden, 1748, M. 8443; Muirhead v Chalmers, 1759, M. 8444; Fulton v Johnson, 1761, M. 8446.

¹¹ Grieve v M'Farlan, 1790, M. 8459, Hailes 1080; Barron v Rose, 1794, M. 8463. See also Park v M'Kenzie, 5 Br. Sup. 539.

¹² See above, p. 139.

Rei interventus is a doctrine qualifying the power to resile, and barring the exercise of it. It is grounded on the fact of the person, otherwise imperfectly bound, having permitted another to proceed on his obligation or agreement as if it were complete, and to perform on [329] the faith of it acts unequivocally referable to, or resulting from, the agreement, and which, by the refusal to execute the agreement, would prove detrimental to the person so misled or encouraged to proceed. The propositions into which this doctrine is resolvable are these:—

1. *Rei interventus* includes such acts, unequivocally referring to the agreement and resulting from it, as are either done as a part of the agreement, or which at least would not otherwise have been done than on the faith of it.¹ Difficulty sometimes arises in the case of leases, whether the act done is truly referable to the imperfect engagement. Mere possession, for example, may be ascribed to a lease for one year, which is good without writing, and does not necessarily infer an intention to confirm the entire agreement. There must be something done to characterize the possession as under the contract: a grassum paid, for example, or money expended to a great amount, in improvements or in building.²

2. The knowledge of the party who is imperfectly bound, that the other is proceeding on the faith of the agreement, is a necessary ingredient in the plea of *rei interventus*; and this either actual knowledge, or knowledge to be implied from circumstances necessarily leading to the probability of loss, without any means taken to prevent it.

3. There must be an inconvenience or alteration of circumstances to the party who has been led to rely on the agreement, though the change is not required to be irreparable. It is sufficient that it be considerable, and that the disappointment would be attended with loss. On this ground, the doctrine delivered by Lord Kilkerran, though it describes correctly enough the effect of *rei interventus* in the most common and clearest set of cases, is not correct, in so far as it professes to furnish a criterion for the application of the doctrine, and to exclude all cases in which the parties can be replaced in their former condition;³ and accordingly the Court has not regarded this as law.⁴

COMMENTARY ON CERTAIN PRESCRIPTIONS PRESUMING FALSEHOOD.—As an appendix to this matter of evidence in these several cases, certain short prescriptions demand notice. Of the shorter prescriptions, two classes may be distinguished: one raising the presumption of falsehood in the constitution of the debt; the other combining with this a presumption of payment. The former, as modifying some of the doctrines above discussed, may be fitly considered here. Of the other class, one example will immediately call for attention, the Triennial;⁵ another, in treating of Bills of Exchange.

VICENNIAL PRESCRIPTION OF HOLOGRAPH OBLIGATIONS.—By 1669, c. 9, ‘holograph mis-

¹ It is not enough, however, in all cases, though sometimes it may be admissible, to allege negatively that something has been omitted which might have been done. *Hill's Crs. v Dunbar*, 14 June 1810. See 16 Fac. Coll. 170, note. [As to joint obligations, see *Craig v Paton*, 1865, 4 Macph. 192.]

² *Grieve v Pringle*, 1797, 12 Fac. Coll. 82; *M'Rorie v M'Whirter*, 18 Dec. 1810, 16 Fac. Coll. 86. [See cases in Hume, pp. 774, 784–6, 801–5, 815, 835, 845–9, 861; *Russel v Freen*, 13 S. 752; *Carruthers v Thomson*, 14 S. 464. The principle was similarly applied in the case of a feu-contract, where the feuar had entered into possession and made alterations on the subject. *Colquhoun v Wilson's Trs.*, 1860, 22 D. 1035.]

³ ‘The rule,’ says Lord Kilkerran, ‘by which it is to be judged whether *res* be *non integra*, so as to exclude the *locus poenitentiae*, was laid down to be this, that wherever anything has happened on the faith of this verbal agreement which cannot be recalled, and parties put in the same place as

before, then *res* is understood not to be *integra*, and there is no longer *locus poenitentiae*.’ *Kilk.* 340. [See observations in *Johnstone v Grant*, 6 D. 881, 884.]

⁴ *Dunmore Coal Co. v Youngs*, 1 Feb. 1811, 16 Fac. Coll. 169. Here one was taken on a *meditatio fugæ* warrant, and liberated on his father becoming bound to pay a large balance. The obligation was not holograph, and the defence was that the obligation was improbable. The answer was, *rei interventus* by liberation. The reply was, that the person liberated has not fled, but is in Court, which is all that could have been required under the *meditatio fugæ* warrant. The Court disapproved of Lord Kilkerran's doctrine, and held the *locus poenitentiae* to be barred. [The payment of the price or consideration of the contract constitutes *rei interventus*. *Church of England Assurance Co. v Wink*, 1857, 19 D. 1079; and see *United Mutual Ins. Co. v Murray*, 1860, 22 D. 1185.]

⁵ See p. 348.

sive letters, and holograph bonds and subscriptions in compt-books without witnesses, not being pursued for within twenty years, shall prescribe in all time thereafter, except the pursuer offers to prove by the defender's oath the verity of the said holograph bonds [330] and letters, and subscriptions in the compt-books.' The object of this law is to avoid the danger of false deeds being founded on as holograph after the means of detection are gone or weakened.

1. The *terminus a quo*, from which the twenty years are to be reckoned, is the date of the writing, not the time of payment, as in the prescriptions implying payment; for the question is the genuineness of the writing.¹

2. The point to be proved by oath of party, when the time has run, is the authenticity of the whole deed. To prove the subscription merely, would leave it in the condition of a deed signed without witnesses.²

3. By the Act it is expressly declared, that this prescription 'shall not run against minors during the years of their minority.'³

QUINQUENNIAL PRESCRIPTION OF BARGAINS.—By the same Act 1669, c. 9, it is enacted, 'that all bargains concerning moveables or sums of money proveable by witnesses, shall only be proveable by writ or oath of party, if the same be not pursued for within five years of the making of the bargain.' And the same declaration as to minority is applied by the Act to this case. The presumption here, then, as in the former case, is falsehood in the alleged bargain,—that no bargain ever existed; and the proof is writing or oath of party.⁴

SUBSECTION II.—OF VERBAL AGREEMENT AND BOOK DEBTS.

VERBAL CONTRACT.—The principles above explained relative to offers and acceptance in writing apply equally to debts of this description. The claim rests on parole proof, aided by invoices, memorandums, etc.; but once established, the obligation is equally valid as if established by the most solemn writing.

DEBT ON OPEN ACCOUNT, OR BOOK DEBT.—The most common form of debt is by account. Retail dealers furnish the goods in which they deal on the general credit and verbal order of their customers, or of those authorized to act for them; a running account being kept in their books in the name of the customer. By this sort of traffic most of the commodities necessary in the ordinary intercourse of life are circulated. Current accounts are sometimes also kept in wholesale dealings, where the parties carry on a course of furnishing. The evidence of furnishings so made, either in the wholesale or retail trade, is generally parole; accounts are sometimes checked by pass-books, or by check-notes, as in cash accounts with bankers. In wholesale dealing, proofs are supplied by invoices, bills of lading, shipping receipts, and notes transmitted at the time.

The *prima facie* proof of a book debt or debt on account, is a distinct specification, from the books, of the several articles; and if that is made the subject of a claim in bankruptcy, the specification is accompanied by an affidavit to the verity of the debt. Where such evidence stands uncontradicted by other circumstances, and unquestioned by the bankrupt, or where it accords with the bankrupt's books, the state of his stock, etc., this is held as sufficient evidence to authorize the trustee on a sequestrated estate to admit the

¹ [Home v Donaldson, 17 Jan. 1773, M. 10992.]

² On this point Erskine's doctrine (Ersk. iii. 7. 26) is refuted by the very cases to which he refers.

³ [See Napier on Prescription, p. 866; More's Notes to Stair, p. 271. On the question whether the statute applies to the use of holograph writings as evidence of a contract, where the writing is not of an obligatory character, see Bank of Scotland, 1747, 5 Br. Sup. 748.]

⁴ [The statute comprehends contracts of sale, hiring, loan,

deposit, and pledge of moveables. White v Spence, 1683, M. 11065; Ewart v Murray, 1730, M. 11069; Noble v Armstrong, 11 June 1813, F. C.; Hunter v Thomson, 1843, 5 D. 1285. It does not apply to consignments of goods, not being on sale. M'Kinlay v M'Kinlay & Co., 1851, 14 D. 162. When the statute is pleaded, the creditor must prove both the constitution and the subsistence of the debt. Campbell v Grierson, 1848, 10 D. 361; Kennard & Sons v Wright, 1865, 3 Macph. 946.]

proof. Where further evidence is required, a dividend must be set apart to be paid to the claimant, provided he shall fully establish his claim.

Where the debt is suspicious or contested, recourse must be had to other evidence. 1. The evidence of the clerks and porters of the seller or furnisher is admissible to prove delivery of the several articles. But it may not always be possible to prove the delivery of each several article. And it will remain for determination by a jury or by arbiters, whether a proof of being a customer, and receiving articles about the time stated in the account, [331] and of the general description there set down, will not be sufficient. 2. The letters that have passed between the parties, the invoices, carriers' notes, bills of lading, rendered accounts, etc., may be resorted to in aid of the claim. 3. The books of a regular merchant have been held to afford a *sempilena probatio* to the effect of the claim being supported by the evidence of a single witness, confirmed by the oath of the merchant in supplement.¹ In bankruptcy, the bankrupt himself will not, as such, be incompetent as a witness in support of the claim. He is not liable to the objection of interest; for any interest which he may have lies against the claimant, not for him.

COMMENTARY ON THE SHORT PRESCRIPTION OF BOOK DEBTS.

Book debts, or debts by account, are subject to a limitation or prescription of three years. This prescription infers a double presumption: *First*, Of falsehood in the constitution of the debt; and *Secondly*, Of payment and extinction. It is established by an early statute, 1579, c. 83; but it is a regulation not unsuitable to the practice of the present day, and attended with many salutary effects. The words of the statute are, that 'all actions of debt for house-mails, men's ordinaries, servants' fees, merchant counts, and others the like debts, that are not founded upon written obligation, be pursued within three years, otherwise the creditor shall have nae action, except he either prove be writ or be aith of his partie.' And there is no exception in the case of minority, as in the other prescriptions already considered.

I. The debts to which this statute applies are merchants' accounts, under which are comprehended the accounts of artificers, or tradesmen, for their work or wages;² accounts of law agents;³ accounts of surgeons, apothecaries,⁴ and the like; servants' wages; house rents;⁵ the expense of boarding, or 'men's ordinaries,' as it is called in the Act. And the enumeration in the Act concludes with 'others the like debts that are not founded on written obligation.' These are debts, in short, which depend not on a single contract or bargain, but are apt to run into credit; and which, as they are commonly contracted without writing, are discharged either at the time or afterwards, without any written acquittance being thought necessary. And as, by the law of Scotland, the payment of money cannot be proved by parole evidence, while the furnishing of the articles may be so proved, this Act was intended by a presumption to protect persons dealing with retail merchants, and those in a similar situation, from a second demand.

II. The term of three years, if the debt be payable termly (as servants' wages), runs on each term's debt severally.

Where the debt is by account of successive articles, the term does not run on the

¹ This was decided so early as 5th June 1672, *Wood v Kello*, 'in respect of the great prejudice that merchants might sustain if they were restricted to a full probation, especially if the parties were dead; and therefore the Court decerned the probation by one witness being *sempilena*; and the count-book with the merchant's oath in supplement was sufficient to make it a full probation.' M. 12728. [*Ivory v Gourlay*, 4 Dow 392.]

² *Bayne*, 21 Dec. 1692, M. 11092. [The Act applies to a

surveyor's or engineer's account; *Stevenson v Kyle*, 12 D. 673. *Secus*, if under a written agreement; *Blackadder v Milne*, 13 D. 820. Held not to apply to charges of *professional witnesses* for attendance before a parliamentary committee. *Barr v Edinburgh and Glasgow Railway Co.*, 2 Macph. 1250.]

³ *Somervell v Muirhead*, 1675, M. 11087. [*Deans v Steele*, 16 D. 317; *Richardson v Merry*, 1863, 1 Macph. 940.]

⁴ *Ersk.* iii. 7. 17.

⁵ *Cuming's Trs. v Simpson*, 1825, 3 S. 545.

several articles as separate debts, but on the whole account considered as one debt;¹ and it begins to run, not while the account is current, but only when it is closed. The close of the account is therefore an important point. And, 1. If the account be continuous, or without any interval of three years, the date of the last furnishing, act done, or article not being [332] a mere accessory article of interest, is the close of the account. 2. An interruption or interval of three years closes the account of what precedes it. 3. The death of the debtor closes an account.² This point occasioned some doubt; as, for example, Whether the funeral expenses of the debtor should form an article in continuation of the account?³ Whether furnishings to the family immediately following upon the death should be held a continuation of the account?⁴ Whether the account continued with the heir, being *eadem persona cum defuncto*, was not strictly to be held as the same account?⁵ But it is now quite settled that the debtor's death closes the account, and that furnishings to the widow or heir commence a new account.⁶

III. There are two points of fact to be established by a creditor against whom the triennial prescription has run,—namely, the *constitution* of the debt, and its *subsistence*; and two kinds of evidence by which they may be established,—writing, or the oath of the debtor.

1. It will be a good answer to the plea of prescription on both points, if the creditor produce a written constitution of the debt. This comes under the exception in the Act, of proof by writ. So, if a bond or bill is granted for the balance, or an acknowledgment by missive, the triennial prescription is excluded; and the matter will then depend on the rule of law applicable to such evidence: as, for example, a holograph writing will be available for twenty years from its date; a more formal one, for forty years; a bill, for six.

2. But if the writing go only to the origin or first constitution of the debt, as a written order for articles to be furnished; this, although, when completed by a carrier's receipt for the goods, it will be good evidence of the constitution of the debt, will not satisfy the law on the other point, viz. that the debt is resting owing. That will still remain to be established by the creditor. It has indeed been often contended, that where a written order is given, the debt is of a description to which the triennial prescription does not apply, as being a debt founded on a written obligation. But this plea the Court has uniformly disregarded, on the principle that the Legislature meant to apply the triennial prescription to all debts in which there is not such a regular written constitution of the obligation as naturally requires a written discharge.⁷

3. As to the *subsistence* of the debt, it is necessary to distinguish, respecting proofs in writing, whether they are dated subsequently to the expiration of the three years, or within that time. If the writing is dated after the expiration of the three years, provided it plainly evinces the then subsistence of the debt, it will be a sufficient answer to the plea of triennial prescription, as counteracting the statutory presumption of payment. If the writing is dated within the three years, it is not held enough that it shows the debt to have been in existence during the three years, since the presumption of payment still remains: it would seem to be

¹ *A v B*, 1675, M. 11086.

Ross v Master of Salton, 1680, M. 11089. It is different with servants' wages. Each year's wages prescribe separately. [Observe that this prescription applies to a single transaction. *Gobbi v Lazzaroni*, 1859, 21 D. 801.]

² *Leslie v Mollison*, 15 Nov. 1803, 15 Fac. Coll. 3. See below, p. 351, note 4.

Wilson v Rutherford, 1826, 4 S. 427.

³ *Lady Ormiston v Hamilton of Bangour*, 1709, M. 4981, 4983.

⁴ *Wilson v Tours*, 1680, M. 11089, 11090.

⁵ *Graham v The Laird of Stonebyres*, 1670, M. 11086.

Erskine says that an account is deemed current, though part of it was furnished to the deceased and the remainder to the heir, when the question is with the heir, because the heir is *eadem persona cum defuncto*; and the same doctrine, he says, may perhaps extend to executors. Ersk. iii. 7. 17.

⁶ *Kennedy v M'Dougal*, 1741, M. 11104.

⁷ Contrast the case of *Watson v Ld. Prestonhall*, 1711, M. 11095, with the following cases:—*Ross v Shaw*, 1784, M. 11115; *Douglas v Grierson*, 1794, M. 11116; *Sadler v M'Lean*, 1794, M. 11119, and Bell Fol. Ca. 104.

requisite that the writing should be intended to constitute the debt as on a new footing, to [333] serve as a voucher to the creditor for his debt. Where such voucher or acknowledgment is given, the debt, as if originally constituted in writing, will require not merely the triennial prescription, but a written acquittance, or the long prescription, or at least the prescription applicable to the document, to discharge it.

It has not been required that the acknowledgment of the debt shall be formally authenticated: a mere jotting, holograph of the debtor, if manifestly admitting the debt to be due, has been sustained as sufficient.¹ But to this the distinction already observed applies: if it be beyond the three years, it will be good; if within the three years, it still leaves the doubtful point unsatisfied. Erskine says that a book of accounts regularly kept by the debtor will be sufficient, if he there charge himself with the debt. If this doctrine is to be adopted in its full extent, the *regularity* of the books forms a chief part of the proof; for although a book of accounts showing, *after the three years*, the subsistence of the debt may be a good answer to the plea of prescription, it is not easy to see how, without relying on the regularity of the books, such entries within the three years can answer the legal presumption of payment. The supposition of the law is, that the furnisher of goods compels payment against the expiration of the three years; and the clearest proof of the debt being due at some time during that period, is no answer to the legal presumption. It seems to be otherwise, however, in England.

4. The proof of a prescribed debt by oath of party depends for its effect on the judicial transaction by which the issue of the cause is *referred* to this test. The points referred in the triennial prescription are those specified above: constitution and subsistence. If both are admitted on oath, or if without oath they are judicially admitted, this is a good answer to the plea of prescription.² On such reference the debtor is bound to answer; but he is not entitled to give a mere general answer: he must answer to particular questions. His oath will not be proof against him, unless he admits that payment was not made. If he swear that payment was made, and his answers to the special questions do not contradict that general affirmation, the demand of the creditor must be rejected.

It is a point of much nicety, What shall be held intrinsically an answer to the reference? On this subject the general rule is, that a direct answer to the question, Whether the presumption of the law be true? is an intrinsic quality, while all collateral matter is extrinsic. But the presumption of the law is here twofold: 1. That no debt ever existed; and, 2. That if a debt existed, it was paid. In a reference to oath, then, under this presumption, the pursuer puts to the defender these two questions; and a denial of the constitution of the debt and of its subsistence will be intrinsic. These, as Dirleton says, are 'inherent in the act and matter in question.'³

A distinction has been stated by Mr. Erskine between the case of a debt demanded before or after the three years. Where the debt is demanded *after* the three years, and there is no proof by writing, so that recourse must be had to the oath of the defender, that oath embraces the two points of constitution and subsistence. Mr. Erskine erroneously conceives that in a demand *during* the three years, where there is no proof by writing or parole testimony in support of the claim, it is enough to refer to the oath of the debtor the constitution of the debt; and that upon establishing this, the *onus probandi* of payment lies on the defender, and so makes an extrinsic quality of his oath. But in this case, no less

¹ *Donaldson v Murray*, 1766, M. 11110. This was an action for the price of malt, and the writing relied on to answer the triennial prescription was: '1st November 1755. G. Murray to Mrs. Kedslie. To four bolls of malt at different times, this day included, at 13s. 4d. per boll.' This note was admitted to be holograph, but not signed. It was held a good answer to the plea. [*Fiske v Walpole*, 1860, 22 D. 1488; prescrip-

tion elided by the debtor's letter, saying 'he would be glad to forward £15 yearly in liquidation of his debt.' *Idem* in *Fife v Innes*, 1860, 23 D. 30, the admission being, 'The number of gallons is correct; but I am charged about 1s. 6d. per gallon more than the agreed price.']

² *Bryson v Ayton*, 1825, 4 S. 180.

³ Dirleton, *Doubts, voce Qualified Oath*, 214.

than in the other, the whole debt is referred for want of other evidence; and so, in the [334] same way as after the three years, the constitution and subsistence of the debt are both the subject of the judicial transaction of reference.¹

If the import of the oath is only that the defender has, on account of something collateral, a defence against the debt as compensation, the quality is not intrinsic, unless it was *pars contractus* originally that there should be such set-off.²

The debtor's bankruptcy does not make it incompetent for the claimant to refer the debt to his oath: for although at one time it was held that the bankrupt was not competent to prove against his creditors on a reference by a claimant,³ this doctrine is now confined to those cases in which the debtor's evidence is objectionable on account of relationship or interest.⁴

IV. Where the original debtor has died, a distinction may be admitted, according as the prescription has begun to run before the opening of the succession, or otherwise. Where the whole term of prescription runs during the heir's time (as where the account was closed only by the ancestor's death), the oath of the heir negative of payment will establish resting owing.⁵ But if the account was closed, and any part of the term has run during the ancestor's life, the heir's oath that *he* did not pay the debt will not make out the pursuer's case.⁶

V. Minority is not pleadable in bar of the triennial prescription. It is a plea not available against any of the prescriptions, unless by force of statute; and it is not made an exception in the statute of triennial prescription, as in the Act 1669, c. 9, relative to the other prescriptions already taken notice of.⁷

CHAPTER II.

OF UNILATERAL OBLIGATIONS.

UNILATERAL obligations and bonds are either simple in their object and form, as obligations to perform an act, or to grant or to deliver a deed, or not to do a particular act; or they are more complex, as bonds of annuity, and bonds of cautionry or suretyship. There is also a peculiar form of obligation, of the first importance in a commercial country, namely, by promissory note or bill of exchange. These shall be considered in their order.

¹ Ersk. iii. 7. 18; Ersk. iv. 2. 11 and 13. See also the case of *Douglas v Grierson*, 1794, M. 11116; Bell, Fol. Ca. 97.

² Contrast these cases, *Rankin v Adair*, 1799, M. 13245; *Brown v Dow*, 1707, M. 13224, where the oath resolved into compensation, or payment to a third party; with the following, where it was at the first agreed that there should be a compensation: *Maitland v Baillie*, 1707, M. 13212; *Forbes v Craig's Crs.*, 1711, M. 12464.

³ *Morton v Gilchrist*, 1680, M. 12463; *Nairn v Drummond*, 1725, M. 12468.

⁴ *Blair v Balfour*, 1745, M. 12473; *Grant v Grant of Carron's Crs.*, 1788, M. 12476.

⁵ *Leslie v Molison*, 15 Nov. 1808, 15 Fac. Coll. 3. This was an action for a law agent's account for defending an action brought against Molison's father, whom he represented, and

in which, on his father's death, Molison appeared as a party, the account continuing with him. The defence was, belief of payment by the father, and triennial prescription. On reference, the defender said he believed his father to have paid all accounts due by him, but that he did not know. The Court held the law not to presume payment during the currency of an account, but only after its close; and this presumption they held in this case to be regulated by establishing that no payment had taken place since the death of Molison's father. [*Auld v Aikman*, 4 D. 1487.]

⁶ See *Wilson v Rutherford*, 7 Feb. 1826, 4 S. 427. [*Macdowal v Loudon*, 12 D. 170.]

⁷ [See *Mackay v Ure*, 10 D. 89, 11 D. 982; *Ellis v White*, 11 D. 1347.]

SECTION I.

BONDS AND OBLIGATIONS.

[335] An obligation may be constituted either by a regular and formal bond, or by a less formal writing, engaging to pay money or to do some act. But without dwelling on any anomalous form of engagement, the two classes of Money bonds and Bonds *ad facta præstanda* may here be considered.

I. MONEY BONDS.—Bonds for money are simple in form; the essential part being an engagement, absolutely or conditionally, at a day certain or in a specified event, to pay a definite sum of money.

1. The demand under the bond is for the principal sum in the bond, with interest, if the term of payment be past, at the rate of five per cent., or whatever may be fixed in the bond under that rate. If there is a bankruptcy, and a necessity of claiming before the term of payment, the demand is for the principal sum, with an abatement of interest to the day of payment. The claim will lie for the whole amount of the bond if granted by several persons bound jointly and severally, or severally, or *in solidum*, or as co-obligants and full debtors.¹ But if the granters are bound singly, or only jointly, each will be liable for his share only.²

2. The EVIDENCE necessary to support the claim is the bond itself, either holograph, or formally subscribed and attested according to the statutes.³

3. The PRESCRIPTION pleadable against bonds is the long negative prescription of forty years uninterrupted by minorities;⁴ or if the bond be holograph and not attested by witnesses, the prescription of twenty years from the date which the bond bears.⁵ The principle of the long prescription is different from that of the short prescriptions. It is not a presumption of payment, but a presumption of abandonment not to be overcome, but available to the debtor as equivalent to a discharge. But the term of prescription may be interrupted, either by minorities, or by the methods appointed for that purpose: as a citation in an action specially libelling on the debt, and renewed every seven years;⁶ or a charge of horning; or diligence by arrestment, poinding, adjudication, or inhibition; or an acknowledgment of the debt, or a partial payment of it.⁷

Money bonds in England are conceived differently from ours. The Scottish bond is a simple obligation to pay the sum borrowed, etc., with interest. The English bond is an obligation to pay double the sum of the debt, with a condition that, if against a certain day the sum of the debt be paid, the bond is to be void. Under an English bond the creditor cannot claim the penal sum to the effect of drawing a dividend amounting to the debt. The intention of conceiving the English bond in such terms was merely to cover interest and costs; and a claim on such a bond in Scotland, just as it would be in England, is merely for the debt, with interest and expenses.

II. BONDS AD FACTA PRÆSTANDA.—Bonds or obligations *ad facta præstanda* may be taken alternatively. The obligation may be enforced by the personal diligence of imprisonment, or the claim of the creditor may be converted into money, either in terms of the bond or by a judgment for damages. Wherever the act has become imprestable, as our [336] law terms it, *i.e.* incapable of performance, the maxim applies, '*in loco facti imprestabilis substit damnum et interesse.*' A claim of damages is substituted in room of performance.

Upon such bonds or agreements, a claim in bankruptcy can properly be made only

¹ *Cleghorn v Yorkston*, 1707, M. 14625.

² Ersk. iii. 3. 74.

³ See above, p. 340.

⁴ 1469, c. 29; 1474, c. 55.

⁵ 1669, c. 9; Ersk. iii. 7. 26. *Home v Donaldson*, 1773, M. 10992. See above, p. 346.

⁶ 1669, c. 16.

⁷ Ersk. iii. 7. 38 et seq.

where the demand is capable of being instantly and certainly ascertained, so that the creditor can swear to the amount. Thus, if the agreement has been to deliver goods at a particular time, the damage is the amount of the loss suffered by the person to whom the engagement was undertaken; and *that* may be ascertained and sworn to. So, where the bond is to present a debtor, for the purpose of personal diligence by caption being executed against him, the damage is the amount of the debt, which may at once be claimed on affidavit. But in many cases the claim of damages, even under a covenant, arises out of so many considerations, that its amount cannot thus be ascertained, but must be fixed either by a court of law with the aid of a jury, or by arbitration.

In bonds and covenants of this description, however, there sometimes is the reservation of a sum or penalty (expressed alternatively with the act to be performed or abstained from), to be paid failing the performance of the act. In these cases distinctions have been admitted. The sum expressed is not always to be allowed to rank.

1. Where the spirit of the obligation is, that the engagement to perform or abstain from a particular act is at all events to be enforced, and the sum is added in order to compel implement, the creditor is entitled to the protection of an interdict, or the remedy of personal execution, to compel performance or prevent encroachment.

2. If the thing to be prevented or enforced has been done, or has become imprestable, the penalty is in equity restricted to the damage, which, as it forms the true debt, must be proved.¹

3. Where the agreement is cast in another form, an alternative being stipulated, not in the nature of a penalty, but permissively, or as estimated damage, the sum appears not to be subject to modification in either case; while in the former, the party on whom the obligation to performance or payment is incumbent, may make his election to pay instead of performing.² It will, however, be observed that no such election can be given to a bankrupt, who would thus fraudulently confer on his creditors a right, by the very conception of the contract, more valuable than the dividend which would be drawn on the alternative obligation for money. Nor can the creditors make such election, without paying in full out of the estate the whole amount of the alternative obligation.

SECTION II.

OF BONDS OF ANNUITY AND OTHER CONTINGENT DEBTS.

A bond of annuity has sometimes been considered as an obligation for a sum of money payable by instalments. But this is incorrect. It is a contract in which the obligor engages to make to the obligee a certain yearly payment, in consideration of a sum or price [337] deemed adequate at the time; or intending to settle on the annuitant for family purposes, or from favour, as a permanent aliment.

Annuities are of two descriptions: *1st*, For a fixed duration of time, or term of years certain, called an ANNUITY CERTAIN; or, *2dly*, For an uncertain duration of time, generally depending on the issue of human life, and hence called ANNUITY ON LIVES.

¹ [*Borthwick v The Lord Advocate*, 1862, 1 Macph. 94. Bond for the faithful discharge of duties of an office; penalty, £250. Held a good ground for summary diligence, the penalty being subject to modification in a suspension.]

² Such questions have occurred chiefly in regard to leases, and the difficulty has been to distinguish between these two several sorts of agreements; for it has been attempted to avoid the difficulties of ascertaining damage by stipulating an alternative rent, without the least intention of giving per-

mission to the tenant to commit waste on the farm. A principle of equity has also had great influence in such cases, viz. that a tenant might perhaps reserve his option to the last years of the lease, when the injury by following a bad course of cultivation could not be repaid by the increased rent. See the cases of *Graham of Balgowan v Straiton*, in H. L. 1789, 3 Pat. 119; *Sir A. M. M'Kenzie v Craigie*, 1811, 16 Fac. Coll. 304. *Hon. J. S. W. M'Kenzie v Gilchrist*, 13 Dec. 1811, *ibid.* 419; *Frazer v Ewart*, 25 Feb. 1813, 17 Fac. Coll. 223.

1. With regard to annuities certain, the commencement and termination being fixed and ascertained, the claim for the annuity, in case of bankruptcy, is not very different from the claim for another debt, of which the term of payment is not yet come. In order to ascertain the extent or value of the debt at any given time, it is necessary only to make allowance for the legal interest during the currency of the annuity; and the term of years and rate of interest (five per cent.) being given, the value of the annuity can easily be found by having recourse to tables calculated for the purpose.¹ In cases of bankruptcy, the value so found as at the period of the bankruptcy measures the claim of the creditor.

2. Where the annuity is of uncertain duration, it is not so easy a matter to ascertain the extent of the claim. Here, either the termination or the commencement of the annuity, or perhaps both, are uncertain, and depend upon particular events or contingencies. The most ordinary circumstances which regulate the duration of annuities, are those involved in the duration and termination of human life. An annuity may, according to the terms of the contract, exist during the life either of the granter, or of the grantee, or of any third party; or during the joint continuance of any number of lives; or during the longest of any number of lives. And it may either commence from the date of the grant, or from a more distant period; or it may depend upon the contingency of survivorship, and only commence after the extinction of one or more given life or lives; or it may depend upon a certain order of survivorship, where different lives are concerned; or upon a variety of other combinations, in which a number of lives may exist together, or in succession one after another. In all these cases, and in every case where the payment of a sum or sums of money depends upon contingent events, which may either happen or not happen; or where a sum of money is payable upon a certain event, of which, though the event itself is certain, the time is uncertain; it is impossible to state the precise amount of the claim as at the period of bankruptcy;—and it is difficult to say what the contingent creditor, in competition with other creditors, whose claims are of a definite nature, ought to draw out of the common fund. Indeed, the difficulty respecting this matter had appeared so great, that in England it probably in some measure gave rise to the rule by which contingent debts were altogether excluded from any participation in the bankrupt estate; and accordingly, although in that country annuities for a term certain might at all times, like other future debts, be proved in bankruptcy;² and although, in the case of annuities for lives, a sort of equitable relief was given, by permitting the penalty to be taken as the debt, wherever by being in arrear the penalty was forfeited; and by allowing a value to be set on the annuity, in order to redeem the forfeiture;³ yet annuitants were, as contingent creditors, strictly speaking, excluded from all claim in bankruptcy, until Sir Samuel Romilly's Act of 49 Geo. III. c. 121, which by sec. 17 provided that the creditors in such annuities shall be allowed to prove under a commission of bankruptcy, as creditors for the value of such annuity, to be ascertained by the commissioners; and by the new Bankrupt Act of England this provision is continued, and a method laid down for valuing the annuity.⁴ In Scotland, annuity [338] creditors never had this difficulty to struggle with; contingent creditors being entitled at common law to claim as well as future creditors.⁵ A creditor in an annuity is held entitled to adjudge heritable property sufficient to answer the annuity; and it has also been found, that if he can discover a fund of lying money sufficient to cover his annuity, he is entitled to arrest it.⁶ And, on the same principle, he is also entitled to claim, as a creditor

¹ Price's Observations, 6th ed. vol. ii. table 2, p. 268. [See 36 Geo. III. c. 52; 16 and 17 Vict. c. 51; *Ferguson v Smith*, 15 S. 25.]

² *Pattison v Banks*, Cowp. 540.

³ Cullen's Bankrupt Law, 92; Eden on Bankrupt Law, 114.

⁴ 6 Geo. IV. c. 16, sec. 54. [See 12 and 13 Vict. c. 106. By the Scottish Bankruptcy Act this principle is also given

effect to. The trustee or sheriff is to value the annuity, 'regard being had to the original price given for the annuity, deducting therefrom such diminution in the value of the annuity as shall have been caused by the lapse of time since the grant thereof to the date of the sequestration.' 19 and 20 Vict. c. 79, sec. 54.]

⁵ See above, p. 332.

⁶ For an explanation of the principle on which this pro-

in bankruptcy, to have a rateable share of the bankrupt's funds assigned to him, corresponding to the annuity.

The rule of law, according to which the annuitant is entitled to bring his action, to do diligence, or to rank upon the bankrupt estate of his debtor, is this:—He is entitled to claim a capital sum corresponding to the annuity, that is, such a capital as would produce an annual interest equal to the annuity; and to have that sum secured by his diligence, or to have in bankruptcy a dividend corresponding to this capital laid out, and the interest accruing thereon paid to him for the time during which the annuity is payable, in terms of his ground of debt.¹ At the termination of this period the capital is again paid, or in bankruptcy the dividend becomes the property of the creditors at large, and forms a fund of division among them. In this way the annuitant is correctly secured in the annual sums to which he is entitled; or in bankruptcy is put precisely upon an equal footing with other creditors, drawing a share of the fund exactly in proportion to his debt, and suffering a proportional loss. Thus, suppose a man is creditor for an annuity of £50 during his life, he may bring an action for securing the capital of £1000, or whatever will cover the interest, and thereupon adjudge or arrest. Or if the debtor is bankrupt, and the estate pays 10s. per pound, and the reserved fund bears interest at five per cent., then he is entitled to have £1000 ranked as a capital corresponding to the annuity; for that is the sum which, if lent out at five per cent., would produce an interest equal to the given annuity. The dividend corresponding to this sum is £500, and the interest drawn by the annuitant during his life will be £25 per annum; so that he will just draw one-half of his debt, in the same way that the other creditors draw one-half of their debts. If the reserved fund bears interest at four per cent., the capital to be ranked as corresponding to the given annuity will be £1250. It seems to follow, as a corollary from the principles upon which this mode of ranking is founded, that the annuitant or his representatives should, upon the division of the capital of the reserved dividend, be entitled to a share thereof, in proportion to the amount of the arrears of his annuity remaining unpaid at the time of such division, in computation with the debts then remaining due to the other creditors.

The same legal rules hold with regard to the diligence competent on the ranking of every other contingent debt.² Suppose, for instance, a creditor, A, holds an obligation for a provision of £1000, payable at the death of B, the bankrupt,—here A is entitled to raise an action for that sum, for the purpose of doing diligence in security: or he is entitled to have the principal sum ranked in case of bankruptcy, and a dividend set apart corresponding thereto; the dividend to be reserved until the death of B, when it becomes payable to A or his heirs; the interest in the meantime being reserved for the debtor, or in bankruptcy thrown into the common fund of division among the creditors. Or, again, suppose £1000 is payable to A upon the death of B, *in the event of A being then in life*,—here A is in like manner entitled to be secured, or in bankruptcy ranked for the principal sum, and the dividend becomes payable to him at the death of B, in the event of his survivorship; the interest in the meantime being reserved to the debtor, or thrown into the common fund: and in this case, if the provision should lapse by the predecease of the contingent creditor, [339] not only the interest, but the capital, of the reserved dividend becomes available to the debtor or the other creditors.

Such are the legal rules to be followed in actions and diligence for security of annuities, and which are still very frequently adopted with regard to the claims of life-annuitants, and other contingent creditors in bankruptcy. Indeed, until of late years, these rules were almost universally followed in cases of bankruptcy, particularly in processes of ranking and sale of heritable estates. But since the doctrine of the valuation of annuities and

ceeds, see the case of *M'Donald and Elder v M'Leod*, 15 Jan. 1811, 16 Fac. Coll. 116.

¹ [See 19 and 20 Vict. c. 79, sec. 54.]

² See 54 Geo. III. c. 137, sec. 48.

reversions, elucidated by Dr. Price and other writers on that subject, has come to be understood and acted upon in this country, practice has introduced another and more convenient mode of ranking annuities and contingent debts. By the former practice, the final division of the bankrupt estate was necessarily delayed till the termination of the annuity, or the emergence of the given contingency; or else, to avoid the delay thereby occasioned, the trustee was obliged to sell the reversion of the reserved dividend, perhaps at a great loss to the estate. To get free from these inconveniences, the method now adopted is, instead of ranking the creditor for a capital corresponding to the annuity, or for the contingent capital, as has been explained, to put a value upon the annuity, or contingent debt, as at the period of division, taking into account the interest of money and the chances of life, or other circumstances, involved in the nature of the question: the creditor is ranked for this value in full of his claim, and is entitled to draw the dividend corresponding to it. In this way the affairs of the bankruptcy may be instantly brought to a close. On this principle, the Legislature has introduced into the Bankrupt Statute a clause,¹ authorizing the trustee, on behalf of the creditors at large, with consent of a majority of the commissioners, to compound and transact, either by submission or private compromise, all doubtful claims, etc., 'and all contingent debts and annuities due to or by the estate, the value of which it may be expedient to settle in that manner, in order that a final distribution may sooner take place.'² It is to be observed here, that there is no power given to the trustee and commissioners (as in England under Sir Samuel Romilly's Act) absolutely to put a value on the annuities and contingent claims without the consent of the contingent creditors; neither is there any right vested in the creditor, according to which he can insist on his being ranked for the value of the annuity, and draw the whole dividend. The legal rules of ranking are left as before, and the valuation of the claim is a mere matter of arrangement between the contingent creditor on the one hand, and the trustee for the creditors at large on the other. If they cannot agree upon the value, or if either of them decline to enter into a compromise upon the subject, the legal rules must take effect.

The expediency of this mode of ranking, however, is so obvious, as to make it desirable that some tables were generally adopted as furnishing a practical rule, according to which annuities and contingent claims might be valued in all cases where no particular circumstances occur to render a deviation from the ordinary standard necessary.³ In the deliberations which many years ago took place in the committees for improving the bankrupt law, that matter was much discussed; and it was proposed that a settled rule should be adopted for valuing all annuities, according to the tables annexed to the Act of the 36 Geo. III. c. 52.⁴ But this was afterwards abandoned, and the value left to be fixed without the aid of any special provision. And it must be acknowledged to be very difficult to find any general [340] rule which can uniformly be followed, according to which the value of a life annuity

¹ Stat. 54 Geo. III. c. 137, sec. 55.

² [In valuing an annuity, it is laid down that regard is to be had to the price paid for it, 'deducting therefrom such diminution of value as shall have been caused by the lapse of time.' In England, before the 6 Geo. IV. c. 16, Lord Eldon (*Whitehead*, 2 Rose 353) laid down the rule that, in the absence of special circumstances, the basis of the original sum paid should be taken, qualified by the time of the engagement. And it was held that the state of health was a material circumstance to be considered (*Thistlewood*, 1 Rose 290), though the state of the money market was not so held (*Webb*, 2 Glen and Jam. 29). But the rule adopted in the above section having been introduced in the English Act of 6 Geo. IV. c. 16, sec. 54, the state of health was, under that Act, held not now to enter into the valuation (*Fisher*, 2 Glen and Jam. 102). *Bell, Obs. on Recent Statutes*, p. 149.]

³ It might be of advantage to adopt some universal standard of this kind, without regard to particular circumstances, as a mode of valuing the claims of contingent creditors, in so far as they are entitled to a vote in the affairs of the bankruptcy.

⁴ The proposed clause ran thus: 'That in the case of life annuities payable by the bankrupt, or charged upon his estate, the trustee shall, instead of the procedure directed for ascertaining the value of contingent claims, be bound, in fixing the sum for which the holders of such annuities shall be ranked or allowed to vote, to adopt the rules of valuation laid down in the tables of the value of annuities on single or joint lives, annexed to an Act passed in the 36th year of his present Majesty, c. 52, entitled, "An Act for repealing certain duties on legacies and shares of personal estate, and granting other duties in certain cases."'

is to be settled. It is a question depending on very nice and difficult data, and with regard to which the methods commonly adopted are almost as various as the persons by whom it is to be ascertained.¹

But if the parties cannot come to an agreement upon the subject, they must [341] resort to the legal mode of ranking. That mode has already been explained; but it has been held by many persons, whose opinions are not to be treated lightly, that the above is not the only legal mode of ranking an annuity. It has been said, that as the sum for which each creditor is entitled to be ranked on the bankrupt estate of his debtor, is the sum which that debtor, if solvent, would be obliged to pay for a discharge; so an annuity creditor, whose debtor is bankrupt, is not to be regarded as spontaneously going to *market* to sell his

¹ The difficulties which I found in this matter, on the occasion just alluded to, and the doubts which so often occur in practice respecting questions of this sort, made me desirous to have the aid of one of those profound and able accountants to whom such matters are generally referred in the Court of Session. The opinion which I received was, that if the value of an annuity were referred to him, he would ascertain it according to the rate corresponding to the given age as appearing on the tables calculated by Dr. Price (Price's Observations, vol. ii. 6th ed. Table 19, for Single Lives, and Table 20, etc. for Joint Lives, at five per cent.) of the value of life annuities, deduced from the bills of mortality at Northampton, and assuming interest at five per cent., without regard to any other circumstance whatever, either as to the state of health or to the price originally paid. And this opinion proceeded on these grounds: 1. As to the rate of interest; because five per cent. is the legal rate which regulates the claims of all the other creditors. 2. As to the chances of life; because the Northampton table is the rule by which all the life insurance societies regulate transactions of this nature, and is generally adopted also in questions between private individuals. And, 3. As to extraneous circumstances; if the given life is in good health, then the result must be considered as the fair value of the annuity. If the person is in bad health, the value of the annuity is no doubt less; but there is no rule by which the difference can be calculated. On the English case of *Thistlewood*, 1 Rose's Cases 290, he observed 'that the value put by Mr. Morgan upon the annuity which formed the subject of the case alluded to, had been calculated according to the table above mentioned; but it was a great mistake in the parties in that case to call it the *market price*, if by that term they meant the price which such annuity would have brought in the market if exposed to sale. In all probability, it would not have brought near so much, because nobody who sinks his capital to be drawn back upon a contingency would be content with merely a return of *five per cent.*, independent of the chances of life, which are equally for and against him. It was incorrect to call it the *market price*. It should rather be called the *standard value*, or the *fair or equitable value*—the value as it should be settled between two parties who are *in pari casu*, and are to settle upon fair and equitable terms; and upon that principle I think the decision was right.

'A life annuity, considered as a subject of sale, is susceptible of two different market prices, according as it is the purchaser or seller of the annuity that goes to market. If a man possessed of an annuity on his own life, or any other life, *wishes to sell it*, he must be content to accept of a great

deal less than the full value; and the quantum of price at different periods depends upon the state of the money market. In general, a man who lays out his money on the purchase of annuities demands, in the first place, as much as will insure the capital sum to be paid at the expiration of the given life; and, in the next place, an annual sum higher than the legal rate, sometimes eight, ten, or twelve per cent.: at present the market rate is considered seven, or even somewhat less. It is the difference between the legal rate of interest and the higher rate demanded that creates the difference between the market price and the fair value of the annuity. On the other hand, if a man *wishes to purchase* an annuity *on his own life*, and goes to the market, the money dealer will demand from him a great deal more than the fair value. The tables according to which the insurance societies in London regulate the annuities granted by them are calculated at *three per cent.* interest; that is to say, *the purchaser* of the annuity gets his money returned, making allowance for the chances of life, with interest only at *three per cent.*, while the person who is forced by circumstances to sell his annuity must be content to accept of such a price as will make a return to the money-dealer of *seven per cent.*, exclusive of casualties. Upon these principles, a person at the age of thirty-four *selling* an annuity to which he had right, would get about ten years' purchase, supposing the purchaser to be content with between seven and eight per cent. for his money; and a person *purchasing* an annuity on his life would, according to the three per cent. table, have to pay about sixteen years' purchase. These are the two market prices; and it will be observed they depend upon the circumstances and necessities of the party going to market. But in the case of bankruptcy, where the conversion of the annuity into a capital sum is a matter of arrangement *forced upon both parties* by circumstances not within their control, it would not be fair to take either of these values as the criterion. The fair value ought to be estimated according to the *five per cent.* table, the legal rate of interest which regulates all transactions in money not arising *ex pacto*; and according to this table, it will be found that an annuity on a life of thirty-four is worth 12.623 years' purchase, so that an annuity of £800 is worth a trifle more than £10,000. This is the rule which, I believe, is for the most part adopted in ranking annuities, as being the most convenient for all parties. There may be cases, however, where the annuitant would prefer to have a diminished annuity during his life, and in that case I apprehend he is entitled to have a capital corresponding to the annuity ranked; and if so, the trustee may either delay the final division until the death of the annuitant, or sell and divide the reversion immediately.'

annuity, which he has no desire to do ; but rather as one who is called on to sell the annuity to the *debtor*, and who may seem to be dealt with differently from the other creditors, if he is forced to rank for a sum less than that at which he could be forced to part with his annuity, if the debtor had stipulated a power to redeem it. But in this opinion there seem to be two misconceptions.

(1.) It seems not only to be contradicted by the clause already referred to in the Bankrupt Act, but to be contrary to the annuitant's right at law, which entitles him to claim only for the interest of the equivalent capital during his life ; while the trustee is not entitled to force him, instead of this, to accept of a dividend corresponding to any supposed value of the annuity. If any changes on the common law upon this point were to be made, it would seem most expedient, as well as just, that it should be left to the trustee to put a value upon the contingent claim, and with a power to the creditor to object, and to have the value ascertained, as in a question of damages. Were any attempt made to fix a standard value, without having regard to the price paid, or other circumstances, it might give rise to great frauds, and be the means of creating undue preferences. The raising of money by the sale of annuities is now becoming more common ; and if there were no power reserved to the trustee and commissioners to inquire into the circumstances attending the creation of annuities of this description, but if, on the contrary, they were bound to value them according to a fixed standard, the bankrupt might, by giving an annuity equal in value to two or three times the amount of the money received for it, create an undue advantage in favour of the person who advanced the money upon such a transaction, to the prejudice of his other creditors. Thus, suppose that a person should a year or two before his failure raise £10,000 upon the sale of an annuity on his own life, and instead of an annuity of £1000, the fair equivalent at the time, should give an annuity of £2000 ; would it be fair or proper to rank this creditor a year or two afterwards for £20,000 (or say £19,000, making allowance for the difference of the age), as the standard value at the time of bankruptcy, without making any inquiry into the state of the health of the granter at the time of sale, or other circumstances which might have induced him to grant him so large an annuity in proportion to the price paid ? In this way an annuity creditor might receive a great deal more than 20s. a pound of the money advanced by him. It is no doubt true that every person who advances money for the purchase of an annuity runs a risk of loss, and it is this which takes it out of the case of an usurious contract ; but still the advantage stipulated may be so disproportionate to the risk, as to render it unadvisable to remove any checks that might be imposed upon this sort of contract, by allowing the circumstances of each case to be considered.

(2.) As to the right of the annuity creditor to have the value of the annuity ascertained at such a sum as would be required to purchase him an equal annuity in the market, there seems to be room for a distinction of cases where the annuity is on the life of the granter, [342] or on that of the grantee, or another. In all cases where the annuity is upon the life of the *grantee*, and is *properly alimentary*, there is a peculiar hardship in forcing the annuitant to accept of an equivalent ; and it seems to be highly equitable to consider him as entitled to be ranked for such a sum as would purchase the annuity in the market. But where the annuity is upon the life of *the granter*, or any other life than that of the grantee, and the transaction may be regarded rather as *an investment of money* than as alimentary provision, it would seem that the conversion should be according to the medium standard, which (supposing that there are no particular circumstances in the case, and that the sale of the annuity was made *bona fide*) is the value of an annuity calculated according to the ordinary chance of life, assuming interest at five per cent. This is neither the market price for purchasers nor for sellers of annuities, but lies somewhere between them. If an annuity were purchased for the annuitant from any of the offices in London, it would be calculated by the *three per cent.* table, and consequently cost a great deal more than the standard value. If it would not be equitable, on the one hand, to value the annuity at the price which it

would sell for *if offered for sale*, which would be less than the standard value; neither, on the other hand, would it be equitable, *in a competition with creditors*, to value it at the price that would be required to *purchase an equal annuity* from any of the offices who make it part of their business to grant annuities, and which would require more than the standard value. The creditors are all in the same unfortunate situation, and each should suffer a proportional defalcation of his debt. The debt due to the annuitant is a certain number of annual payments equal to the number of years between the age of the annuitant and the ultimate period of human life, each payment depending upon the annuitant surviving the terms at which that payment would become due; and the present value of the whole annuity is the aggregate amount of these payments severally multiplied by the chances of arriving at the respective terms, and discounting compound interest at five per cent. It is according to this rule that the tables of the values of annuities have been calculated, and so these five per cent. tables seem justly to form the general standard or criterion for valuing annuities of the description last mentioned in cases of bankruptcy.¹

In England the same difficulties have been felt, and much discussion and inquiry has taken place, with a view to settle some certain rule on the subject.² In the last decision quoted below, Lord Chancellor Eldon made very extensive inquiries concerning the [343] principles and methods of valuing such annuities. And he came to this conclusion: 'Upon the best consideration which I have been able to give to this question, which is of considerable importance, the conclusion at which I have arrived is, that as there are not any peculiar circumstances in this case to affect the price, as it is altered by the effluxion of time, and only by the effluxion of time, I ought to presume that the parties acted fairly at the time when the contract was made, and that the value of the annuity is the original sum given, with the variation occasioned by the lapse of time since the grant.' And this rule has been adopted by the Legislature in the new Bankrupt Act for England; the provision of the 54th section being, 'That any annuity creditor of any bankrupt, by whatever assurance the same be secured, and whether there were or not any arrears of such annuity due at the bankruptcy, shall be entitled to prove for the value of such annuity; which value the commissioners shall ascertain, regard being had to the original price given for the said annuity, deducting therefrom such diminution in the value thereof as shall have been caused by the lapse of time since the grant thereof to the date of the commission.'

REDEEMABLE BOND OF ANNUITY.—Redeemable annuities have of late years become of unusual importance. The great demand for money, and the low rate of interest allowed by

¹ The gentleman to whom I formerly alluded put this case by way of illustrating the point:—Suppose that a person possessed of an office for life, in want of money, goes to the Royal Exchange Insurance Office to raise a sum of money upon an annuity of £1000 on his own life. Suppose him to be thirty years of age, they will probably give him no more than ten years' purchase, that is, £10,000, which, taking the chances of life upon an average, would make them a return of seven per cent. After two years the seller of the annuity fails, and his life interest and all his property is brought to sale, and the office claims as creditor for the annuity. Now, let it be supposed that the creditors were entitled to rank for the maximum price, that is, such as it would require to purchase him an annuity from another office, and the trustee goes to the Westminster Office, and inquires what would they sell such an annuity for? They would look their three per cent. table, and tell him they could not give it for less than sixteen years' purchase. Would it be equitable in this case to rank the creditor for £16,000, that is, £6000 more than had been paid for the annuity two years before? If the life was insurable at the time of sale, it is evident that by the lapse of two

years it must be of less value than before, instead of greater, for the values of life interests are constantly diminishing by the lapse of years. It may be said, indeed, that even taking the value according to what may be considered as the standard, viz. the five per cent. table, the sum to be ranked as the debt will amount in the case supposed to considerably more than the original price of the annuity. This is true; it will amount to near £13,000, that is, about thirteen years' purchase. Still, however, this is no objection to the adopting of that standard as the value, because, upon the principles before stated, in making the valuation you are not to look to the price that was paid, unless there were some *mala fides* in the transaction; neither are you to look to the price that would be required to purchase the annuity, nor to the price at which it would sell, but to the convertible value: that is, you are to convert it into a principal sum by assuming the ordinary chances of life, and the *legal* rate of interest, as the basis of the calculation.

² *Ex parte Thistlewood*, 19 Ves. 236, 1 Rose 298; *ex parte Whitaker*, 1 Rose 301; *ex parte Whitehead*, 1 Merivale 10, 127.

law, compared with the profits to be made in the mercantile employment of capital, led to loans on redeemable annuity.

This transaction is a complicated one: ostensibly a purchase of a redeemable annuity on a certain life, with security for payment of it; really a contract by which the lender or his heir is secured in a high interest, and in a return of the capital on the expiration of the life. The bond contains—1. An acknowledgment of the receipt of the money as the price of an annuity. 2. An obligation to pay to the person advancing such purchase-money a certain annuity during the life selected, and the not-redemption by the granter. 3. In security of this annuity, caution is given; or more commonly, lands are conveyed, with procuratory and precept for infefting the lender, under a declaration, on the one hand, that the right shall be redeemable at the option of the borrower only, and, on the other, that the conveyance and obligation shall become void and ineffectual on the termination of the selected life. 4. The annuity is made large enough to cover both the high interest required by the lender, and a premium of insurance of the selected life, by which the lender may, if he please, secure himself and his heirs absolutely, on the death, in payment of the sum advanced. This is a most oppressive sort of security; but there do not appear to be grounds in law for refusing effect to it. The objection naturally occurring against such a transaction lies on the statute of usury; and the words of the statute of Queen Anne¹ are very broad and comprehensive, extending to all persons who shall take or accept, 'by corrupt bargain, loan, exchange, chevizance, etc., or by any deceitful way or means, or by any cover, engine, or deceitful contrivance, for the forbearance or giving day of payment for one whole year, of money, etc. above the sum of £5, for the forbearance of £100 for a year,' etc. But there are no words directly applying to a contract of this special nature. It is an annuity during the selected life, redeemable by the borrower; and the danger of the death without redemption, relieves from the legal imputation of usury.² This is a risk, indeed, against which provision may be made by insurance; but that insurance being an act of the creditor alone, and not stipulated to be done by the debtor, it is collateral to the contract, as the insurance of bottomry would be. The policy is exclusively the creditor's; and where he chooses to sell that policy, the debtor is not, in redeeming the annuity, entitled to credit for the price [344] received for it.³

In all these annuity transactions, unless the parties look a great deal further, and provide more cautiously than is commonly done, the creditor may in bankruptcy be very much disappointed. He can rank on his security only for the annuity proportioned to the life; and supposing that life to be the borrower's, and the rate to have been calculated so as to cover the price at whatever time the insolvency may happen, the debtor may fall into disease, which may make his life not worth two years' purchase, and yet he may outlive his bankruptcy many years, whereby the creditor must suffer the loss of his annuity and advance of his premium for a considerable time. It may be questioned in such cases, What deduction is in equity to be made in admitting the claim for the term that has passed since the original purchase? it being unreasonable to allow, after the elapse of years, the full original value of the annuity as settled between the parties.⁴

¹ 12 Anne, stat. 2, c. 16. See above, p. 327.

² In *Glen v Pearson*, 6 March 1817, such a transaction, though exceedingly harsh and oppressive, held not to be usurious, 19 Fac. Coll. 317. [The usury laws being now repealed, the considerations referred to in the text are no longer of importance. Redeemable annuities, secured by life policies, are an ordinary mode of raising money for behoof of heirs of entail. The interest and premiums are secured on the rents, and the capital is secured by the assignation of policies of assurance on the life of the debtor.]

³ *Lyon v M'Klew*, 1821, 1 S. 47. A redeemable bond of

annuity of £321 was granted for £2200, no mention being made of insurance in the deed of annuity. The creditor insured the granter's life, and afterwards sold the policy to the insurance office. In redeeming the annuity, the debtor insisted on deduction or allowance of the price so obtained. But he was found not entitled to it.

⁴ See the case of *Le Compt*, 1 Atk. 251, where in the year 1720 the claimant had for £300 bought an annuity of £30; and in making claim in 1738 for the value of the annuity against a bankrupt, the whole £300 was claimed. Lord Hardwicke referred it to the commissioners to settle the

As to the claim to be made on the insolvency of the granter of a redeemable annuity, the question is, Whether the *redemption money* is to be taken as the measure of the *value of the annuity*? It seems to be clear that the redemption money ought not to be taken as the criterion. It may be either more or less than the convertible or standard value. If it is *less* than the value, the annuity creditor seems to be entitled to claim for the full value of his debt, while the trustee for the creditors at large is not entitled to take the benefit of a condition in the constitution of the debt, unless he implement that condition by making full payment of the redemption money. He must either therefore rank the annuity creditor in such a manner as to allow him to draw a rateable *annual* dividend, or rank him for the full value of his debt, or pay him the full amount of the redemption money. On the other hand, if the redemption money is *greater* than the standard value, the trustee seems to be entitled to deny to the annuity creditor a right to rank for more than the full value of his debt. The clause of redemption was optional to the borrower, and therefore can never operate in favour of the lender, unless the borrower, or those coming in his right, choose to act upon it.¹

When the annuity is irredeemable, the creditor is not, on bankruptcy, bound to take the original purchase-money. He may exercise the option of remaining a creditor for his annuity, with such security as he may hold over the debtor's land.²

SECTION III.

OF JOINT AND SEVERAL OBLIGATIONS.

Where more than one are joined in the obligation, it is important to mark the [345] terms of the engagement and the particular species of the contract, as materially affecting the nature of the obligation to the creditor, and the reciprocal responsibilities of the co-obligants to each other.

I. EXPRESS TERMS OF THE BOND.—The bond is differently expressed where the intention is to bind each party for the whole, and where it is designed to make the obligation only *pro rata*. The general rule is, that an obligation *in solidum* is not to be presumed;³ and that in order to produce that effect, the bond must bear an engagement beyond the rateable proportion of the debt.

1. Where co-obligants are bound 'jointly and severally,' they are each liable for the whole, and may either be called upon to pay jointly, or any one may be singled out for the demand, leaving him to find his own relief.⁴

2. Where the co-obligants are bound each severally, 'as co-principal and full debtor,' each is bound for the whole, although in such cases it has sometimes been argued that the omission of the words conjunctly and severally imports a restriction of the obligation.⁵

3. The term 'jointly or conjunctly' may in strict propriety of language import an obligation undertaken, not separately, but each to perform his part—the converse of an

value of the life, holding it unreasonable that the claimant should claim the full purchase-money after enjoying the annuity for eighteen years.

¹ In a late publication on the subject of annuities, reversions, etc., will be found rules for solving all varieties of questions relative to annuities, contingent and reversionary interests: 'The Doctrine of Life Annuities and Assurances analytically investigated and practically explained, by Francis Baily,' 2 vols. 8vo.

² *Hamilton v Roger*, 1823, 2 S. 325.

³ [This is the general rule of the civil law, of the English

and French law, and of our law (Dig. De Duob. Reis Constipulandis; Stair i. 17. 20; *Fergusson v Link*, 1 Br. Sup. 623; *Robertson v Forbes*, M. 14674; 1 *Shepherd's Touchstone*, 375; Poth. Oblig. No. 265).]

⁴ Ersk. iii. 3. 74. [See *Erskine v Cormack*, 4 D. 1478.]

⁵ *Cloverhill v Ladylands*, 1631, M. 14623. Here the parties were not bound conjunctly and severally, but as full debtors, to pay the sum to the creditor.

Dunbar v E. of Dundee, 1665, M. 3584; *Cleghorn v Yorston*, 1707, M. 14624.

obligation by each severally; but the construction put on it in law has been different: it is held to be an obligation in which each is bound for the whole.¹

4. Where parties are bound simply, the obligation is held to be only *pro rata*; each being liable for his own share, not *in solidum* for the whole.² But where the bond bears the money to be for the use of one of the parties, the rest are held to be cautioners, and liable for the whole.³

5. Where each is bound 'for his own share,' it is by force of the express words an obligation *pro rata* only. So, where each subscribes a specific sum, as underwriters in a policy of insurance, or co-obligants with a public officer, trustee, etc.

II. IMPLIED OBLIGATION.—To the general rule, and even to the effect of particular expressions, there are exceptions arising from the special nature of the transaction, or connection of the parties, or from usage. And,

1. Where the subject of the obligation is indivisible, the parties are bound *in solidum*.⁴ [346] But where the principal obligation becomes imprestable, and resolves into pecuniary damages, the expression of the obligation will give the rule.⁵

¹ *M'Millan v Sloan*, 1751, Elch. *voce Sol. and Pro rata*, No. 1, notes, 431. This was an engagement for a bargain of sheep, M'Millan engaging to become bound 'conjunctly.' The decision proceeded partly on the nature of the bargain, as *pro indiviso*, but also 'unanimously we found him liable *in solidum*, which is the common acceptance among the commons of the word conjunctly.' See also *M'Kellar v Campbell*, 7 June 1811, 16 Fac. Coll. 272. *Commercial Bank of Scotland v Sprott*, 3 D. 939.

[The cases of *M'Millan* and *M'Kellar* referred to do not support the construction contended for. *M'Millan's* case was obviously one of guarantee or cautionry, and that determined the meaning in this special case; the nature of guarantee being repugnant to the idea that the cautioner should be liable for a share, and the principal debtor for a share. *M'Kellar's* case was that of a bill accepted by three persons 'conjunctly;' and the Court repelled the attempt to restrict the liability of each acceptor to his own *pro rata* share as contrary to the nature of a bill. The legal construction of 'conjunctly,' as meaning a *pro rata* liability, is fixed by *Campbell v Farquhar*, 1724, M. 14626. So the equivalent terms 'each along with the other' (*Alexander v Scott*, 28 Nov. 1827, F. C.). The word has no technical signification importing joint or *pro rata* liability as distinguished from several liability, or liability *in solidum*; but just means 'as co-obligants,' leaving the nature of the co-obligation to be determined *aliunde*. Where two parties bind themselves as 'full debtors,' that is of course held to override the ordinary presumption for *pro rata* liability. See *Cloverhill and Cleghorn's* cases. But it seems that if several cautioners have bound themselves in one bond as cautioners and co-principals, the use of the word 'co-principals' has no effect in making each liable for the whole debt to the creditor, but simply operates to exclude the obligants from pleading that their obligation is only accessory to that of the principal, and renounces discussion (*Grant v Strachan*, 1721, M. 14633). Explanatory terms in other clauses of the deed have been admitted to supply the omission of the technical words 'severally' or 'conjunctly and severally' in the clause of obligation, and co-obligants shall be taken as liable each *in solidum* if such be the fair import of the words of the deed taken in all its parts. See, e.g., *Boyd v Peter & Hamilton*, 1649, 1 Br. Sup.

403; *Wallace v Corsan*, 1671, 1 Br. Sup. 635, where a clause of *pro rata* relief implied that towards the creditor the obligation of each was *in solidum*. The addition of qualifying words may destroy the effect of the usual technical phrases implying solidarity of obligation, and may let in, as in a case of ambiguity, the legal presumption for *pro rata* liability to rule the construction of the deed. See *Farquhar*, 1638, M. 2282, where the phrases 'conjunctly and severally,' 'ilk ane for his own part,' which are directly contradictory of each other, were held to import an obligation *pro rata* only.]

² *Ersk. iii.* 3. 74. It is otherwise in England, on the ground that, by uniting, the parties show their intention to bind for the whole.

³ *Grant v Strachan*, 1721, M. 14633.

⁴ *Grant v Sutherland*, 1672, M. 14631. Here the action was grounded on a contract of carriage of goods, which, though not absolutely indivisible, is so by the usage of trade.

⁵ *Urie v Cheyne*, 1630, M. 14626.

[The mere circumstance of an indivisible *factum*, owed *in solidum* by each of several co-debtors, resolving, on failure to perform, into a claim for pecuniary damages, does not alter the obligation of each from an obligation *in solidum* into an obligation *pro rata*; for that would be to allow the debtor's own failure to operate to his own benefit, and to the prejudice of the creditor. The creditor has right to call on any to do the whole, on penalty of paying the whole damage resulting from his failure to do it. See *Darlington v Gray*, 1836, 15 S. 197: Obligation by two that a third should restore hired furniture, or, on failure to return it, that damage was to be held assessed at £60. The Court held the leading obligation, as *factum præstandum*, indivisible and imprestable by parts, and that each, being bound for that fact *in solidum*, was liable for the £60 *in solidum* as the assessed damages coming in place of his obligation. In *Grant v Strachan*, 1721, M. 14633, on a bond of indemnity by two persons to a cautioner for a debtor, a question arose—there being no words expressing the nature of their liability—as to whether each was bound for the half or the whole money. The Court held each bound for the whole sum; for, although payment of money is *ex sua natura* divisible, yet there was added to it an obligation to deliver up the cautioner's bond held by the creditor, or a discharge thereof

2. Where the obligants are partners, or joint adventurers, or even joint purchasers, the obligation is held to be *in solidum*.¹

3. Where, in an obligation *ex mandato*, the parties have a joint interest in the employment which forms the object of the contract,² unless where there is an express limitation of responsibility, the parties are bound *in solidum*.³

4. By the usage of trade, bills and promissory notes are held to infer a joint and several obligation.⁴

III. EFFECT AMONG THE CO-OBLIGANTS OF JOINT OR SEVERAL OBLIGATIONS.⁵—The reci-

by the creditor—that, the delivery of either of these deeds being an indivisible *factum præstandum*, and each bound to do it, each must be held bound to pay the debt too. The old cases are not always satisfactory. Where a *factum* resolves into payment, the precise nature of the obligation must be considered as to whether the *factum* and the payment stand to each other as leading obligation and penalty, or whether they are both from the first the subjects of a proper alternative obligation. In *Darlington v Gray* the £60 was of the nature of penalty; it was not meant that the debtor should have choice of returning or paying: the return of the furniture was the leading, payment the secondary and subsidiary obligation. And therefore the Court correctly held the assessed damage as coming *in vicem* of the furniture due by each *in solidum*. But if the obligations had been alternative from the first, each would have fallen to be treated, on the election being determined, as if it had been an independent and solitary obligation, and the joint or several liability of the obligants fixed according to its own nature, irrespective of the nature of the other alternative. If the election, whether made by debtor or creditor, resulted in making the obligation an obligation to pay money in the divisible obligation, the debtors would have been liable each *pro parte sua*, in that, if in an obligation to perform the indivisible prestation, each would have been liable for it *in solidum*. The penal obligation is not a properly alternative obligation with the leading one, but an accessory obligation—a *surrogatum*—which is forced on the creditor; and the debtor's obligation, which was *in solidum* as to the leading prestation, should not become less as to the surrogate. In a proper alternative contract, the creditor bargains from the first with the chance before him of either a divisible or an indivisible prestation ultimately becoming due by election. See, on the nature of proper alternative obligations, Poth. Tr. des Obligations, No. 245 et seq. According to this principle, *Urie v Cheyne*, M. 14626—where two persons were bound for return of a powder mill, or on failure to pay 500 merks, and where, on failure to return it, the Court held each liable only for one-half the sum, on the ground that the primary obligation had resolved into one for pecuniary payment—was wrongly decided. If the debtors had had the option from the first of paying, or the creditor of demanding money in place of the mill, this would have been right, as in that case the money obligation could not have been regarded as accessory to, and partaking of, the nature of the other obligation.]

¹ *Mushet v Harvey*, 1710, M. 14636; Ersk. iii. 3. 74.

[Pothier tells us (Obligations, No. 266) that the same doctrine as the Court held in this case was laid down by the Parliament of Toulouse, and had become a general maxim in French law, viz. that two merchants who buy together a lot of goods, although there is no partnership between them, are

considered as being in partnership as regards the solidarity of their obligations for that purchase, though solidarity is not expressed. So Pardessus, Cours de Droit Commercial, sec. 182, says that the nature of commercial undertakings leads to a presumption for solidarity in the absence of express stipulation. Those who together contract a commercial obligation, but without employing expressions which, according to the rules of common law, would be construed as a promise of solidarity, are presumed to have made 'une association en participation.' But we must distinguish *collective* from *successive* engagements of this kind. The several subscriptions of underwriters on one policy are successive, and not collectively adhibited. See Stair i. 12. 13 and 14, on the joint and several liability of co-mandatories; and i. 13. 10, on that of co-depositaries of goods. Where liability arises from delinquency—the debt due being the reparation owed for an injury which is the joint act of two or more persons—they are all considered by the law liable *in solidum*, and have no presumption of *pro rata* liability in their favour, being undeserving of the favourable construction which law puts on the debtor's part of a contract obligation, and which is the foundation on which the presumption for *pro rata* liability in the interpretation of contracts rests. One delinquent cannot plead that he was not so bad as the rest. If participant in the injury at all, he is liable for the whole. It is all *unum negotium*; and what the judge looks to is mainly the convenience of the injured party, that he may recover his damages as speedily and certainly, and with as little trouble and expense, as may be; *Smith v O'Reilly*, Hume 605; *Western Bank v Douglas*, 1860, 22 D. 448.]

² *Anderson v Sinclair*, 1726, M. 14706; *Chalmers v Ogilvy*, 1730, M. 14706; *French v E. of Galloway*, 1730, M. 14706.

Walker v Brown, 1803, M. App. No. 1, *Sol. and Pro rata*, where a meeting of distillers employed an agent.

Wilson v Sir W. Honeyman, 10 July 1813, 17 Fac. Coll. 437. One of the parties in a division of commonty held liable *in solidum* for the expense of a survey.

Wilson v Mags. of Dunfermline, 1822, 1 S. 417, N. E. 389.

Ellis v Connel, 1822, 1 S. 528, N. E. 486.

³ *Murdoch v Hunter*, 15 Feb. 1815, 18 Fac. Coll. 216. Here the obligation was to pay expenses according to the amount of the respective debts. Held liable only *pro rata*, not *in solidum*.

⁴ *M'Morland v Maxwell*, 1675, M. 14673. A bill drawn abroad, without the words jointly and severally, settled to be joint and several on a report of mercantile usage. Confirmed, *Rutherford v Donaldson*, 1707, M. 14674.

M'Kellar v Campbell, 7 June 1811, 16 Fac. Coll. 272.

⁵ [On the subject of the solidarity of obligations, see Pothier, Obligations, Nos. 261–282. For the English doctrines in regard to joint and several obligations, see Leake,

procal obligations of co-obligants raise questions of relief between the co-obligants. Relief is the indemnification that a co-obligant paying more than his share is entitled to demand from those who are bound along with him. The rules are these:—

1. Where each is bound only *pro rata*, and pays his own share and no more, he has no claim of relief against the other obligants. But if he should pay more than his own share, he is entitled to an assignation from the creditor, under which he may recover what he has paid beyond his own share.

2. A person bound jointly may insist on all the co-obligants being called; and if any be insolvent, the solvent obligants divide the responsibility.

3. If the co-obligants be bound jointly and severally, any one may be taken for the whole debt. But if truly a cautioner, such person is entitled to an assignation to recover the whole from the principal, and their proportions from the co-obligants.¹

SECTION IV.

OF CAUTIONARY OBLIGATIONS.

Cautionary obligations are granted by way of security for the fulfilment or performance of primary or principal engagements. They are classed as accessory obligations. They correspond with Suretyship in English jurisprudence; and the principles which regulate [347] these obligations are nearly the same in both countries. By a cautionary obligation one becomes bound that the principal debtor shall pay to the creditor the debt which, by the principal obligation, he engages to pay; or that he shall deliver or perform what, by that principal obligation, he has undertaken.²

SUBSECTION I.—OF CAUTIONARY ENGAGEMENTS, OR SURETYSHIP IN GENERAL.

A cautionary obligation may either be constituted along with the principal obligation, and in the same bond or contract; or separately; or subsequently; and the essence of the engagement being that the principal debtor shall perform his undertaking, two consequences arise: 1. The cautioner is entitled to insist that the creditor shall do his best to compel performance on the part of the principal debtor; and, 2. When the cautioner is forced to answer for the principal, he shall have his remedy against the principal debtor. The former is called the RIGHT of DISCUSSION;³ the latter, the RIGHT of RELIEF.⁴ 3. Another right

Contracts, pp. 216–221, and Parsons' Contr. vol. i. 11–38, vol. iii. 79–86.]

¹ *Ledingham v M'Kenzie*, 5 June 1824, 3 S. 113, N. E. 74.

² See below, Of Constitution of Guarantee, p. 387.

³ [The right of discussion is abolished by the Mercantile Law Amendment Act, 19 and 20 Vict. c. 60: 'Where any person shall, after the passing of this Act, become bound as cautioner for any principal debtor, it shall not be necessary for the creditor to whom such cautionary obligation shall be granted, before calling on the cautioner for payment of the debt to which such cautionary obligation refers, to discuss or do diligence against the principal debtor, as now required by law; but it shall be competent to such creditor to proceed against the principal debtor and the said cautioner, or against either of them, and to use all action or diligence against both or either of them, which is competent according to the law of Scotland: Provided always, that nothing herein contained shall prevent any cautioner from stipulating in the instrument of caution that the creditor shall be bound, before proceeding against

him, to discuss and do diligence against the principal debtor' (sec. 8). *Ewart v Latta*, 1865, 4 Macq. 983, 3 Macph. (H. L.) 36. This section, of course, does not alter the essentially conditional nature of a proper cautionary obligation, which is only exigible on the failure of the principal debtor to pay at maturity of his obligation. It does not render a cautionary obligation a debt in the first instance, irrespective of anything having occurred to state the principal debtor as *in mora* or default. If, for example, in a debt payable on demand, the cautioner could be proceeded against in the first instance without any demand on the principal first made and not obtempered, the person bound with the principal would not be a cautioner at all, but a *correus*. See *Wilson v Tait*, H. L., 1 Rob. 137; Poth. Oblig. sec. 270. *Correi* have not the right of discussion, but that does not make them cautioners. It is not peculiar to cautionry. See Poth. Oblig. Nos. 407–14; Nov. iv. sec. 1; Poth. Oblig. sec. 446.]

⁴ [On the cautioner's right of relief *ex mandato* or *negotio gesto* against the principal debtor, see Pothier, Oblig. Nos.

arises to cautioners where more than one is bound as surety, and the words of the bond do not exclude it, called the RIGHT OF DIVISION;¹ by which each is entitled to refuse to answer for more than his own share, the other cautioners being solvent.

In relation to these peculiarities of the doctrine of cautionary obligations, it may briefly be stated, 1. That cautioners, bound as such, are entitled to the benefit of discussion; 2. That if there be more than one, they have also the benefit of division; 3. That they have a right of relief against him for whom they engage, and against each other, so far as they have paid more than their share;² and, 4. That where they are bound as full debtors, or conjunctly and severally, they renounce thereby, in favour of the creditor, the benefit of discussion and division; but retain, as against the principal debtor, and against each other, their right of total or of *pro rata* relief.

There is a species of cautionary obligation the nature and effect of which is not always sufficiently attended to. In accomplishing loans on heritable or other security, the lender frequently desires to have a collateral personal obligation for the regular payment of the interest; and not unfrequently the agent of the borrower, in reliance on the rents and produce of the estate being sufficient to secure himself against risk, undertakes 'to pay regularly, every half-yearly term, a certain sum of interest during the not-payment of the principal sum.' This looks like an obligation for the interest only; but if the subject of the security fail, it seems to result in an obligation for the principal sum, or an annuity redeemable by payment of that sum, and must be ruled by the same principles which regulate annuities.³

Questions on cautionary obligations may arise in several situations which require to be distinguished: as, 1. Where the principal debtor has failed; 2. Where the surety or cautioner has failed; 3. Where both have failed; and, 4. Where the principal debtor and one or more of the cautioners have failed, the others being solvent.

I. WHERE THE PRINCIPAL DEBTOR HAS FAILED, THE CAUTIONERS BEING SOLVENT.—1. If the creditor have already been admitted to rank on the funds of the bankrupt, the [348] cautioner is not also to be admitted. Not only would that be to sanction a double ranking of the same debt on the same estate, but it is manifest that whatever is drawn by the principal creditor from the principal debtor's estate must accrue to the benefit of the cautioner: for, had the cautioner paid the whole debt, and himself claimed upon the principal debtor's estate, he would just have drawn the same dividend which the principal creditor has drawn, and consequently would have suffered precisely the same loss which now falls on him.⁴

2. Where the surety pays the debt for the principal debtor, he becomes the creditor of the principal debtor, and is entitled to be ranked for the debt, either in his own name in consequence of an assignation, or in the original creditor's name.⁵

3. If the principal creditor have not proved his debt, the cautioner is entitled to prove as a contingent creditor, to the effect of having a dividend set apart for him, in case the creditor should, without entering a claim on the debtor's estate, call on the cautioner to pay the debt.

429–444; and on the *jus cedendarum actionum*, which is not peculiar to cautionry, see Poth. Oblig. secs. 280, 281, 519–523.]

¹ [See Poth. Oblig. Nos. 415–426.]

² [As to a cautioner's right of relief against his co-cautioners, see Poth. Obl. sec. 445; Stair i. 8. 8, 9.]

³ See above, p. 353. A case of this kind occurred in the ranking of Fairholm's creditors. On the removal of an arrestment which had been used by the trustee for Fairholm's creditors, an obligation was granted for payment of the interest of a sum of money until the principal should be paid. The fund for payment of the principal failed, and Fairholm's trustee claimed on the collateral obligants for the arrears of interest,

and for the principal, as equivalent to that part of the obligation which was not implemented. The Court of Session gave judgment to this effect. The case was afterwards appealed, and remitted on a specialty, and compromised.

⁴ It will be recollected, however, that the subject under discussion is only the claim of indemnification against the general fund. The cautioner may have *security* for his indemnification: 1. By heritable security; 2. By pledge, or other security on moveables; 3. By retention or compensation. In all of these cases he will be entitled to a total relief, so far as his security reaches.

⁵ See *Norman Lealy v Gray*, 1665, M. 2111; *Wood v Gordon*, 1695, M. 3355; *Erskine v Manderson*, 1780, M. 1386.

4. It is a consequence of the benefit of discussion, that if the creditor hold a security for the debt over the estate or effects of the principal debtor, directly or indirectly, by heritable bond, pledge, retention, or compensation, the cautioner has a *jus quæsitum*, or right to insist that the creditor shall apply the full benefit of that security towards extinction of his debt, and claim from him as cautioner only the balance; or that he shall at least, when he demands payment from the cautioner, assign the benefit of his security.¹ The creditor will not, however, be bound thus to apply his security exclusively; or perhaps at all; or to assign it, where the security is indefinite, and not appropriated to this particular engagement, and where the creditor has other debts due to him by the principal debtor, to which the security may be held to apply.

5. If there be more than one cautioner, bound jointly and severally, the creditor may demand the debt from any of them, on assigning his remedy against the principal and the other cautioners; or, after drawing from the principal debtor what he can, he may claim the balance from any of the cautioners so bound; or where the cautioners are not so bound, those who are solvent lose the benefit of division by the insolvency of the others.

6. Sometimes it happens that one of the cautioners has a security on the estate of the principal debtor for his own safety. And it may be questioned what shall be the effect of it on the one hand, as against the creditors of the principal debtor; and on the other, as against the favoured cautioner?

As to the creditors of the principal debtor, no exception can be taken by them against the operation of the security to the full extent. That security would undoubtedly be available to the favoured cautioner, if called upon to pay the whole debt.² Nor could he

¹ [This right, however, only accrues to a cautioner or co-obligant who makes payment in full; and payment of a dividend by a trustee in bankruptcy is not held to be full payment. *Ewart v Latta*, 1865, 4 Macq. 983, 3 Macph. (H. L.) 36.]

² [The general body of the principal debtor's creditors have clearly no right to take exception to the security, if given by him to the cautioner anterior to the time when his insolvency commenced. Nor will the particular creditor to whom the cautionary obligation is granted have any interest if the cautioner pays him in full. But if the cautioner as well as the principal debtor fails, and the cautioner's estate can pay only a dividend on the debt, a balance remaining still owing to the creditor, questions of difficulty may arise between that creditor and the trustee for the general creditors of the cautioner, as to the security held by the cautioner. Is the creditor entitled to take the security in payment of the balance still due to him, or to receive a preference therefor on the proceeds of the security over the cautioner's general creditors? Or shall he simply rank *pari passu* with the cautioner's general creditors on the cautioner's estate; and the trustee for the cautioner's creditors draw from the security, for the general behoof, relief of the dividends (including this particular creditor) payable to the former,—an arrangement which in theory suggests an infinite series of dividends (susceptible of algebraic summation) to ascertain the entire dividend due to him? A creditor is entitled in equity to the full benefit of all securities the principal debtor has given to his surety, as well as to the benefit of those given directly to the creditor himself by the principal debtor; and the rule extends not only to the case of proper sureties, but to that of any one standing in the relation of a surety, as, *e.g.*, an endorser of a bill—holding security from the acceptor—in a question with the unpaid holder. See *Maure v Harrison*, 1 Equity Cases

Abridg. 93; observations of Sir William Grant, M. R., in *Wright v Morley*, 11 Vesey 12; *Pitman on Principal and Surety*, p. 88; *in re Cramer*, 7 Upper Canada Law Journal 48. *Nicolson v Kinloch*, 1687, Harc. 59; M. Sup. 51. Suppose A draws on B, who accepts, and C holds the bill endorsed by A, and A holds a security against all debts due or to become due to him by or on account of B. A and B fail. C ranks on both estates, which together cannot pay C 20s. per pound. Does C rank as an unsecured creditor on A's estate, and A's trustee draw back out of the security for division among A's whole creditors, C included, what he pays C? And if there is a surplus of the security after this claim by A's trustee is satisfied, does C take it in preference to B's other creditors? Or is C entitled to a preference on the security over both A's creditors and B's? And if so, must C, in ranking on A's estate, value and deduct it 'as a security over a part of A's estate,' in the sense of the 65th and 66th sections of the Bankrupt Statute? It rather seems that C would be entitled to a preference to the extent of the security over A's and B's general creditors, ranking *pari passu* with them for the balance, at least if the security was held specially against this particular transaction. But what if it were a general security to A against all his transactions with B, and there were other endorsees in C's position, and perhaps a balance due by B to A for goods sold and not drawn for, or the bills for which were not endorsed away by A, but held by him? In this last case, would A and C and the other endorsees all rank *pari passu* on the security? Or would A's estate have a preference for the bills not endorsed away? Is the purpose of securing A's indemnity not paramount, so far as regards the bills still held by A, over any equity that C and the others, who took the other bills without special security, may have as against A's or B's general creditors?]

claim any right of relief against the co-cautioners while he held the funds or security of the principal. They would be entitled to defend themselves on the ground that, holding funds of the debtor sufficient to extinguish the debt, he cannot claim from them more than the balance.¹

As to the cautioner who alone has stipulated for security, it is more difficult to [349] determine whether he shall to his own prejudice be obliged to communicate the benefit of that security. A near relation, or confidential friend, may not think himself entitled to require security, while a stranger may be well justified in refusing to engage without it. And there seems to be no equity in obliging the latter to communicate the benefit of his precaution to one who would not himself have stipulated for it. At least, where such a difference has been openly made between cautioners, and with the knowledge of each other, it is probable that the Court would not communicate the security. But where, the cautioners being originally equal, one gets an advantage over the rest on the demand being likely to arise, or where the security to one is secret, the principle which rules the case is, that the co-cautioners are bound to act, or held to have acted, for the general benefit; so that what is given for the relief of one is to be communicated for the benefit of all.²

But an exception has been admitted to the rule now laid down, where the cautioners are bound, not in one and the same obligation, but each separately for his own particular part; and this either in separate bonds, or even in the same bond, each for a specific sum. In such cases, if one of the cautioners have stipulated a security, it has been held to be peculiar to himself.³ This question was not decided without some difference of opinion on

¹ *Fisher's Crs. v Campbell's Crs.*, 1778, M. 2134. Campbell, with several others, were cautioners for a cash account of £600 in Fisher's name. Campbell got from Fisher an heritable security in relief of his engagement, and was infest. Fisher failed; and the other cautioners having paid their shares into Campbell's hands, he paid the debt to the bank. Adjudications having been led of Fisher's estate, a competition arose in the ranking and sale between the cautioners who held no security and the adjudging creditors, Campbell being quite indifferent. The Court 'found that, after Campbell himself is secured, there remains a residuary security to his co-cautioners on his infestment.'

² *Campbell v Campbell*, 1775, M. 2132. Here, on a demand against a debtor and his cautioners, the former induced a friend to pay up the debt, and gave him heritable security in relief. One of the cautioners indemnified the stranger, and got an assignment to his security. The security not being sufficient to cover his whole advances, he claimed relief against a co-cautioner, who pleaded that they were *tanquam socii*, and that he was not bound to pay without a communication of the benefit of the security. The Court did not sanction the notion of a *society*, but considered the cautioner who paid up the debt as a *negotiorum gestor*, and held him bound to communicate the security, so far as related to the debt on which he and the defender were jointly bound.

Milligan v Glen, 1802, M. App. Cautioner, No. 2. Milligan and Glen were co-cautioners in a cash account to a bank to the extent of £300 for Muncie. Glen some years afterwards got a disposition of land in security of a sum which he had advanced, and also in relief of his obligation under the bank credit, and out of the price of this land he paid £150 as his share of the bond to the bank. Milligan being forced to pay the balance, brought an action against Glen for one-half in relief. The Court held him liable, on the ground that the payment from the debtor's funds was available to both the cautioners.

Nicol v Doig and Baxter, 16 June 1807, 1 Bell III. 199. Doig obtained from Baxter a conveyance to heritable property, in security of a cautionary obligation which he and Nicol had undertaken to the Bank of Scotland for a cash-credit to Baxter. Lord Newton held 'that Nicol and Doig, being jointly and severally bound as cautioners for Baxter in the said cautionary obligation, Doig was not entitled to apply the whole proceeds thereof for his own relief, but is obliged to communicate one-half of the same to Nicol, for relief *pro tanto* of his share of the said cautionary obligation.' To this judgment the Court adhered, by refusing a petition without answers.

³ *Lawrie v Stewart*, 1823, 2 S. 368, N. E. 327. Here three cautioners were bound in the same bond for a composition to be paid to the creditors of Menzies, but each for a specific sum—Lawrie binding for £500, Stewart for £300, and so on. Lawrie paid his £500; but coming to learn that Stewart and others had, by arrangements with Menzies, got securities against loss, he raised an action to compel a communication of the security. Some of the Court held this a joint cautionary obligation and *commune negotium*; but Lord Alloway, as Ordinary, and the majority of the Court, held the defenders not to be *correi*, but each bound to the amount of his own individual subscription as if by separate bonds. [See on this case in particular, and the general point discussed in the text, Brodie, Stair, App. 942-4, and notes. See also *Craythorne v Swinburne*, 14 Vesey 161—per Lord Eldon; *Deering v Winchelsea*, 2 Bos. and P. 270—per Eyre, C. J.; *Collins v Prosser*, 1 B. and C. 682; Pitman, p. 149. The question as to the soundness of the judgment in *Lawrie v Stewart* goes back to what the true principle of the contribution among co-sureties is: whether it is implied contract—in which case it was right, for there was no room for that implication; or the substantial justice of compelling all parties bound in a common burden to relieve the person who by his own loss effects their liberation. Stair i. 8. 9; Pothier, Oblig. No. 445. Put it on the

the bench; and it well deserves reconsideration, for there are many important cases that would fall under the rule which may admit of question. In the case of a composition contract (which was the nature of the contract in the case below), or in that of a cautionary obligation for a bank agent (in which this sort of engagement is very often undertaken), [350] it seems more equitable, and more according to common understanding, to follow the general rule,—to hold the responsibility to be joint, each cautioner being considered as *negotiorum gestor* for the whole, and as bound, when possessed of funds of the debtor, to apply them in extinction of the principal debtor's obligations in the first place.¹

7. Where any one of several cautioners takes for his own security a collateral obligation, not over the funds of the principal debtor, but from a third person, it seems very doubtful whether he is bound to communicate the benefit of it to the rest. It has sometimes been contended that cautioners are in society; but this, like all attempts at analogy in matter of law, has on examination been found not to be correct. It has also been said, that on principles of equity they ought to be held as *negotiorum gestores* for each other; but this also seems not to be satisfactory. And if the true ground of the right to communication of the benefit be, that the funds of the principal debtor primarily liable are in the hands or under the power of the cautioner, and are to be first applied, that will afford no ground, in the case now under discussion, for demanding a communication of the collateral security. There has not occurred any case in which the benefit of the security stipulated and obtained by one cautioner has been communicated to others, where it was not a security over the funds of the principal debtor. It may further be questioned, whether in one case the benefit even of a collateral personal security would not be available to the other cautioners? namely, where he who has so secured himself collaterally has failed to pay his share, and the other cautioners have been obliged to discharge it. Would they not in such case be entitled to recourse against the collateral obligant?

II. WHERE THE CAUTIONERS OR SURETIES HAVE FAILED, THE PRINCIPAL DEBTOR BEING SOLVENT.—1. In the case of a cash-credit or standing guarantee, the natural course is to require new securities, or to withdraw the credit. But a hold may still be kept of the cautioner though insolvent, either if such change of security be not required, or if no new cautioner be procured to supply the place of the former.

2. A cautioner, bound as such, is liable only after discussion of the principal; but in case of the cautioner's bankruptcy, a contingent claim may be entered on his estate, either before discussion of the principal, or before the condition or term of payment of the obligation have arrived, to the effect of having a dividend set apart. Out of this dividend the creditor will be entitled to have payment of whatever is deficient in the payment by the principal debtor, on proceeding to discuss him; but the effect of a payment from the principal will be, not to limit the *ranking* on the estate of the cautioner, provided the claim has been made against the cautioner before such payment, but merely to prevent the creditor from drawing on the whole more than his debt.

III. WHERE BOTH THE CAUTIONERS AND THE PRINCIPAL HAVE FAILED.—1. If the debtor fail, and also all the cautioners, whether bound as such or not, the creditor is entitled to claim on the estate of each cautioner, as well as on that of the principal debtor, for the full amount of the debt. The effect will be to entitle the creditor to draw, on the whole, payment of his debt, and no more. The bankruptcy of the principal is sufficient discussion. If he is not yet made bankrupt, it will be still competent for the creditor, even where the cautioner is bound as such, to rank on the cautioner's estate as a contingent creditor, in order to have set apart for him, till the principal debtor be discussed, a dividend, out of which he will be entitled to draw what may be deficient in the payment by the

latter ground, and it leads to a different conclusion from that which was given effect to in *Lawrie's* case. But the obligation of equal contribution may of course be qualified or waived by

express contract among the co-sureties. *Swain v Wall*, 1 Ch. Reports 249; *Coope v Twynam*, Turner and Russel 426.]

¹ [*Coventry v Hutchison*, 8 S. 924.]

principal. Care should be taken to claim on all the estates before the debt is diminished by payment.

2. Where all the cautioners are bankrupt, and the dividends to be drawn from all their estates taken together will exceed the claim of the creditor, it would appear that [351] questions of relief among the bankrupt estates of the cautioners will be settled in the following manner:—*First*, If one cautioner's estate is able to pay 15s. in the pound, and another only 5s., the debt will be extinguished by the payment of these dividends, and there will be no relief between the two estates; each being bankrupt, and having already paid the dividend corresponding to the whole of the debt which is properly due out of that estate. *Secondly*, If one estate pay a dividend of 15s., and the other a dividend of 10s., the former will, of course, be relieved of the cautionary debt to the extent of 5s., and so they are equal. *Thirdly*, But if the former precede the other in paying the dividend, justice is not done unless it shall be allowed to the creditors or trustee on that estate to come into the creditor's place, to the effect of drawing back 5s. from the co-cautioner's estate. And yet if the cautioner, while solvent, had paid the debt, he would not in his own person have been entitled to rank for more than one-half, according to a determination in the House of Lords in a case to be afterwards quoted.¹

3. Where the cautioners are taken bound in different proportions, the responsibility of their estates will be different in different circumstances. Suppose a debt of £10,000 with three cautioners; one bound to the extent of £5000, another of £3000, another of £2000. Their estates will all be liable in these proportions for the debt; or each will be liable in the above proportions, should the principal debtor fail while the whole debt is due. But if there shall have been paid off as much as to reduce the balance to the smallest of the sums for which the cautioners are bound, the estates of all the cautioners seem to be liable in an equal responsibility for that balance; or, in other words, a claim on each seems to be competent to the extent of such balance.

4. Where the cautioners have each granted bond for the same debt, they are all liable to the creditor equally; and they are also bound in mutual relief to each other, whether they are aware of each other's obligation or not. The cautioners have this relief on the principle of the *beneficium cedendarum actionum* without actual assignment. So, on a bankruptcy of them all, the creditors may claim as if they were jointly and severally bound in the same bond; and any one of them paying the debt will be entitled to the same claim on the estates of the others, as if one bond were signed by the whole.

5. Frequently additional security is subsequently taken by bond of corroboration or otherwise, saving to the creditor all the effects of the former caution. This happens where a cautioner fails or dies; where the credit of the principal himself has received a shock; where a demand is made which cannot be answered; where the principal debtor is charged to pay, and suspends on caution; and so forth. The relief, as between the new and the old cautioners, seems to be regulated on these principles:—

First, If the subsequent engagement have been undertaken at the desire of the principal debtor, not at the desire of the cautioners, or to relieve them from an impending demand;²

¹ Sir R. Maxwell's *Crs. v Heron's Trs.*, M. 2136. Reversed, 3 Pat. 359.

² *Arnold v Gordon*, 1671, M. 14641, where the principal in a bond, with four cautioners, suspended on caution; and the cautioner in the suspension having paid and got assignation to the debt, charged the original cautioners. He was held to have right so to do, deducting his own fifth part.

Kerr v Gordon, 1685, M. 14641. Riddel, bound with Kerr as cautioner, afterwards corroborated the debt with a new cautioner, Gordon. Kerr paid the debt, and claimed half against Gordon, and was found entitled to it.

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Murray of Broughton v Heirs and Crs. of Orchardton, 1722, M. 14651, aff. 1 Robertson 465. Here the question was much discussed. Sir A. M'Culloch and his son, with Maxwell as cautioner, were bound for 2000 merks. Five years afterwards, the son, and new cautioners, Lord Kenmuir and Murray, gave a bond of corroboration; and Murray paid the debt, and on an assignation claimed total relief against the original cautioners. He was found to have relief only as co-cautioner; and this was affirmed in the House of Lords.

This was confirmed in a subsequent case, *Lockhart v L. Semple*, 1738, Elch. Cautioner, No. 9. See also next note.

then the new cautioner has only a rateable relief, as if he were a party to the original bond.

[352] *Secondly*, If the new cautioner have interposed at the request of the former cautioners;¹ or if the first cautioners have suspended on caution; or even if the former cautioners have been apprised of the application to the new cautioner, and have approved of it, as tending to relieve them from present demand; then the new cautioner is entitled to a total relief, and, on paying the debt, may claim the whole from the insolvent estates of the former obligants.²

Thirdly, In distinguishing the cases to which these rules are to be applied, the legal *presumption* is, that the new cautioner has interposed for the debtor alone, since the debtor is liable in the first instance, the cautioners being liable only after he is discussed;³ and particular indications are required to establish a right to a total relief against the other cautioners.⁴ Among such indications, it seems sufficient that a demand has actually been

¹ [So in England, *Turner v Davies*, 2 Esp. 478.]

² *Wallace v Fleming*, 1685, M. 14642, where a cautioner in a second suspension, at the instance both of the principal, etc., and of the cautioner in the first suspension, was held entitled to total relief against the first cautioner.

Pollock v Sir R. Pollock, 1745, M. 2125; Elch. Cautioner, No. 16. 'It is, no doubt, in general true,' says Lord Kilkerran, 'that the equity on which the relief among cautioners is founded (for as *nullum negotium gestum est* between them there is none in strict law) obtains no less where they are bound in different deeds, and at different times, than where they are bound in the same deed. And so it has been often found, that where the principal granted bond of corroboration with a new cautioner, there was a mutual relief between the cautioner in the original bond and the cautioner in the bond of corroboration; particularly 15 Dec. 1722, *Murray of Broughton v The Crs. of Orchardton*. From the analogy in which decision, which was affirmed by the House of Peers, though there was only an appearance *ex parte* for reversing the decree, and from the general presumption that the interposition of a new cautioner is on account of the principal debtor, some able judges were for sustaining the defence in this case; and it may be admitted that the general presumption lies that way. But the circumstances of the case, upon which the decision of all questions of this kind depends, appeared to the Court to be sufficient to elude such presumption here. For, as the principal debtor was dead; the circumstances of his children encumbered; as there was direct access to diligence against the cautioner; and, last of all, as it was become necessary to compel him to pay, as his cautionary obligation was near expiring, and the bond actually registered for that end; it was thought the intention of the bond of corroboration could be supposed to be no other than to save the cautioner from diligence.

'But in every case wherein it appeared from circumstances that the interposition of the new cautioner was on account, or at the desire, of the cautioner in the original bond, the new cautioner has been found entitled to a total relief from the cautioner on whose account he interposed.' Kilk. Rep. p. 117.

³ *Loch and L. Strathallan v L. Nairn*, 1701, M. 14644; see also Kilkerran's dictum in the preceding case.

⁴ The doctrine was fully discussed in *Smeiton v Millar*, 1792, M. 2138. Here Millar held a bank credit with the British Linen Co. for £800, on a bond by him and three other persons jointly and severally bound. Walker, one of the

cautioners, died; and the bank having required a new cautioner in his room, Millar granted a bond of corroboration along with Smeiton as cautioner. On Millar's bankruptcy and death, Smeiton, the new cautioner, sought total relief against the old cautioners. They pleaded that he had interposed, not for them, but for Millar, the principal debtor; and the Court held his engagement to be as cautioner, entitling him to a rateable relief, but no more. Lord Justice-Clerk M'Queen said: 'This is a general and important question. The decisions have not differed: they all tend to one general rule—and this rule is founded in common sense—That where a new surety engages on account of the principal debtor, and for the purpose of saving him from diligence, there is nothing that ought to difference his case from that of the cautioners in the original obligation: they are all cautioners for the principal debtor. There is another case, where the principal and cautioners are distressed, and a person interposes to relieve them. It is clear that this person interposes for them all, and that with regard to him they are all principal debtors; and consequently, when he pays the debt, he has a claim for a total relief against the whole. The analogy of the law in other matters confirms me in the opinion which I have formed. Thus, it often happens that where a security is given over a particular subject, the creditor demands a further security, and other lands are added to those over which the creditor's security formerly extended. There can be no question here as long as these subjects remain the property of the debtor. But I shall suppose them to be sold to different purchasers, and that the creditor comes to demand his payment from the purchaser of the last property. "Why attack me?" says the purchaser. "Make your demand rather from that subject over which you were first secured, or at least divide the demand." The creditor answers, "I will not divide my payment;" and so the purchaser of the last subject must pay. But then he is entitled to a conveyance, and he comes against the estate over which the debt originally extended, and he ranks on it *pro rata* according to the respective values of the two. There are many cases to the same purpose, as for example the case of catholic creditors and secondary creditors. The doctrine applies to all of these cases. The secondary creditor has no right to a total relief, but to a proportional one; and these considerations strengthen in my mind the principle which I think ought to regulate this case. Cautioners are often hurt by lenient creditors, who, by accepting of new cautioners,

made against cautioners,¹ and that the creditor has forborne to urge payment on [353] receiving new cautioners; or that the debtor is abroad, which opens immediate access to the cautioners, and that the creditor has made his demand; or that the debtor is dead, which still more distinctly brings forward the responsibility of the cautioners; or that the first cautionary obligation is near expiring, and the bond recorded for diligence.² But it is not sufficient to change the presumption, and ground an inference of the corroborating cautioner having engaged merely in support of the cautioners, that he has granted bond by himself, without taking any letter or obligation of relief from the principal debtor.³

IV. WHERE THE PRINCIPAL DEBTOR, AND ONE OR MORE OF THE CAUTIONERS, HAVE [354] FAILED, THE OTHERS BEING SOLVENT.—1. Where the principal debtor has failed, and there are two cautioners, one of whom is solvent, the other insolvent, the creditor, after discussing the principal, may either go against the solvent cautioner, and make him pay the remainder of the debt; or he may, if he think fit, claim to be ranked for the full amount of the debt upon the estate of the insolvent cautioner, and, after drawing a proportional dividend for it, take the balance of the debt (after imputing such dividend) from the solvent cautioner. But he can so claim for the *whole* debt only before receiving payment of any part.

If the creditor go first against the solvent cautioner, and compel him to pay the whole debt, such solvent cautioner is entitled to be ranked upon the estate of the insolvent cautioner for one-half only of what he pays: for as, where there are two cautioners, each stands indebted as principal for one-half of the debt, and as cautioner for the other, when a solvent cautioner pays the whole debt he necessarily extinguishes that moiety of it in which he stands indebted as principal; and of course he can claim and prove against the co-cautioner's estate only the other moiety, which he has thus paid in the character of surety for his co-cautioner.⁴

enable the debtor to enlarge his debt. In this case no favour whatever was done to the other cautioners by the interposition of Smeiton, the additional cautioner; and they must be entitled to relief against him, just in the same way as if his cautionary obligation had been contained in the same bond with theirs.' Dreghorn: '*Ex facie* the cautioners are principals in the original bond. But Smeiton's obligation is in the same terms, and he must therefore have known that they were cautioners.' Swinton: 'Put the case, that in place of joining in a bond of corroboration, Smeiton had paid the debt, would he not have been entitled to recourse upon the cautioners in the original bond? If so, the bond of corroboration is not in the same situation with the original bond. It appears to me to place Smeiton in the same situation as if he had paid the debt. The former cautioners ought to be held as all principals to Smeiton.' Lord Henderland said that the matter appeared to him in the same light. Lord President Campbell: 'If Lord Swinton were right in the view which he has taken of these bonds, the case would come to the same point with that of M'Dowall of Canonmills, where there were two sets of cautioners, and the question came to be, whether the new bond superseded the old one? Your Lordships ultimately thought that it did, and that the original cautioners were free. But this is a different case: it is one of those questions where the general rule of law is, that all cautioners have a claim *pro rata*, whether they be bound in one or more deeds, seeing they are all bound for behoof of and at the request of the principal debtor alone. This is the general rule, and yet it may appear from circumstances that the new obligation has been entered into on account of the cautioners as well as on account of the principal; and then there is an exception from the general rule, and the new cautioners have a relief from

those for whose benefit they became bound. Here there are two sets of cautioners: the second was bound not for the cautioners, but for the principal; and therefore, in deciding betwixt them, they must be entitled to relief *pro rata*.'

¹ *Clarkson v Edgar*, 1703, M. 14645. Fountainhall misses the point. Dalrymple states that the charge was given 'against the principal and cautioners.'

² *M'Kenzie v M'Kenzie*, 1752, M. 14661. Charge against two co-obligants. M'Kenzie became cautioner in a bond of corroboration, paid the debt, and on assignation charged both. One of the co-obligants then produced a bond of relief from the other, in proof of his being only a cautioner. The Court gave total relief. [*Walker v Inglis*, 5 S. 677; aff. 4 W. and S. 40.]

³ See the case of *Sir Robert Pollock* as reported by Kilkerran, M. 2125; Elchies' notes, p. 89.

⁴ *Lennox v Campbell*, 18 May 1815, 18 Fac. Coll. 359. Two cautioners signed a bond of credit to the Bank of Scotland with Lee for £400. One of them died, and Campbell signed a bond of corroboration, binding himself jointly and severally with the obligants in the prior bond. He took no letter of relief from Lee. The same thing took place on the death of the other original cautioner, and Still became cautioner. Lee died with a balance due the bank. The representatives of the deceased cautioners paid up the debt, and claimed relief *pro rata* against Campbell and Still. They attempted a distinction, on the ground that in the former cases the new cautioner was bound along with the principal debtor, while here he had executed a bond alone. But the Court refused to sanction this distinction.

⁵ *Sir R. Maxwell's Crs. v the Trs. of Patrick Heron*, M. 2136; revd. 11 June 1794, 3 Pat. 359. The Court of Session held

When, on the other hand, the creditor goes first against the estate of the insolvent cautioner, he is entitled to be ranked upon it for the full amount of the debt, and to draw a proportional dividend, in regard that both cautioners are bound to him *in solidum*.

But although the creditor is thus entitled to be ranked upon the estate of the insolvent cautioner for the full debt, yet the estate of the insolvent cautioner is entitled to no further relief against the solvent cautioner, than in so far as the estate may pay more than the insolvent cautioner's moiety of the debt. It has been contended that as, in the event of the creditor proceeding in this manner, the estate of the insolvent cautioner is made to pay a dividend not only upon that moiety of the joint debt which is his own proper debt, but upon that moiety of it for which he is only a cautioner, his estate ought to have relief of half of the dividend that may be drawn by the creditor, whatever it may be. But this has been overruled; and it has been held, that unless the dividend drawn by the creditor from the estate of the insolvent cautioner exceed that moiety of the debt which he must have paid had he continued solvent, the estate is entitled to no relief, and that it is only for the excess above such moiety that any relief is competent.¹

The doctrine thus established does, in its consequences, seem inequitable and arbitrary; since, according as the creditor may think fit to proceed, very different results to the parties arise. If the creditor choose to take full payment from the solvent cautioner, it will be ultimately for the advantage of the estate of the insolvent cautioner. If, on the other hand, [355] he think fit to go in the first place against the estate of the insolvent cautioner, it will be ultimately for the advantage of the solvent cautioner.²

2. Where the principal debtor has failed, and there are *three or more* cautioners, some of whom have failed, and the others remain solvent, the creditor will in like manner be entitled to go either against the solvent or the insolvent cautioners, after discussing the principal; and a difference will, upon similar principles, take place according to the way in which he exercises this option.

If the creditor go first against one of the solvent cautioners, that cautioner, if he pay the debt, will be entitled to demand against the co-cautioners relief of all that he has paid beyond his own proportion. The intricacy of the cases which may arise in such circumstances requires some discrimination. 1. If the cautioners are all solvent, the rule is simple: In claiming relief from any one of the co-cautioners, he who has paid is entitled to demand that co-cautioner's own proportion, and one-half of the proportions falling on the rest; and thus the payment and the risk is equally divided, and each is left to seek his relief against the

the co-cautioner, on paying the debt, entitled to be ranked for the whole, to the effect of drawing one-half. But the House of Lords reversed this judgment, and ordained the cautioner who had paid the debt to be ranked on the estate of the other cautioner 'for half of the sums due on those debts in which they were jointly bound along with the principal debtor, each of them having been indebted as principal for a moiety thereof, and as security for the other moiety.'

¹ *Cranston v M'Dowall*, 1798, M. 2552. Dr. M'Farlane and James M'Dowall were cautioners for A. M'Dowall to Heriot's Hospital and to the Royal Bank. A. M'Dowall failed, with a balance of £700 due to the hospital and £240 to the bank. Dr. M'Farlane failed; and although James M'Dowall, the other cautioner, was solvent, the hospital and the bank ranked on the estate of Dr. M'Farlane for the whole debts, and drew less than one-half. The trustee for M'Farlane's creditors brought an action of relief against the heir of James M'Dowall, the co-cautioner, on this and other accounts. On this question the Court assoilzied M'Dowall's heir from the claim for any part of the dividends received out of M'Farlane's estate upon debts for which M'Farlane was jointly bound, in respect

those dividends do not exceed the proportion of those debts for which M'Farlane was liable.

² In this respect the law of England coincides with the law of this country. In *ex parte Elton*, 3 Ves. jun. 240, Lord Chancellor Rosslyn expresses himself thus: 'Suppose in the case of A and B, partners, the former remains solvent, the latter becomes a bankrupt, and there is a joint debt of £1000; the creditor making his claim first against the separate estate (of the bankrupt partner), paying a dividend of 10s. in the pound, receives £500. Can the assignees claim against the solvent partner what they have paid? His answer would be, they could only claim the same right the bankrupt could; and as against the bankrupt, he is entitled to retain: he has paid his moiety of the partnership debt. If the case is turned the other way, and the creditor first sues the solvent partner, he recovers all the debt against him; and he has a right to come in as a separate creditor of the bankrupt, to the amount only of a moiety of that debt: for a moiety only of the debt of the partnership he could have recovered against him if he had been solvent. That makes a very great difference to the separate creditors.'

rest for that share which has been advanced on his account.¹ 2. If some of the cautioners are solvent, the solvent cautioners are bound each to repay his own share, and also his proportion of the share that should have been paid by the insolvents; and thus each suffers the loss equally, and has a right to claim on the insolvent estates of the cautioners who have failed for the amount of what he has advanced for them.² 3. The difficulty is, to find a rule for ranking him who pays on the estates of the insolvent co-cautioners: for although it be generally true, that in a question between two cautioners (although there may be more), the cautioner who has paid the debt is entitled to relief of one-half, that proceeds on the supposition that relief is open against the estates of those on whose account any higher demand is made than the co-cautioner's own proportion; which would be excluded, if, in the case supposed, the cautioner who has paid should demand relief of one-half from each insolvent estate. But perhaps the benefit of having a clear practical rule, seconded by the consideration that cautioners unable to indemnify the person who advances their proportion ought to be barred from competing with him as creditors in relief, may recommend to adoption the same rule as in the simple case already under consideration (p. 371),—namely, that the cautioner who pays the debt should be ranked for one-half on the estate of each insolvent cautioner, to the effect of drawing his full relief for all beyond his own proportion.

To have a practical illustration of this rule: Suppose there are three cautioners, A, B, and C; and, 1st, let it be supposed that A pays the debt of £1000, and that B and C are insolvent. Here A is entitled to rank upon each of the estates of B and C for £500; and if each of the estates pays 13s. 4d. per pound, the dividend from each will be £333, 6s. 8d., which will be just equal to the remainder of the debt that ought to fall upon A, the solvent cautioner. In this case, therefore, A will be entitled to draw the full dividends. But supposing each of the estates to pay 15s. per pound, the dividends would be £375, and [356] they must therefore be restricted to £333, 6s. 8d.; so that in this case also each will ultimately bear an equal share of the loss. If, however, it should be supposed that the estate of B pays 10s. per pound, and the estate of C 15s., then the dividends would be, from B £250, and from C £375. Here A would be entitled to draw the whole dividends from both estates; because, although the dividend from C's estate exceeds £333, 6s. 8d., the third of the debt, yet it does not exceed the loss ultimately falling upon A: for, after imputing the £250 received from B's estate, one-half of the difference, £375, is just equal to the dividend from C's estate.

But if the creditor should go first against the insolvent cautioners, he will be entitled to rank upon the estate of each for the whole debt, to the effect of drawing full payment; and if he should draw from the estate of any of the bankrupts more than the share payable by such bankrupt, the trustee for the creditors at large on that estate will be entitled to relief against the solvent cautioners for the surplus.

In the practical application of this rule, the creditor would be entitled to rank for the full sum of £1000 upon each; and if each of the estates paid 10s. per pound, or more, he would draw £500 from each; and each of the estates would have a claim of relief against the solvent cautioner for the difference between £500 and £333, 6s. 8d., their respective shares of the debt.

3. Where an annuity bond is granted by several persons jointly and severally, and they are all bankrupt, the grantee may claim on the estate of each for the entire annuity, to the effect of drawing the full annuity on the whole; or if the parties agree, he may be ranked on the estate of each for the converted value of the annuity, to the effect of drawing that value upon the whole.

4. Where one of the co-obligants is bankrupt, and the rest solvent, if the parties should agree to convert the annuity, the true method seems to be the following: 1. If the bankrupt

¹ See Kames' Principles of Equity, B. i. p. 1, sec. 3; Elucidations, art. 29.

² [Finlayson v Smith, 1827, 6 S. 264.]

is the primary or proper debtor, the rest only cautioners, the annuitant should be ranked on the bankrupt estate for what is the ascertained value; relieving the co-obligants, as cautioners of the future annuities, to the extent of such annuity as the dividend may purchase,—or pay the dividend to the co-obligants, on their securing him in payment of the whole annuity. 2. Where they all are principals, the proper course seems to be, to rank the annuitant on the bankrupt estate for the whole ascertained value, to the effect of his drawing the share payable by the bankrupt, and so relieving the co-obligants, as before, to the extent of that part of the bankrupt's share of the annuity to which the dividend may correspond. 3. Where the bankrupt is a mere cautioner, the annuitant will, of course, be entitled to demand new caution, and will even be entitled to rank on the bankrupt estate as a contingent creditor, before the principal has failed.¹

EXTINCTION OR DISCHARGE OF CAUTIONARY OBLIGATIONS.

Claims on cautionary obligations may be barred or discharged, not only by extinction or satisfaction of the principal debtor's obligation, but also by the statutory limitation, by implied discharge, by neglect, and want of due diligence in recovering against the principal.

I. COMMENTARY ON THE ACT LIMITING CAUTIONARY OBLIGATIONS.—In 1695 an Act was passed for limiting the endurance of cautionary obligations to the term of seven years from the date of the bond. This law was made in order to prevent the 'great hurt and prejudice that hath befallen many persons and families, and oftentimes to their utter ruin and undoing, by men's facility to engage as cautioners for others, who, afterwards failing, have left a growing burden on the cautioners, without relief.' 1695, c. 5. But this law, with those [357] wise and humane purposes, was ill concerted for the attainment of its object. The enacting words are: 'That no man, binding and engaging for hereafter, for and with another, conjunctly and severally, in any bond or contract for sums of money, shall be bound for the said sums for longer than seven years after the date of the bond; but that from and after the said seven years the said cautioner shall be *eo ipso* free of his caution.' Had the Act stopped here, it would have been well; but it proceeds in these words: 'And that whoever is bound for another, either as express cautioner, or as principal or co-principal, shall be understood to be a cautioner, and have the benefit of this Act, providing that he have either clause of relief in the bond, or a bond of relief apart, intimate personally to the creditor at his receiving of the bond, without prejudice always to the true principal's being bound in the whole contents of the bond or contract: as also of the said cautioner's being still bound conform to the terms of the bond, within the said seven years, as before the making of this Act.' A clause is added, providing, 'That what legal diligence by inhibition, horning, arrestment, adjudication, or any other way, shall be done within the seven years by creditors against their cautioners for what fell due in that time, shall stand good, and have its course and effect after the expiring of the seven years, as if this Act had not been made.'² The Act being thus confined to cases in which the cautioner engages professedly

¹ [By the Bankrupt Act, 19 and 20 Vict. c. 79, sec. 54, it is enacted, that no creditor in respect of an annuity granted by the bankrupt shall be entitled to vote or draw a dividend until such annuity shall be valued, and directions are given for that purpose; and (sec. 55) 'that where any person is bound as cautioner for payment of such annuity, it shall not be lawful for the creditor therein to sue or charge after the date of the sequestration such cautioner, and such cautioner shall only be liable for the value fixed as aforesaid, and the arrears of annuity; and on such cautioner making payment of such value and arrears to the creditor, and the lawful interest thereon, he shall be discharged of all liability for

such annuity, and he may thereupon enter a claim in the sequestration for the sum so paid, and vote and draw dividends thereon: Provided that if such cautioner shall not pay the sum so fixed, and arrears as aforesaid, before any payment of the annuity subsequent to the fixing thereof becomes due, he shall be bound to make payment of the said annuity, and all subsequent annuities, until he shall make payment of the sum so fixed, arrears and annuity and interest as aforesaid, deducting always such dividends as the creditor shall have received before full payment as aforesaid.']

² This Act appears to have been carefully considered in a committee of Parliament; and probably the objections stated

as such, or as a co-obligant, having a bond of relief from the principal, intimated at the time to the creditor, it has been in many cases entirely defeated by the obvious device of taking all the obligants bound as principals, and by the creditor keeping himself ignorant of the relief stipulated among them.

In order to give to a cautioner the benefit of this Act, and free him from a demand by the creditor after seven years, these points are necessary:—

1. The statute by its words applies only to bonds for sums of money; and this has been held, rather too strictly perhaps, to apply only to loans of money, to be repaid within the seven years. Cautioners *ad facta præstanda* have not the benefit of it;¹ nor judicial cautioners, as in suspensions or loosing arrestments;² nor cautioners in marriage contracts;³ nor for the discharge of an office.⁴ Neither has a cautioner in a bond of relief the benefit of this Act.⁵ Cautioners for payment of a composition on bankruptcy are not comprehended under the Act.⁶

2. Either the cautioner must appear in the bond expressly as cautioner (the law, however, not being held to extend to the case of a bill wherein one signs as cautioner).⁷ Or,

3. If he there appear as co-obligant, it is necessary that, at the time of settling [358] the transaction, there shall have been intimated to the creditor the principal debtor's obligation to relieve his co-obligant;⁸ and this notice must be notarial or judicial,⁹ mere private knowledge not being sufficient.¹⁰ But, 1. The law does not extend to the case of co-obligants stipulating by a clause of relief their mutual remedies.¹¹ 2. It does not comprehend the case of the granter of a simple bond of corroboration for a debt already constituted.¹² 3. An engagement by letter or otherwise, to pay or see paid a sum already lent, is not within the Act.¹³ And, 4. A letter of guarantee in a mercantile transaction is not within the Act.¹⁴

The obligation of the cautioner will be extended beyond the seven years in the following cases:—1. Where the bond shall have been renewed, or a corroboration granted by the

by moneyed men likely to suffer by the weakening of their securities had led to the temporizing and qualifying expressions which have deprived the Act of half the salutary effects intended in the original proposal.

¹ *Robertson v M'Kinlay*, 1736, M. 11010; *Elchies*, Cautioner, No. 6. And observe the distinction where the character of a bond *ad factum præstandum* is lost in the money obligation. *Sir R. Monro v Bain*, 1741, M. 11017. See *Elchies' Notes* on No. 10.

² *Hope v Foulis*, 1715, M. 11009; *M'Kinlay v Ewing*, 1781, M. 2154, 2 Hailes 881. The Court found 'that the Act 1695 does not apply to cautionary obligations in judicial proceedings in suspension.'

³ *Balvaird v Watson*, 1709, M. 11005; *Stewart v Campbell*, 1726, M. 11010. The obligation in chief was to have ready a sum, and to lay it out for the wife's liferent, and the heirs of the marriage in fee. It was found that the cautioner being bound *ad factum præstandum*, and not to pay a certain sum of money, his case did not fall under the Act.

⁴ *Fleet v Strang*, 1709, M. 11005.

⁵ *Bruce v Stein*, 1793, M. 11033.

⁶ *Cuthbertson v Lyon*, 1823, 2 S. 330, N. E. 291. See also *Anderson v Wood*, 1821, 1 S. 28, N. E. 31. ['No person who has not produced an oath as a creditor before the date of the deliverance (in a sequestration) approving of the composition, shall be entitled to make any demand against the cautioner after the space of two years from the date of such deliverance, reserving to such creditor his claim for the composition

against the bankrupt and his estate.' 19 and 20 Vict. c. 79, sec. 144.]

⁷ [*Sharp v Harvey*, 1808, M. App. Bill of Exchange, No. 22.]

⁸ *Ross v Craigie*, 1729, M. 11014; *Douglas, Heron, & Co. v Riddock*, 1792, M. 11032. See below, p. 376, note 1.

⁹ *Bell v Herdman*, 1727, M. 11039.

¹⁰ It was, however, sustained as enough that the creditor was both writer and witness in the bond of relief. *M'Rankin v Shaw*, 1714, M. 11035. 'The Lords found private knowledge not relevant; but found that the charger's writing the bond of relief, and signing as witness to it, of the date of the bond charged on, was a sufficient intimation.' [*Drysdale v Johnston*, 1 D. 409. See, as to cash-credit bonds, *Macartney v Mackenzie*, 5 W. and S. 504; *Alexander v Badenach*, 6 D. 322. In the last-mentioned case an opinion was expressed that the statute does not apply to a cash-credit bond in which the parties are bound as co-obligants.]

¹¹ *Park's Cra. v Maxwell*, 1785, M. 11031.

¹² *Rutherford v Scott*, 1715, M. 11012. This doctrine was held in a very strong case: the Court considering it, *first*, as a necessary inference from the statute; and, *second*, as settled by practice and the legal understanding of the country. *Lady Henrietta Gordon v Tyrie*, 1748, M. 11025. See *Elchies*, Cautioner, Notes, No. 10. [*Monteith v Pattison*, 4 D. 161; *Tait v Wilson*, 1 Rob. 137.]

¹³ *Caves v Spence*, 1742, Kames' Rem. Dec. p. 54; *Kilk. 420*. [*Howison v Howison*, M. 11030.]

¹⁴ *Bertram, Gardner, & Co. v Sprott*, 3 March 1795, Baron Hume's Sess. Papers. [*Alexander v Badenach*, *supra*.]

cautioner; or negotiations for answering the demand of the creditor carried on with the cautioner, so as to bar him *personali exceptione* from pleading on the Act:¹ and the doctrine of Erskine (B. iii. tit. 7. sec. 24) is not law, that nothing but diligence ought to prolong the obligation; and that even a declaration by the cautioner that he stands bound for the debt, will not prevent the obligation from expiring with the seven years. 2. It will also extend beyond the seven years, where the creditor shall have raised diligence against the cautioner within the seven years.² The doctrine of Erskine is also in this point objectionable, in so far as he says that diligence raised within the term shall have no effect but to secure the special subjects affected by the diligence; for though this may appear to be the import of the words used in the Act, the Court deliberately adjudged the construction not to be thus limited. And, 3. The obligation will be continued where the creditor shall have obtained decree against the cautioner;³ mere citation in an action not being sufficient as in ordinary prescription.⁴

[359] This difference, however, will be observed between the septennial limitation and ordinary prescriptions, that the diligence or action raised within the seven years does not operate like an interruption or stop to the course of prescription. The effect of the limitation is perfect in stopping responsibility on the part of the cautioner, except for what becomes due before the expiration of the seven years.⁵ So he is chargeable with such interest only as arises within the seven years.⁶

II. EFFECT OF THE DISCHARGE OF THE PRINCIPAL DEBTOR OR CO-SURETY.—A cautioner is presumed to engage for the principal debtor, partly in reliance on his solvency or the efficacy of his funds in rendering the engagement safe, and partly in reliance on the co-operation and relief to be afforded by co-cautioners. The creditor therefore cannot discharge the principal debtor, or give up any funds of which he may be possessed, affording the means of satisfying the debt, or grant an acquittance to any co-obligant bound to relieve the cautioner, without virtually discharging, to the extent of such discharge or renunciation, the obligation of the cautioner.

1. The discharge of the principal debtor, granted by the creditor without the cautioner's consent, is a discharge to the cautioner.

2. A discharge of a cautioner, in the same way, without the co-cautioner's consent, is an acquittance to the co-cautioner for the share which the discharged cautioner should have borne. Thus, if there be two solvent cautioners, and one of them is discharged, the creditors can, on the debtor's bankruptcy, charge the other with only one-half of the debt. If there should be many co-cautioners, and some of them insolvent, the discharged cautioner would have borne both his own share, and also his proportion of the share falling on the

¹ Douglas, Heron, & Co. v Riddock, 1793, M. 11032; House of Lords, 4 Pat. 133. Kirkpatrick, with Currie and Riddock as his cautioners, granted bond to Douglas, Heron, & Co., payable 29th October 1778. Riddock died in 1777. Decree in absence was taken in 1779. In a correspondence with the curators of his heir the company threatened diligence, and the curator solicited delay. This began before and continued after the elapse of the seven years. Afterwards the company proceeded to diligence, and the statute was pleaded. But the correspondence was held a bar *personali exceptione*.

In the House of Lords the judgment was affirmed, and it was held unnecessary to consider certain other pleas, 'in respect of the transaction which is proved by the correspondence between the company and the factor of Riddock and his curators, and which is established to have been approved of by him, whereby he is barred from insisting on the benefit of the Act 1695.'

² Irving and Copland, 1752, M. 11043.

³ Douglas, Heron, & Co. v Riddock. This formed one of the points in the case (*supra*, note 1); the decree in absence in 1779 being held as diligence. But on this point the House of Lords gave no judgment.

⁴ In the Folio Dictionary, vol. iv. p. 102, there is a decision shortly noted inconsistent with this: *Clark v Stewart*, 1779, M. 11043. But I doubt the correctness of that note; and there is no report of any such case in the Faculty Collection or elsewhere.

⁵ The editor of Erskine (edition 1812) seems to have misapprehended the principle of this doctrine, where, objecting to Erskine's text, he says: 'The effect of doing diligence within the seven years seems to be that of interrupting the prescription, and of saving to the creditor the bond.' P. 620, note. [But see Ivory's note, and *Irving v Copland*, *supra*.]

⁶ Rowand v Lang, 1738, M. 11041; Reid v Maxwell, 1780, M. 11043, Hailes 850; *Irving and Copland*, *supra*.

insolvent cautioners; and so the creditor must, in charging any other solvent cautioner, give allowance for these. If the claim is made against an insolvent cautioner, there is a difficulty on the principles explained above, and perhaps no deduction would be given but of the discharged cautioner's own proportion.¹

3. The renunciation of any security held by the creditor over the debtor's estate is also a discharge of a cautioner to that extent.

4. The discharge of the debtor from prison has been held an entire acquittance to the cautioner, it being impossible to estimate the effect that personal diligence may produce. But the creditor may depart from inchoated personal diligence without discharging the cautioner.²

5. If the creditor, without consent of the cautioner, accept of a composition from the principal debtor in discharge of the debt, so as to alter the cautioner's security or increase his risk, this will be an acquittance to the cautioner.³ At the same time, where the cautioner is himself insolvent, or when he has been called on and neglects to answer for [360] the debtor by paying the debt, and taking the principal debtor in his own hand, it is not to be expected that the creditor shall abstain from taking what he can get from the principal's estate, and a composition may be the most advantageous arrangement for paying off the debt. In such a case, the creditor may safely take the composition, after having given due notice to the cautioner, provided he reserve his recourse against the cautioner in so doing.⁴

6. To concur in accepting a composition under the Sequestration Act, without the consent of the cautioner, or at least without giving him an opportunity of dissenting where such concurrence has the effect of carrying through the composition, and rendering the discharge imperative on all the creditors, is a discharge to the cautioner. In one case a different doctrine would seem to be adopted.⁵ But when carefully examined, that case is an

¹ [By 19 and 20 Vict. c. 60, sec. 9, it is enacted, that 'where two or more parties shall become bound as cautioners for any debtor, any discharge granted by the creditor in such debt or obligation to any one of such cautioners, without the consent of the other cautioners, shall be deemed and taken to be a discharge granted to all the cautioners; but nothing herein contained shall be deemed to extend to the case of a cautioner consenting to the discharge of a co-cautioner who may have become bankrupt.' It would seem that, notwithstanding the generality of the words of the statute, they are only intended to apply to a gratuitous discharge or for an inadequate consideration. Therefore where, after action raised, a pursuer received from one of several co-cautioners his proportion of the sum secured, and discharged him both from the debt and the action, he was held entitled to obtain decree against the other cautioners, conjunctly and severally, for the balance. *Church of England Insurance Co. v Wink*, 1857, 19 D. 1079.]

² Ersk. iii. 3. 66. *M'Millan v Hamilton*, 1729, M. 3390. The creditor had apprehended the debtor on a caption, and kept him some days in the messenger's custody, but without incarceration. He afterwards set him at liberty. It was admitted that a creditor can pass from no consummated diligence or security, but contended that he may begin, without being obliged to complete, his diligence. The cautioner was held not to be liberated.

See *ex parte Glendinning*, Buck's Cases in Bankruptcy, 517; *ex parte Gifford*, 6 Ves. 809.

³ This is part of the doctrine already laid down, and the same authorities may be referred to. This doctrine was first applied in English cases by Lord Thurlow, after great consideration; as in the case *ex parte Smith*, 3 Brown 1. See also, decided by Lord Thurlow, *ex parte Smith and others*,

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Cook's B. L. p. 170; *ex parte Gifford*, 6 Ves. 805, by Lord Eldon. [Add. on Cont. 6th ed. 571.]

See *Fleming v Wilson*, 1823, 2 S. 336, N. E. 296. [*British Linen Co. v Thomson*, 1853, 15 D. 314.]

⁴ *Smith v Ogilvy*, 1821, 1 S. 169, N. E. 159; aff. 1 W. and S. 315. Innes and Smith were co-obligants for £1000 to Ogilvy. Smith was a cautioner, and the creditors were aware of this. Innes became bankrupt, and Smith, when called on, was unable to answer the demand. Innes proposed a private composition, and Smith was aware of this, and of Ogilvy's being requested to accede to it. They did accede at last, 'reserving recourse against Mr. Smith, cautioner.' Smith pleaded on this as a virtual discharge to him; but the Court held him bound, in respect the discharge was qualified, and under condition that the same shall not be effectual to Mr. Innes, in case the cautioners shall be liberated thereby. [As to the effect of an extrajudicial settlement in liberating cautioners, see *Falconer v North of Scotland Banking Co.*, 1863, 1 Macph. 704.]

⁵ *Whitelaw and Kirk v Steins*, 20 May 1814, 17 Fac. Coll. 610. Certain persons having guaranteed a purchase by Small from Steins, both Small and they failed, and were sequestrated. Steins ranked on Small's estate, and also on that of Whitelaw and Kirk, the cautioners, for £1374. The cautioners offered a composition, which their creditors accepted, and Steins among others. They accordingly paid the first instalment, reserving their relief against Small. Small having also proposed a composition, Steins and their other creditors accepted it, and without Steins' concurrence it could not have passed. Then the cautioners pleaded an acquittance, in consequence of the creditors having accepted the composition. The Court, however, held them bound.

That case does not deny the general doctrine above laid

authority only for this qualification of the general doctrine, that where the creditor makes a demand on the cautioner, and the cautioner either refuses or is unable to pay the debt and take his own relief, the creditor may follow such prudent measures as, in the circumstances of his debtor's affairs, may be advisable, without being held thereby to discharge the cautioner.

7. It follows, of course, that to take a composition which, without the creditor's concurrence, has under the Sequestration Act been voted and confirmed, is not a discharge to the cautioner.¹

8. Where several persons are bound for an annuity, it may be inferred perhaps, on the general principle, that the creditor will not be entitled to enter into a compromise for valuing the claim against the principal debtor without the consent of the cautioner.²

III. NEGLIGENCE AND IMPLIED DISCHARGE.—It is important to consider the creditor's [361] duty to the cautioners, and how far the neglect of measures proper or necessary for the common interest will furnish to cautioners a defence against liability. On the one hand, the creditor holds the direct power of compelling payment from the principal; and the neglect of obvious means of safety may be said to be a voluntary incurring of risk, which it is not equitable to lay on the cautioners. But, on the other hand, the cautioners are bound to look to the condition of the debtor for whom they interpose; and even without paying up the debt, which is always in their power, the law provides them with remedies, by inhibition, adjudication, or arrestment in security, to protect themselves against the insolvency of the debtor. Unless, therefore, there is something in the peculiar nature of the debt implying a particular course of diligence, as in the case of bills; or something confidential in the nature of the transaction, as in the case of cautionary obligations for the fidelity of a bank agent; or something of fraud, or collusion, or gross negligence approaching to dole, the creditor is not held chargeable to such a degree with the protection of the cautioners as to be under any special necessity of doing diligence,³ though, as already said, he cannot discharge his diligence when completed without freeing the cautioners.

1. It will not then be a sufficient answer to his claim on the cautioners, in the ordinary case, that by due diligence he might have recovered from the principal.

2. If, however, there is a particular privilege annexed to the debt, by which the creditor may have a preference over the debtor's funds, it would seem that it can no more be neglected with safety to the claim of recourse against cautioners, than a security which ought to have been available to the cautioners may be renounced or neglected. In loans, for example, by means of Exchequer bills, under particular statutes, or on bonds to the Excise or Customs, the person binding as co-obligant or surety has it in his power, on paying up the debt, to

down, and which in England has received effect so often in cases of this description. Much of the weight of the decision appears to rest on the circumstance that, by the demand made against the cautioners, they had the opportunity of paying up the debt, and taking their remedy, which, if a cautioner does not or cannot do, he may be held as leaving the creditor to do what he can for his own benefit. The doctrine delivered by Lord Meadowbank does not appear to be guarded with all the care that the occasion required. The question was not, What were the motives which actuated the creditor in assenting to the discharge? but, Whether had he not by such assent cut off the relief of the cautioners? In the case then in question there was no alternative, at least none which the cautioner had it in his power to adopt; for, being a bankrupt, he could not pay the debt. Although, therefore, the judgment seems unimpeachable, the reasons of it, as delivered by that eminent judge, cannot be assented to without more consideration than seems to have been bestowed on them.

¹ [By 19 and 20 Vict. c. 79, sec. 56, it is enacted, that 'where a creditor has an obligant bound to him along with the bankrupt for the whole or part of the debt, such obligant shall not be freed from his liability for such debt in respect of any vote given or dividend drawn by the creditor, or of his assenting to the discharge of the bankrupt, or to any composition; but such obligant may require and obtain, at his own expense, from such creditor an assignation to the debt, on payment of the amount thereof, and in virtue thereof enter a claim on the said estate, and vote and draw dividends, if otherwise entitled lawfully so to do.']

² [After the date of the sequestration, the creditor is not entitled to sue the cautioner, except for the ascertained value of the annuity and arrears previously due. 19 and 20 Vict. c. 79, sec. 55.]

³ See Ersk. iii. 3. 66. [Morrison v Balfour, 1849, 11 D. 653; Smith v Campbell, 1829, 7 S. 789.]

secure a preference by writ of extent. If he neglect this till it be too late, and then come against other persons bound to him as cautioners or guarantees, they would seem to be entitled to defend themselves on the ground of virtual discharge.¹

3. It is not required that the creditor shall, in an ordinary money bond, or in a bargain on a certain term of credit, instantly enforce payment of the debt on the expiration of the term.² But where the creditor has by positive contract given time, the case is different from that of mere inactivity; it being by such contract put out of the power of the surety to have recourse against the principal in the same way in which he might otherwise have proceeded.³

4. It is a question of some difficulty, what shall be the effect of the creditor's neglect to take proper means of completing the security stipulated. An heritable bond, for example, if good, will be available to the cautioners, but may be rendered ineffectual by an error in completing the sasine on the titles. It seems to require a very special stipulation to prevent such a neglect from discharging the cautioners.⁴

¹ *Morrison v Balfour*, 1822, 1 S. 525, N. E. 484, was a case in which this defence seems to have been repelled on the ground that the sub-cautioners had absolutely bound themselves to pay up the whole sums at the four stated terms in the bond, 'and give you your name from the obligation.' By this obligation they may be held to have undertaken the active superintendence of the principal debtor, and the onus of preserving the privileged diligence for themselves.

² *Fleming v Wilson*, 1823, 2 S. 336, N. E. 296; *Frazer v M'Turk*, 1822, 1 S. 524, N. E. 483.

³ *Samuell v Howarth*, 1817, 3 Merivale 272. Where one selling goods on the suretyship of another, at the usual credit, either takes a bill which he renews, or on the expiration of the credit takes a bill at a renewed credit, the surety will be discharged. [See also *Forsyth v Wishart*, 1859, 21 D. 449; *Warne & Co. v Lillie*, 1867, 5 Macph. 283; *Caledonian Bank v Kennedy's Trs.*, June 1870; Add. on Cont. 6th ed. 567; Sm. Merc. Law, 7th ed. 472.]

⁴ *Fleming v Thomson*, 1825, 4 S. 221, N. E. 224. Here the heritable security was rendered ineffectual by an error in completing it, and the Court appears to have held the cautioners liable only in virtue of the special terms of the contract. It is not therefore to be received as a decision weakening the doctrine of the text; and it was reversed in the House of Lords, 23d May 1826, 2 Wils. and Sh. 277.

[The Court of Session held that if the cautioner relied on the heritable security for his relief, it was his own affair to see that it was made perfect, and not the creditor's duty actually to look after the cautioner's security. This principle in the general case was quite sound, but the House of Lords went upon a specialty which the Court of Session overlooked; and although Professor More questions the judgment in the House of Lords (Lectures, i. 248), there is no doubt of its being right in reference to that specialty. Pothier, Oblig. sec. 521, has stated at once the general principle applicable to the ordinary relation between creditor and cautioner, and the exceptional principle which the House of Lords gave effect to, and has illustrated them by the distinction between the duty of the creditor to a cautioner and the duty of the mandator to a *mandator pecuniæ credendæ* in regard to the preservation of securities got from the debtor. A has lent a sum to B by order of C, and, by undertaking the mandate, has contracted a formal obligation towards C, his principal,—de

lui céder et de lui conserver l'action qu'il acquerroit par le prêt qu'il feroit en exécution du mandat. On ne peut pas dire de même à l'égard d'un fidéjusseur que le créancier ait contracté envers lui l'obligation de lui conserver et de lui céder ses actions: le cautionnement est un contrat unilatéral par lequel il n'y a que la caution qui s'oblige. Si le créancier est obligé de céder ses actions au fidéjusseur, ce n'est que la seule équité qui l'y oblige, parce qu'il n'a aucun intérêt de les refuser: mais il doit être obligé de les céder qu'autant qu'il les a, et telles qu'il les a: et on ne doit pas lui imputer, s'il ne les a pas conservés et s'il s'est mis hors d'état de les pouvoir céder.' And he ultimately comes to the conclusion that the *exceptio cedendarum actionum* can only be pleaded by a cautioner against a creditor when it has been by a positive act on the creditor's part that he has rendered himself unable to cede his actions against the debtor, by having discharged the debtor's person or property, or when there are circumstances indicating collusion between creditor and debtor. But a simple negligence on the creditor's part, if accompanied with no *mala fides*, cannot release the cautioner—(1) Because the creditor, being bound to cede his actions not by a contract with the cautioner, but solely by equity, is not under any precise obligation to conserve these actions for the cautioner, as a mandator is bound to do for his principal, and it is enough that he has kept good faith in the matter, and done nothing positive contrary to the interests of the cautioner; and (2) because the cautioner, who might have protected himself, has no right to complain of the creditor's negligence in not protecting him. In *Fleming v Thomson*, however, there was an *express contract* between the cautioner and the creditor, that if the cautioner paid the debt, the creditor would convey to him the security given by the debtor; and the cautioner was entitled in virtue of this formal contract to withhold performance of his obligation to pay, unless the creditor were prepared to implement his special counter-obligation to convey the security. It cannot therefore be laid down that the creditor is liable for any omission or negligence (if there is no *mala fides*) by which the benefit of securities held, or which might have been held by him, are not forthcoming to the cautioner, his obligation to assign being in the common case not an obligation by contract, but a duty of pure benevolence. The distinction has not been sufficiently kept in view in some of the subsequent cases.]

SUBSECTION II.—OF CAUTIONARY OBLIGATIONS FOR THE FAITHFUL PERFORMANCE OF AN OFFICE; AS
BANK AGENT, MESSENGER, NOTARY, ETC.

[362] Cautionary engagements are frequently undertaken prospectively, for the faithful performance of an office; or for payment of such sums as, in the course of the intromission with or administration of a particular estate, or the exercise of the duties of a place of trust, may become due.

I.—CAUTIONER FOR A BANK AGENT.

The national banks, and also some private bankers, have branches established in provincial towns, the business of which is carried on by agents or factors. This is a trust of great delicacy, and in the administration of which the temptation to take undue advantages is often too great to be resisted. The great classes of transactions in which there is hazard, are: the taking of money on deposit, the lending of money on bills, and the making of advances on bank credits or cash accounts.

1. The agent commonly is entrusted with the power of taking money in deposit for the bank, which is perhaps the most dangerous power of all to the bank, and which is the least under check.

2. He is also entrusted with the power of discounting bills and lending money on notes; he himself, however, being responsible to the bank for the bills so discounted, or the notes so taken. In this respect he resembles a factor with a *del credere* commission; the bills so discounted belonging to the bank, while the agent is indebted for the balance, including the dishonoured bills.

3. The power of granting cash-credits is generally reserved to be exercised by the directors of the bank themselves, the advances being afterwards made by the agent without any personal responsibility or risk.

The checks interposed on the agent's fidelity consist: 1. Of regular weekly statements transmitted to the head office, showing the discounts and advances, and accompanied by the bills themselves; 2. Of check officers, as tellers and accountants, named by the bank, by whom regular balances ought to be made of their books, and reports transmitted; and, 3. Of occasional and unlooked-for visitations and examinations of the vouchers, and of the state of cash in the strong-box. The cautioners who engage for the balance that may arise in these perilous transactions naturally trust to those checks in a great measure, as at once a protection to the bank and to them. And the delicacy of interfering with bank transactions seems to subject the cautioners still more to a dependence on the vigilance which the bank itself ought to exert in keeping their agents to a strict and rigid accounting. On this ground, some very distressing questions have lately arisen on the sudden failure of bank agents, where demands have been made on their cautioners for enormous sums, as the result of a scrutiny into the agent's accounts for many years back. How this question is to be determined in the various cases which such situations present, or what degree of neglect on the part of the bank will bar their claim against the cautioners, is not yet correctly settled, although several cases have lately been determined on the subject.

There is a very obvious difference between the guarantee of a debt to be paid at once, and an engagement of this prospective nature, in which the cautioner is neither entitled, by [363] paying up the sum engaged for, to discharge his obligation, and take the debtor in his own hand; nor at liberty to take precautions, or interpose, for his own security, checks that may have the effect of impeding the operations of the bank, or impeaching the credit of their agent. The bank, in taking security from their agent, is not understood so much to contemplate their protection against those irregularities which they have it in their power to check, as those frauds which elude detection, and those perils against which the

del credere guarantee is directed. The cautioners, on their part, trust to the bank protecting themselves by vigilance, and by the observance of the ordinary regular precautions. It seems to result from these considerations, that the bank, though protected as by a *del credere* guarantee against the insolvency of customers, and also against the frauds and peculations and irregularities of the agent, when not encouraged or connived at, will not be entitled to relief of sums allowed to accumulate by long-continued irregularities, and the neglect of the ordinary and regular course of accounting.¹ Where, for example, the weekly or regular accountings, or bill lists of an agent, are neglected to be transmitted, or permitted to be sent full of obvious errors; where his accounts are not checked; where he is permitted to go on with a series of transactions, augmenting continually a balance which ought to have been kept down; the bank will scarcely be allowed to take recourse against the cautioners.² But this must have its limits; for cases may easily be imagined where the agent has so exercised his lawful powers as to incur, in unfavourable times, a responsibility which cannot at once be rectified, which it is the interest of all parties gradually to reduce, and which the bank cannot suddenly check, or take public notice of, without doing incalculable mischief. And certainly it cannot be said that cautioners are entitled to require a bank, on the occurrence of every difficulty or embarrassment in the conduct of the agency, to correspond with them; or at once to wind up the responsibilities and dealings of the agent, and stop the operations of such delicate machinery.³

Bonds given on those occasions are made to indemnify the bank against past as well as against future loss. It is therefore important to observe, that wherever the bank, in requiring caution, have concealed the real state of affairs, it will afford a fair ground of exception against their availing themselves of the bond to cover their past loss. If, for example, a bank have begun to doubt the regularity of their agent's transactions, and, on occasion of the death of cautioners, require additional security for his continuing in office, holding him out as a trustworthy person, without explaining to the cautioners that there already stands a great balance against him, which secretly they intend the cautioner [364] to undertake, the cautioner seems to have a good exception to their action, in so far as grounded on the balance due at the requisition.⁴

¹ In the House of Lords, in *Smith v Bank of Scotland*, Lord Redesdale mentioned a case before him in Ireland, where a banking company had trusted their clerk too far, and had not called him to account in the ordinary regular manner. He became indebted to them in a large sum, which he was unable to pay, and they called on his sureties. They contended that the bank had not acted fairly by them, in not calling on the clerk to account in the ordinary manner, which, if they had done, the deficit would have been much smaller, and perhaps the misconduct would never have occurred. Lord Redesdale remarked that the principal ought to call on the agent to account in the ordinary regular course of business, and that it certainly was not acting altogether fairly by the surety to be negligent in this respect. On this opinion the case appears to have been settled. 1 Dow 296.

² Yet this plea was rejected in an early case. It would probably not be held a precedent now to be followed. *British Linen Co. v Nisbet*, 1773, 5 Brown's Sup. 409. [*Leith Bank v Bell*, 5 W. and S. 703, affirming 8 S. 721; *British Guarantee Co. v Western Bank*, 15 D. 834.]

³ *Thomson v Bank of Scotland*, 1822, 1 S. 275. In 1808 a bond of caution was granted for the faithful administration of a bank agent, limited to £10,000. In 1811 additional security by heritable bond was taken, when the responsibility of the agent was at £40,000; and also a note for that sum, reserving other sureties. The agency closed in 1812, and the

cautioners were charged to pay their £10,000. The chief defence was rested on the bank having permitted the agent grossly to misconduct the business, to give extravagant accommodations, and in particular large discounts to a house connected with the agent in trade. The Court of Session held the cautioners liable. But the judgment was reversed in the House of Lords. 2 Sh. App. Ca. 316.

⁴ No case has been determined of this precise nature. But in the House of Lords, in the case of *Smith v the Bank of Scotland*, a case was mentioned at the bar and on the bench which illustrates it.

Sir Samuel Romilly mentioned at the bar *Fishmongers' Co. v Maltby*. Maltby was a clerk of the company, with several sureties. Some of them died, and he was required to renew the suretyship. The company coming to be dissatisfied with his conduct, directed an inquiry into the state of his accounts, and found that he was indebted to them in a very considerable sum, which had been increasing from year to year, and at last became greater than was likely to be paid. Before settling accounts with him, they required new sureties, and a bond was executed accordingly. Immediately afterwards Maltby was removed. The case was before the Lord Chancellor on a motion; and the light in which it appeared to him was this: 'That if he knew himself to be cheated by an agent, and, concealing that fact, applied for surety in such a manner and under such circumstances as held him out to

A stipulation is generally contained in such bonds, by which a stated account, made out from the books of the bank, and signed by the accountant (or other officer), shall be sufficient to constitute and ascertain a balance, to the effect of authorizing a charge and other diligence. This fixes the amount of the claim for which the bank is entitled to do diligence against the cautioners,¹ or to rank on the estates of the several co-obligants, principal and cautioners.

But such a stipulation in the bond does not preclude the cautioners from requiring to see the particulars of the account as appearing in the books.² They will be entitled to this inquiry even in the way of suspension, if any good ground can be shown for refusing summary execution on the bond; and when a claim comes to be entered in bankruptcy, the bank may in the same way be called on to exhibit a copy of the account.

It is also sometimes stipulated that no suspension shall be competent of a charge on such an account, unless upon consignment of the balance. This, however, is not a legitimate or effectual stipulation.³

The bond generally provides that the co-obligants shall be chargeable with interest on the balance appearing on the stated account, from the time that the demand is made. Where no such provision is made, interest seems to be due from the date of the balance being ascertained, and a demand made for payment; for from that time the sum exists as a debt due by the principal, which the cautioners may discharge.⁴

II.—CAUTIONER FOR A MESSENGER.

The cautioners for a messenger are taken bound 'for the damage, interest, and expenses which the lieges shall sustain through the negligence, fraudulent or informal execution of the [365] messenger.'⁵ This is a very great responsibility, considering the infinite delicacy and importance of the acts which a messenger has to perform; that it protects both the employer and the person against whom the diligence may be erroneously executed; and that it extends to all acts of usurpation and injury to which the messenger is admitted by means of the diligence.⁶ (See below, p. 385, note 2.)

The claim against a messenger or his cautioners is to be constituted by a decree of the proper court, ascertaining the damage, and decerning for the amount. It is held, 1. That the cautioners are liable only for what the messenger does, or neglects to do, in his proper office of messenger; not in the office of agent, in which occasionally a messenger is employed in combination with his ministerial duties.⁷ 2. That the messenger, as such, has no discre-

others as one whom he considered as a trustworthy person, and any one, acting under the impression that the agent was so considered by his employer, had become bound for him, it appeared to him that he could not conscientiously hold that security. He was accordingly of opinion that the Fishmongers' Co. could not hold their security.' On this opinion the case was settled. And Lord Eldon said, in Smith's case, that 'he had since reconsidered the matter, and still retained his former opinion, and would act upon it judicially if occasion offered.' 1 Dow 294.

[See, on the subject of concealment, *Railton v Matthews*, 3 Bell's App. 56, reversing 6 D. 536; *Royal Bank v Ranken*, 6 D. 1418; *Hamilton v Watson*, 4 Bell 67, affirming 5 D. 280; *Swan v Bank of Scotland*, 9 D. 1062.]

¹ *Fisher v Stewart*, 1824, 2 S. 695, N. E. 583, 3 S. 426, 7 S. 97. The objection stated was, that there was no authority in the registration clause to register the account, so as to be a ground of charge. The cautioner's bill of suspension was refused.

² *Bank of Scotland v Frazer's Cautioners*, Winter Session

1818. Lord Alloway authorized an inquiry into the accounts of a bank agent, where the balance, as ascertained in the stated account, was given as the result of a scrutiny for many years back. The case was settled on the result of the investigation. [As to the cautioner's right to withdraw, see *Taylor & Wright v Adie*, 1818, Hume 114.]

³ *Forrester v Walker and Hunt*, 27 June 1815, F. C. The case was very deliberately considered, and in the report of it in the Faculty Collection the opinions of the judges are fully given. 18 Fac. Coll. 467.

⁴ See below, p. 384, General Rules of Responsibility.

⁵ This is the form of the bond used in the Lyon Office, in compliance with the Act 1587, c. 46.

⁶ *Kennedy v M'Kinnon*, 1821, 1 S. 210, N. E. 190. The messenger in arresting a ship removed the pump, took possession of the ship abandoned by the crew, and in attempting to navigate her, run her on shore and lost her. The cautioners were held liable.

⁷ *Welsh v M'Veagh*, 1781, M. 8893, Hailes 876, where the messenger, instead of pointing the debtor's effects, re-

tionary power. 3. That it is not enough to characterize his employment as that of agent, that he is addressed as 'writer.'¹ 4. That the cautioners are liable not merely to the employer of the messenger, but to those against whom he has committed any fault.² 5. That, in estimating the damage arising from neglect, the creditor is not bound to show his loss; the law presuming that the damage arising from the non-execution of diligence is the amount of the debt.³ 6. That where the diligence to be executed is personal, which operates indirectly, this presumption is absolute, and not to be overcome by proving the desperate circumstances of the debtor, and the hopelessness of recovering the debt;⁴ nay, even where the diligence is direct (as pointing), the Court does not admit any evidence to show speculatively that this diligence would probably not have produced payment;⁵ although clear evidence of the impossibility of deriving payment from such diligence must undoubtedly be received as a sufficient defence; as, for example, where an arrestment is blundered, and it turns out that on a balance of accounts there are no funds in the hands of the arrestee.

III.—CAUTIONER FOR A NOTARY.

Notaries, before they are admitted to the exercise of their office, find surety for [366] the faithful exercise of their function;⁶ and questions on the negligence or irregularity of their proceedings must be determined on the same principles which regulate the case of a messenger.

1. It is no defence against the cautioner's responsibility, that the act has proceeded from want of skill, and that the legitimate provision against that is the examination before admission.

2. It is not necessary to make out a case of fraud or dole; the cautioner will be liable also for error or neglect.

3. It has been held that the cautioner for a notary is not responsible for errors or neglects in the exercise of the office of town-clerk, which is separate from that of a notary. And,

received them from him and sold them by public auction, and applied the proceeds to his own purposes. His cautioners were held not liable for the money allowed to come into his hands, as his malversation was in the character of agent.

In *Hamilton v Frazer*, 14 Feb. 1817, 19 Fac. Coll. 291, the action not being against the cautioners, there was no occasion to discriminate correctly between the character of agent and messenger; but the defender was found liable for the misconduct of another messenger to whom he sent the diligence to be executed. As argued by the pursuer, this must have been on the ground of an agent's responsibility. But the expression used by the Court leaves it doubtful whether he was not held liable as messenger.

¹ *Wilson & Co. v Snody*, 31 Jan. 1817, 19 Fac. Coll. 268. Here the messenger was held as acting in that official capacity, and not with the discretionary power of an agent, although the letter sending the diligence was addressed 'Mr. N. Snody, writer.'

² *Grant v Forbes*, 1758, M. 2081; aff. 7 March 1759. This case was confirmed in *Kennedy v M'Kinnon*, *supra*, p. 382, note 6. [See *Stewart v Lowrie*, 1813, Hume 100.]

³ *Chatto v Marshall*, 17 Jan. 1811, F. C. [*Glen v Black*, 1841, 4 D. 36.]

⁴ The same rule is followed here as in the escape of a prisoner, where, without inquiring into probabilities, the

magistrates are subjected for the whole debt. *Dean v Magistrates of Ayr*, 1803, M. 11765; *Affleck v Magistrates of Kirkcudbright*, 17 June 1803, n. r.

⁵ *Chatto v Marshall*, 17 Jan. 1811, 16 Fac. Coll. 121. In this case, the claim against the cautioner was for the messenger's neglect to execute a pointing. It was stated: 1. That a writ of extent had been issued, which must have defeated the pointing; and, 2. That the debtor could have been made bankrupt, so as to defeat the pointing, by means of the *pari passu* preference. But as it was not shown to be absolutely impossible that the pointing could have been effectual, the Court adhered to the general rule, and the creditor recovered what he never would in any other way have realized. See Lord President Blair's opinion, when the case was first decided.

⁶ The words are: 'The said A (the notary), and B as cautioner for him, hereby enact, and bind and oblige them jointly and severally, and their heirs, executors, and successors, for the said A, his honest and faithful administration of his office, conform to law, under the pain of deprivation and such other punishment, etc., and such fine to be paid by him and his said cautioner as the said Lords shall think fit, and to satisfy and pay to every person prejudged by his maladministration such damages as the said Lords shall modify.'

4. It rather appears, that when a writer sends a sasine, etc., to a notary to be executed, already written out, but erroneous, the notary will not be liable, nor his cautioners responsible for the errors into which he is thus betrayed.¹

IV.—GENERAL RULES OF RESPONSIBILITY BY CAUTIONERS FOR DUTIES OF OFFICE.

Without particularizing other offices, for the administration of which this precaution of suretyship may be necessary, it may be sufficient to observe,—

1. That it will depend much on the expression of the bond, whether it is to be extended to prior as well as to future intromissions.

2. That where the sureties are bound generally for the intromissions or faithful administration of the principal, and subjoin a limitation of their responsibility to a certain sum, should the balance due on his intromissions happen to exceed the sum limited in the cautionary obligation, the engagement of the cautioners is held to be a security for that balance, after applying in extinction of the debt whatever the estate of the principal may afford in the way of dividend. The cautioners are not therefore entitled to require that such dividend from the principal's estate should be rateably applied in extinction of their engagement: the creditor is entitled to apply it in payment *pro tanto*, leaving the engagement of the cautioners as his last resource. As, for example, if caution has been given to the extent of £500 for the intromissions of a trustee, and he fails with a balance of £1000 against him; the creditor, after receiving a dividend from his estate of 10s. in the pound, would still be entitled to demand from the cautioners the £500 which they had guaranteed.² This, it will be observed, is different from the case of advances made beyond a sum limited in a cash-[367] credit. There an engagement is tacitly undertaken to give no enlargement of the credit but on the footing of a common creditor; and so the cautioners will be entitled to an equality with the creditor. But in stipulating responsibility for a bank agent, the presumption is, that the surety is to answer for a deficiency which cannot in the nature of things be limited.

3. That if no special stipulation is made as to the evidence by which the balance is to be struck and ascertained, it must be constituted by an action on the account between the officer and his principal, or those to whom he is accountable; or by a claim in bankruptcy, accompanied by the account and vouchers.

4. That the demand against the officer's estate for the balance is a mere personal debt, on which no preference can be claimed, unless in so far as the funds entrusted to him can be identified as part of the trust-estate; in which case they may be vindicated from the fund divisible among his other creditors.

5. That cautioners having once engaged for an officer's fidelity, cannot suddenly withdraw from that responsibility, to the effect of throwing the affairs entrusted to the officer into confusion. For example, the cautioners for a bank agent cannot, on a sudden, stop the whole operations of the bank, by withdrawing. But they may withdraw, by giving notice of their resolution so to do, after a reasonable time allowed for a new arrangement.

¹ *Stevenson v Tweddale*, 16 May 1818, Hume 111.

² *Maxton v M'Intosh's Crs.*, 1777, M. App. Cautioner, No. 1, 5 Brown's Sup. 408. The Perth Bank employed Ferguson as their agent at Edinburgh, on a cautionary bond being granted by four friends, 'that he should faithfully account for and pay what balance shall be due by him to the creditors; or failing thereof, that the cautioners should rateably, according to the sums for which they were respectively bound, pay the said balance.' Ferguson failed, indebted to the bank in £5000, and the bank received a dividend of £1200. They then brought an action against the cautioners for £1000 each.

They pleaded their right to have a communication of the dividend. The Court held the cautioners bound that Ferguson should account indefinitely, and that a taxation of this to £1000 each no doubt freed them from paying ultra, but did not entitle them to any share of Ferguson's effects till the bank was totally paid.

Borthwick (East Lothian Bank) v Balfour & Gibson, 29 Jan. 1819, 19 Fac. Coll. 641. In this case the same question was raised as in Maxton's case. Lord Pitmilley decided it on the very same principles, and the Court adhered. Affirmed, 1 Sh. App. Ca. 131.

6. That, notwithstanding the death of the cautioner, the engagement still subsists against his representative as cautioner, unless *he* shall by a similar notice terminate his obligation.¹ And,

7. It has been held (but the question is full of doubt) that the bankruptcy of the cautioner annihilates the bond, so that it cannot revive, but requires to be renewed.²

SUBSECTION III.—OF CAUTIONARY OBLIGATION FOR A CASH-CREDIT WITH A BANK.

The use of credits with bankers, or merchants having a great command of capital, has in all trading countries been productive of great advantages, by enabling dealers without imprudence to extend their trade further than they otherwise could do. The operations on such credits are carried on in various ways; by the discounting of bills, or by drafts or checks on the banker, as if he held money of the dealer.

The trade of Scotland has been fostered by a peculiar sort of cash account or bank credit, which, from the time of their first institution, the Scottish banks have been accustomed to open with their customers, and which have produced great benefit in all branches of trade and manufactures. A cash-credit of this description is an undertaking on the part of a bank to advance to an individual, or to a partnership, such sums of money as may from time to time be required, not exceeding on the whole a certain definite amount, to be repaid, and a continual circulation kept up by the replacing in the bank of small profits [368] and sums as they come in. The security upon which the advances are made is a bond with sureties, generally two in number, for the repayment on demand of the sums actually advanced, with interest upon each issue from the day on which it is made; interest at a lower rate being allowed by the banker for the sums paid into the bank. And the credit is continued as long as the bank finds its advantage in doing so, and while the person having the credit proceeds with a circulating capital to a certain proportion beyond the amount of the credit. The security on which such credits are given may be either that of heritable property or personal suretyship. In the application of heritable securities to this purpose, there was formerly danger, both at common law and under the provision of the bankrupt law, against the granting of securities for debts to be afterwards contracted. And although those dangers have now been removed,³ bankers decline heritable security, and rather wish to have the personal credit pledged to them of such sureties or cautioners as will immediately answer a demand when made.

The form of the bond is that of a joint and several obligation by the principal and his sureties, as co-obligants; the principal being no otherwise distinguished in the bond than as the person in whose name the account is to be kept, and who, by his draft and orders, is to operate on the credit to the extent of the obligation. In this way the parties evade the septennial limitation of the Act 1695, c. 5.⁴ The nature of the operations or transactions by which the principal is to take advantage of the credit, and which the banker is entitled to comprehend within the cover of the bond, is usually defined by an enumeration in the bond of all sorts of cash transactions which can occur in daily practice.⁵ The credit is limited

¹ See *University of Glasgow v Sir W. Miller*, 1790, M. 2106, Bell's Cases 140, Hailes 1091.

² *Hibbert v Mann*, 1818, so determined by Lord Alloway in the Outer House, where the cautioners of a messenger had failed and been discharged, and had again become rich, his bond remaining all the time in the Lyon Office, and appearing, on occasion of a subsequent malversation by the messenger, to be the sole cautionary obligation for his fidelity.

³ Of this hereafter, in Book IV. [See 19 and 20 Vict. c. 79, sec. 7.]

⁴ See above, p. 374 et seq.

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⁵ The parties bind themselves, jointly and severally, as co-obligants and full debtors to the bank, 'for the sum of £ , or such sum as the said A shall value for, or be due to the bank, by orders or drafts on the cashier, or by receipts to him, or by letters addressed to him, or by accepted, endorsed, or discounted bills, promissory notes, letters of credit, guarantees, or in any other manner of way.' 'And it is hereby declared, that an account made out from the books of the bank, and subscribed by the accountant, shall be held fully to liquidate and ascertain the balance due, and for which a charge may proceed,' etc.

to a precise amount; the balance at any time due, to be ascertained by a signed or certified account from the cashier.¹

Correctly proceeding under the bond, the banker ought to enter regularly as articles in the cash account, every bill or note discounted which it is his intention to cover by the security. But it appears to be more convenient for all parties, on the one hand, that the cash-credit shall not be held as operated upon, and perhaps exhausted, by every bill transaction, however high in credit the parties whose names are on the bills may stand; and, on the other hand, to give the banker a right of throwing into one general account at the ultimate settlement of the balance, all the responsibilities of the holder of the credit. When the question was first raised, it was greatly doubted whether bills could be introduced under such a bond of credit, to be covered by the responsibility of the cautioners, if not originally entered in the account, though perhaps discounted for other persons than the holder of the account. And it appeared to be a practice of reprehensible looseness in bankers, to introduce subsequently into the account opened under the bond of credit, all the bills and responsibilities of the holder of the credit, however unconnected in their origin with the credit of the cautioners. There could be no doubt that a bond expressed as above (or even more generally expressed) was, strictly speaking, capable of comprehending such transactions; but it was thought that where the banker, at the time of making the discount or entering into the transaction, did not place it to the debit of the cash account, or where it was not truly a cash transaction for the benefit of the holder of the account, it ought to be held that the transaction was not on the credit of the names in the bond, and that the discount [369] of a bill should be held as a purchase merely of the obligations which that document carries with it,—a separate transaction made on the faith and credit of the bill alone. It was said to be the proper way of entering a bill discounted for the person who holds the credit, when intended to be under the bond, to make it at the time an article in the account, exhausting *pro tanto* the credit; or at least to enter it short in the account, leaving its fate as affecting the balance to be determined by the event. But other views have prevailed. The terms of the bond were found to have been carefully devised to avoid this construction, and with a view to give to bankers the privilege of bringing under the security bond the whole of their customer's responsibilities. Accordingly, the Court held that the cautioners were liable for the specified amount of the credit, comprehending in the balance, bills, notes, and engagements which were not at the time specifically brought into the account, or directly taken on the security of the bond.²

The general rules of the creditor's obligation to sureties apply to such a case. The bank will not be held bound to do diligence against the holder of the credit. But, on the other hand, they will not be entitled to renounce any security which they hold. They will not be bound to discuss the parties to bills, but will not be entitled to include under the account bills which they have failed duly to negotiate.³ They will be fully entitled to renew

¹ See, as to the effect of this, above, p. 382.

² *Liddell v Sir W. Forbes & Co.*, July 1820. A credit of £1000 was given to Sibbald & Co., on a bond by W. Sibbald and J. Liddell in the terms above (p. 385). The credit being nearly exhausted, a bill for £5000 at twelve months by W. Sibbald was lodged and accepted to Sibbald & Co. as 'to your credit when paid.' On Sibbald & Co.'s failure the cash account showed a small balance in their favour; but two bills discounted and then current, but not entered in the account, having been dishonoured, were brought into the account, turning the balance in favour of the bank, and a demand was made on the cautioners. Liddell pleaded: 1. The bills not being discounted under the credit, or entered in the cash account at the time, cannot affect the balance; 2. If liable, he is in relief entitled to the collateral security of the £5000

bill. Lord Alloway repelled both pleas, holding: 1. That the bond covered these bills, and that their eventual dishonour altered the balance as it stood at the bankruptcy; and, 2. That the bill of £5000 was merely a source of additional credit *beyond* the cash account, and not intended as any additional security for that cash account; and that the whole balance was below the sum in the bond. The responsibility was accordingly divided as under the bond; and this judgment was adhered to by the Court. [*British Linen Co. Bank v Thomson*, 15 D. 314. Bill for £1500 deposited in security of cash-credit bond. Held that obligants not liable unless there were a balance due by the debtor at the time the bill arrived at maturity.]

³ [See *Swan v Bank of Scotland*, 1839, 2 D. 78.]

bills, and give time both to the holder of the credit, and to those who in the course of his discounts come to be collaterally bound to them; for the very purpose of the credit is to enable the bank to give every facility that may be useful to those who hold this accommodation, looking at last to the guarantees of his mercantile credit.

The bank will be bound to assign to the cautioners such obligations as they have brought into the account; under this qualification, that if the balance due to the bank exceed the sum secured by the bond, the banker will not be required to give up bills or other securities on which advances have been made, unless they have at the time of the transaction been introduced into the cash account, and discounted expressly on the credit of the cautioners. It has been held that they cannot demand the benefit of collateral securities, as long-dated bills, lodged as a fund of credit.¹ But this is very questionable; and the case seems rather to fall under the rule already explained, pp. 370, 371.²

The cautioners in cash accounts may put an end to their responsibility when they please, by giving notice to the bank, and to the person in whose name the account is kept. The former is the essential notice. But the death of the cautioner does not discharge his bond: the bond binds the parties, their heirs and successors; and it still subsists against representatives, not merely for the debt as it stood at the cautioner's death, but prospectively, as if they were the original obligants for what may become due under the credit till the recall of the responsibility.³ Notice ought to be given to the representative of the [370] obligation: for as it happens in most cases that the heir has no means of knowing that such engagements have been undertaken by his predecessor, the hardship may be very great of a sudden and unforeseen demand in consequence of such an undertaking; and although it cannot be said that such notice is necessary to continue the responsibility,⁴ a court will examine very strictly into the equities of a claim in which this has been neglected.

Although the stipulation in the bond will entitle the bank to summary diligence on the certified account showing a balance (p. 382), a claim in bankruptcy must be made in the ordinary way, by producing the bond, with a certified copy of the account, and the vouchers of that account. The claim, of course, may be made against each obligant to the full amount, so as to draw, on the whole, the full sum of the debt and nothing more.

In suretyships having a prospective operation, as in cash-credits, standing guarantees, etc., it is important to mark the effect of a change of the persons concerned in the transactions.

1. Where there is a change on the part of the creditor; where a cash-credit bond, for example, is granted to a banking-house, the partners of which happen to be materially altered during the currency of the credit, do the cautioners continue responsible, notwithstanding such change, and without any notice or any renewal of their engagement? It would be a great hardship even on the customers, if on every change all the bonds of credit of a banking-house were to be renewed; but there does not seem in law to be any necessity for this, and generally there is a stipulation against it in the bond. See below, Partnership.

¹ [Nor is a cautioner entitled to the benefit of the banking company's lien upon dividends on their stock due to the customer, in competition with the claim of the banking company itself for overdrafts above the amount secured by the bond. *Scott v Grahame*, 1830, 8 S. 749.]

² [The amount of the obligation in a cash-credit bond is sometimes extended by a letter guaranteeing an overdraft to a certain amount. Such a letter is held to have the same character as to continuity as the original obligation. *Sir W. Forbes & Co. v Dundas*, 1830, 8 S. 865; *Houston v Speirs*, 1834, 12 S. 879.]

³ *Commercial Bank of Aberdeen v Callender*, 1801, Hume 88. There John Durno had a cash-credit, with Barclay and

Callender as co-obligants. Callender died; and the bank having, as usual, required a new cautioner, Leslie of Summerhill signed a bond of corroboration. Durno exhausted the credit, and failed; Leslie also failed, and Callender's executors were called on by the bank. They pleaded: 1. That the bank had kept the obligation latent from them till after Durno's failure; 2. That Leslie came in Durno's place. But the Court repelled the defences.

Paterson v Calder, 5 July 1808, 14 Fac. Coll. 235. The principle of the determination was, that the representatives were, 'as principals, indisputably liable; and as cautioners, they were liable on the precedent of *Sir W. Miller's case*.'

⁴ [*British Linen Co. v Monteith*, 1858, 20 D. 557.]

2. Where there is a change on the part of a company, for whose use and in whose name the credit is to be operated on, the responsibility will be more easily discharged. The same inconvenience cannot here be stated as in the renewal of all the cash-credit bonds of a banking-house; while the confidence reposed, the very occasions of cash operations, the whole character of the debtor whose dealings are guaranteed, undergo a radical change.¹ The death or retiring of an old partner, or the adoption of a new one, if known to the bank, will discharge the cautioner; unless there is either a renewal expressly of the cash-bond, or at least an implied assent to the change, in consequence of distinct notice given to the cautioners.²

SUBSECTION IV.—OF LETTERS OF CREDIT OR GUARANTEE.

Guarantee may be taken as the generic term, comprehending both letters of credit and engagements to be answerable for debt. The nature of the engagement is an undertaking to be answerable for the payment of a debt, or for the price of goods, or for the balance arising in a course of dealings, or for the performance of an undertaking, by another person, liable in the first instance. It has commonly in contemplation future rather than past transactions, but not unfrequently is applied to a series of dealings of which some have already taken place. It is distinguished from a formal cautionary obligation chiefly by the looser epistolary form of the writing.³

[371] The doctrine of the nature and construction of contracts and obligations, already laid down, is applicable to this engagement. In England, the statute of frauds (29 Car. II. c. 3, sec. 4) denies action on any collateral obligation for the debt, default, or miscarriage of another, unless upon a note or memorandum thereof in writing signed by the party;⁴ while it is held not to apply if the promise be not collateral, but an original and absolute undertaking to pay the debt.⁵ In Scotland the rule is, that no cautionary obligation or guarantee can be constituted by parole agreement; so that an acknowledgment or a reference to oath will not constitute an effectual guarantee. But this is not carried so far as in England the words of the statute have compelled the Courts to go. If goods be furnished, or money paid, or indulgence given from the immediate execution of diligence, on the faith

¹ [By 19 and 20 Vict. c. 60, sec. 7, it is enacted, that 'no guarantee, security, cautionary obligation, representation, or assurance granted or made after the passing of this Act, to or for a company or firm consisting of two or more persons, or to or for a single person trading under the name of a firm, shall be binding on the granter or maker of the same, in respect of anything done, or omitted to be done, after a change shall have taken place in any one or more of the partners of the company or firm to which the same has been granted or made, or of the company or firm for which the same has been granted or made, unless the intention of the parties that such guarantee, security, cautionary obligation, representation, or assurance shall continue to be binding, notwithstanding such change shall appear either by express stipulation, or by necessary implication from the nature of the firm or otherwise.']

² *Spiers v Royal Bank*, 1822, 1 S. 554. The account here was to be kept in the name of Archibald Macnab & Co., which then consisted of two partners. One of them retired, and announced this in a newspaper; others were assumed; but the firm remained unchanged, and no notice was sent to the bank of the shifting of partners. The cautioner was held liable; for although it was said the bank took in the newspaper in which the change of partners was announced,

no notice was proved. [*Morrice v Scott*, 1831, 9 S. 480; *Bowie v Watson, Macknight, & Co.*, 1840, 2 D. 1061.]

³ [By 19 and 20 Vict. c. 60, sec. 6, 'all guarantees, securities, or cautionary obligations made or granted by any person for any other person, and all representations and assurances as to the character, conduct, credit, ability, trade, or dealings of any person, made or granted to the effect or for the purpose of enabling such person to obtain credit, money, goods, or postponement of payment of debt, or of any other obligation demandable from him, shall be in writing, and shall be subscribed by the person undertaking such guarantee, security, or cautionary obligation, or making such representations and assurances, or by some person duly authorized by him or them, otherwise the same shall have no effect.' This provision, and the law relating to it, are treated in detail in a note appended to this section. See 9 Geo. IV. c. 14, sec. 6.]

⁴ So even where, in consequence of a promise to see the price of goods paid, in reliance on which the goods have been delivered, there is no action. *Anderson v Hayman*, 1 H. Blackst. 120; *Kirkham v Master*, 2 Barn. and Ald. 613; *Barber v Fox*, 1 Starkie 270.

⁵ *Goodman v Chase*, 1818, 1 Barn. and Ald. 297.

of the engagement, though verbal, and with the knowledge of the person so engaging, the obligation will be effectual by the law of Scotland.¹

1. **LETTERS OF CREDIT**, strictly speaking, are mandates, giving authority to the person addressed to pay money or furnish goods on the credit of the writer. They are generally made use of for facilitating the supply of money or goods required by one going to a distance or abroad, and avoiding the risk and trouble of carrying specie, or buying bills to a greater amount than may be required. The debt which arises on such a letter in its simplest form, when complied with, is between the mandatory and mandant; though it may be so conceived as to raise a debt also against the person who is supplied by the mandatory. 1. Where the letter is purchased with money by the person wishing for the foreign credit, or is granted in consequence of a check on his cash account, or procured on the credit of securities lodged with the person who grants it, or in payment of money due by him to the payee, the letter is in its effects similar to a bill of exchange drawn on the foreign merchant. The payment of the money by the person on whom the letter is granted raises a debt, or goes into account between him and the writer of the letter; but raises no debt to the person who pays on the letter, against him to whom the money is paid. 2. Where not so purchased, but truly an accommodation, and meant to raise a debt against the person accommodated, the engagement generally is, to see paid any advances made to him, or to guarantee any draft accepted or bill discounted; and the compliance with the mandate in such case raises a debt both against the writer of the letter, and against the person accredited.

2. **LETTERS OF RECOMMENDATION AND GUARANTEE**.—There is a species of letter of credit, used both in foreign and in domestic transactions, which is of the nature of a proper guarantee, or cautionary obligation, where the writer of the letter gives assurance of the responsibility of a third person.

The chief difficulty is to distinguish these from mere letters of recommendation. A guarantee raises a credit on the pecuniary responsibility of the writer of the letter; a simple recommendation infers no responsibility on him whatever, unless the representation shall turn out to be fraudulent and false. It would appear, 1. That when the person who writes in commendation of the character and credit of another, does so in consequence of an application on the part of him who is about to engage with that other in transactions, his expressions are to be interpreted largely in his own favour, and so that the [372] friendly information thus drawn from him may not entrap him into a guarantee.² 2. That he will be liable for the consequence of wittingly deceiving another into a transaction with one unworthy of credit. This, however, is a case difficult to be made out. The examples of it which are to be found in the books, are in cases where the recommendation was spontaneous.³ 3. That a recommendation spontaneously given, if expressed in general terms, speaking merely of the respectability, regular conduct, and good credit of the person introduced, is an introduction only, not a letter of credit.⁴ But where there is a distinct

¹ *Hunter v Carson*, 1824, 2 S. 716. [As to the constitution of informal guarantees, see *Simpson v Fleming*, 1857, 20 D. 77; *Burnett v Burnett*, 1859, 21 D. 813. A guarantee may, it seems, be constituted by the endorsement of a bank check. *Macdonald v Union Bank*, 1864, 2 Macph. 963.]

² See much discussion on these points in *Haycoft v Creasy*, 2 East Rep. 92 et seq. See also *M'Iver v Richardson*, 1 Maule and Selw. 557, where the Court construed the letter to be an answer to inquiries made, but to import only an offer to guarantee, which required acceptance. See also *Symmons v Want*, 2 Starkie 371.

³ *Balfour, Junor, & Co. v Russell*, 8 March 1815, 18 Fac. Coll. 335. This was a case of misrepresentation of a trader's circumstances, the writer being quite aware that he was in a

state of great embarrassment. He was held responsible for the debt.

Corbet v Gray, 1794, 1 Ill. 207. This was a similar case decided in the same way. Farquhar Gray wrote to Corbet of a man whom he knew to be in labouring circumstances, that 'he had requested my line of introduction to somebody in the trade in Glasgow; and if you and he can agree as to the price, I have no doubt of your dealing to a considerable extent.' [*Ross v Lindsay*, 1820, Hume 116; *Wilson & Corse v Wood*, 1797, Hume 85.]

⁴ See opinions of the Court, especially of Lord President Blair, in *Ranken v Murray*, 15 May 1812, 16 Fac. Coll. 562. [*Taylor & Cunningham v Waddell*, 1804, Hume 93.]

allusion to a particular transaction, and an assurance of safety in entering into it, this, where spontaneous, is held to amount to a guarantee,¹ even where it is only a colloquial or verbal expression of assurance.²

3. GUARANTEES are often granted of single bargains or transactions relating to cash or bills; and there is no set phraseology in which they must be expressed. The chief point is, that the particular transaction shall be so described as to comprehend distinctly the claim of indemnity that is grounded on it, and that the condition of acceptance or otherwise shall have been complied with.³

In the stamp laws there is an exception from the duties for agreements, or minutes, or memorandums of agreements, of 'memorandums, letters, or agreements made for or relating to the sale of any goods, wares, or merchandise.'⁴ And under one of the earlier Acts, having the same exception, it was held that a guarantee of a purchase of goods did not require a stamp.⁵ But letters of guarantee for intromissions, and other similar engagements, require a stamp.

[373] It is a rule, that one who takes a guarantee is bound to inform the surety fairly of the nature of the contract to which his credit is to be interposed, and not to avail himself of a private compact which does not appear on the face of the guarantee to be known to the surety.⁶

LIMITATION OF GUARANTEES AND LETTERS OF CREDIT.—It is important to observe any limitation in respect of the transaction, the person or the time to which a guarantee may be meant to extend. The language used, the nature of the transaction, and the plain understanding between the parties, must all be taken into consideration. But the general rule is, that the strict words of the agreement, where intelligible, must be adhered to, and at all events never carried beyond the plain and manifest intent of the party.

I. LIMITATION IN RESPECT OF THE TRANSACTION.—It seems to be settled by decided cases,—

1. That where any particular transaction is specified, or distinctly pointed at, the guarantee can be held to extend only to that transaction: as, where a letter of credit is subjoined to an order for goods, the guarantee is confined to that order.⁷

¹ Such was the letter in the above case of *Ranken v Murray*, which, however, occasioned considerable doubts. The letter was introductory of one Shannon to Ranken, as 'intending to open for a sale of spirits and ale at the term. The lad has always behaved himself with propriety hitherto, and I doubt not will give satisfaction in any transactions he may have with you.' The judges held this to be a letter of introduction in the first part of it, a letter of guarantee in the latter part; but there was much doubt in the case.

Observe, however, the distinction taken in the case of *M'Iver v Richardson* (see above, p. 389, note 2), where the assurance is to be construed merely as an offer to guarantee, and where acceptance is necessary.

² *Hunter v Carson*, 1824, 2 S. 716.

See also *Mather v Mathie*, 1823, 2 S. 263; *Fermin de Tastet & Co. v M'Queen*, 1824, *ibid.* 747 and 750. [Correct the text by 19 and 20 Vict. c. 60, sec. 6.]

³ *M'Iver v Richardson*, 1 Maule and Selw. 557.

⁴ See above, p. 336.

⁵ *Warrington v Furber*. In this case Furber proposed to purchase Manchester goods to the value of £1070 from Martin, and offered the guarantee of Warrington, who gave an unstamped letter of guarantee for the price at a credit of six months. The goods were furnished on this credit, and a bill drawn at six months. The buyer failed, and Warrington paid £1000 under the guarantee, and brought his action for indem-

nification. One defence was the want of a stamp, and the question whether it did not fall under the exception of the 23 Geo. III. c. 58, sec. 4, as a contract relating to the sale of goods? The Court held that the law did not limit the exception to the case of an immediate sale of goods between buyer and seller, but by the very words extended to agreements relating to the sale of goods. 8 East 242.

⁶ *Jackson v Duchaire*, 3 Term. Rep. 551. Here Welch, wishing to assist Duchaire, who was entering on a house that had been occupied by Jackson, agreed to purchase for Duchaire, at the price of £70, the goods left by Jackson in the house. There was a private agreement between Jackson and Duchaire that £30 more should be paid for the goods. This was held a fraudulent concealment from Welch.

Pidcock v Bishop, 3 Barn. and Cress. 605. Here Bishop guaranteed the payment of £200, value to be delivered to Tickel in pig-iron. There was a private agreement that, besides the market price of the iron, Tickel should pay 10s. on every ton toward extinction of an old debt. This was held a fraud on Bishop, varying the degree of his responsibility.

⁷ *Crichton, Strachan, Bell, & Co. v Jack*, 1797, M. 8229.

In *Ranken v Murray*, 15 May 1812, F. C., one difficulty with the Court was, what should be the extent of such an engagement? Lord President Blair said, and the Court concurred with him, though the point was not necessary in the judgment: 'One difficulty is, Where is this to stop? But it

2. That where the expression is general, for goods to be furnished from time to time, or for *any* dealings, to a limited extent, the guarantee will be limited in respect of the sum, but extended to successive transactions, and held in mercantile phrase to be a **STANDING** or **CONTINUING GUARANTEE**.¹ But care must be taken that the expressions indicate an engagement for goods to be furnished successively, or from time to time.²

3. That where the guarantee is unlimited in extent, the discretion of those to [374] whom it is addressed is strictly referred to.³

4. That a guarantee for the payment of goods to be supplied, will apply to goods agreed to be sold the day before, but not delivered till after.⁴ But where the words plainly point to subsequent transactions, or rather where they do not plainly comprehend past transactions, the guarantee will not cover dealings prior to its date.⁵

5. It is sometimes difficult to distinguish whether a transaction be fairly comprehended within a guarantee which describes in general terms what is intended to be done; as where one agrees to guarantee a loan or accommodation to be granted to another, supposing it to relate to some future accommodation, but where truly it is intended only to settle past accounts. If the words be clear, they must guide the determination; if not, the obvious meaning and understanding of the parties must be taken, not carrying the engagement beyond the strict words.⁶

appears to me that this guarantee only applies to the first transaction under the letter, the object of which transaction was to enable Shannon to open his shop for business.' [See *Grant v Campbell*, 1 May 1818, 6 Dow 239; *Scott v Mitchell*, 1866, 4 Macph. 551.]

¹ *Merle v Wells*, 1810, 2 Camp. 413. The general word 'any' is in such cases important. Thus, one binding for 'any debts, the person alluded to may contract to the extent of £100,' the sum mentioned is held the sole limitation, and the guarantee applicable not merely to the first, but to subsequent debts to that extent. 'The guarantee,' said Lord Ellenborough, 'is not confined to one instance, but applies to debts successively renewed. If a party means to be surety only for a single dealing, he should take care to say so. By such an instrument as this, a continuing suretyship is created to the specified amount.'

Mason v Pritchard, 1820, 2 Camp. 436. A guarantee, 'for any goods he hath, or may supply my brother with, to the amount of £100.' Baron Wood held it necessary to give notice to stop the guarantee after any furnishings, if there was a design to limit it further than to the £100. And the Court of King's Bench refused a rule holding it a cautionary guarantee.

Bastow v Bennet, 3 Camp. 220. A guarantee 'to the extent of £300 for any tallow or soap to be supplied.' Lord Ellenborough said: 'Without the word *any*, it might perhaps have been confined to one dealing to the amount of £300; but as it is actually worded, I am of opinion it remained in force while the parties continued to deal on the footing established when it was given.' [See *Kemble v Mitchell*, 1831, 9 S. 648; *Veitch v Murray*, 1864, 2 Macph. 1098; *Caledonian Bank v Kennedy's Trs.*, June 1870; *Sm. Merc. L.* 7th ed. 470.]

² *Melville v Hayden*, 1820, 3 Barn. and Ald. 593. The guarantee here was 'the payment to A. M. to the extent of £60, at quarterly account, bill two months, for goods to be purchased by him of D. M. There had been goods delivered for three quarterly accounts, and paid. The default was in the fourth, and for that the action was brought. Abbot, Ch. J., held at the trial that the guarantee was at an end before

the goods of the fourth quarter were furnished. The Court of King's Bench held this to be law, there being here no provision for guaranteeing goods to be delivered from time to time.

[*Tennant & Co. v Bunten*, 1859, 21 D. 631. The guarantee was for payment of any purchases not exceeding £200 sterling in all within four months. Held that it covered a balance due on successive purchases made within that period.]

³ See below, No. II., and the cases in the following notes.

⁴ *Symmons v Keating*, 1819, 2 Starkie 426. On 6th December, one had applied for goods and selected them; but the plaintiffs would not deliver them without a respectable reference for her responsibility. On the 7th she brought a letter engaging, in consideration of supplying M. C. with such goods as she wished to buy, the defendant would guarantee the payment, not exceeding £50. Held that, the sale not being complete till delivery, and delivery being subsequent to and on the faith of the guarantee, the defendant was liable.

⁵ *Dykes v Watson*, 1825, 4 S. 69.

See *Houston's Exrs. v Speirs*, 12 May 1826, 4 S. 566, N. E. 573. [*Downie v Barr*, 13 Nov. 1840, 3 D. 59.]

⁶ *Glyn v Hertel*, 1818, 8 Taunt. 208. Here a mercantile house was largely indebted to its banker, for which the banker held the Company's note with security bills. The account being in a very unsatisfactory state, the banker insisted for payment or further security, and made application to the aunt of one of the partners to become security. The letter to her led to the conception that ready money was to be advanced to the house. The guarantee desired to be sent was, 'to guarantee the transactions in the account of S. M. & Co. with your house, to the extent of £5000.' The letter actually written was, 'I will be answerable to the extent of £5000 for the use of the House of S. M. & Co.' On receiving this, the note was cancelled, and the security bills delivered up. The bills were then redelivered with a new note, but no money passed. The Court held the guarantee to contemplate only a future loan, and that the transaction did not amount to a loan of money, so as to charge the defendant.

[*Rennie v Smith's Trs.*, 1866, 4 Macph. 669. A builder took

6. That which is a necessary part of the transaction guaranteed, comes under the guarantee.¹

II. LIMITATION IN RESPECT OF THE PERSON.—Guarantees and letters of credit are limited to the persons to whom they are addressed, in whose discretion the writer is presumed to have peculiar confidence. So, 1. A letter addressed to *one person*, authorizing him to introduce the bearer to dealers, will not authorize *another* to introduce him, to the effect of making a guarantee by the writer.² 2. A letter of credit addressed to a dealer will not [375] authorize him to send the bearer of it to another dealer.³ 3. A letter of credit to A will not authorize B to furnish the goods.⁴ 4. A letter of credit addressed to a company will not authorize dealings with that company after a radical change in it.⁵ But probably the doctrine already stated, relative to credit bonds with companies,⁶ would be held to apply even to guarantees. 5. A guarantee of furnishings to be made to a company will not authorize furnishings after a radical change in the partnership; though, if such furnishings are made *bona fide*, and in ignorance of any change, the guarantee will be effectual.⁷

an obligation from his employer to pay six instalments of £100 each at certain times, 'and the balance when the work is completed.' Memorandum added by the architect in these terms, 'I hereby agree to see you paid the above instalments,' held not to import an obligation to pay the balance.]

¹ *Sime v Duncan & Co.*, 1824, 2 S. 604, N. E. 516. Duncan endorsed Leach's bill; Leach failed to pay it; and the holder agreed, on a guarantee by Duncan & Co., to give indulgence to Duncan, by raising money on bills in the meanwhile, and pushing Leach. The guarantee was in these terms: 'As you seem to apprehend loss from your friendly interposition in the business with Leach, we therefore guarantee you against this.' The original bill was not paid, and more debt was accumulated on the bill transactions for intermediate accommodation. Duncan & Co. acknowledged their liability for the original bill, but refused to pay the balance. The Court held them liable for the loss attending the drawing of bills, originating from Leach's bill remaining unpaid.

² *Stewart v Scott*, 1803, Hume 91. Three persons applied to Scott for a letter of recommendation to corn-dealers in Leith. He gave them a letter to Mr. Sandeman, begging him 'to introduce the three gentlemen, who will deliver you this, to any of your corn or grain merchants, assuring them of their safety in what bargains they make with them.' And the three names were subjoined. Two only of those persons went to Leith; and not finding Sandeman, they went direct to a corn merchant, Stewart, and opened the letter to him, allowing him to take it as their recommendation. He sold them a whole cargo of oats, price £1849. It was an imprudent bargain; and Stewart brought his action against Scott on the above letter as a guarantee. The Court was very doubtful whether it was a guarantee, or anything else than a mere letter of introduction. But assuming it to be a guarantee, they held, 1. That Scott had relied on all the three persons, and on their mutual discretion in the proceedings to be taken under his letter. 2. That he had mainly relied on Sandeman's discretion to introduce his friends to proper dealers. 3. That it was (if a letter of credit at all) limited only by the discretion of the persons directly referred to acting in conjunction. Accordingly Scott's defences were sustained.

³ *Philip v Melville*, 21 Feb. 1809, 15 Fac. Coll. 204. Melville recommended Yetts to Durie for a supply of spirits,

adding: 'I am sure she will pay you at the time she may fix with you; so you are quite sure with her, as Mr. Gordon can also inform you.' Durie wrote on the back of the letter of credit an assurance to C. & J. Philip, that, not having the article himself, he had sent Yetts with this letter of credit, on which they might rely. C. & J. Philip furnished the spirits, and Yetts failed. They brought their action against Melville. The Court held: 1. That Melville's was an effectual guarantee of the transaction if made with Durie. But, 2. They held unanimously, that a letter of credit addressed to a particular person is limited to him, and that the writer must be held to have granted it in reliance on his prudence and discretion in acting upon it; that such a letter contains no general power to interpose the writer's credit or transmit his guarantee; and that this is specially to be observed, where the general terms of the letter make the personal limitation the only restraint on the responsibility of the writer.

⁴ See preceding note.

⁵ *Myers v Edge*, 7 Term. Rep. 254. Edge addressed a letter of credit to Myers, Fulden, Ainsworth, & Co., promising to be answerable for a certain quantity of cotton twist. At this time Ainsworth was a partner, and continued so for half a year, during which furnishings were made, and they continued after Ainsworth ceased to be a partner. Then the dealer failed, and an action was brought by the company against Edge. Certain technical objections to the action were overruled. The jury, under the direction of Mr. Justice Rook, who held the security as having been given to the house, and not to the individuals, found a verdict for the plaintiffs. But the Court of King's Bench delivered a different opinion, holding the contract as having been made with a party, of which perhaps Ainsworth was the very person chiefly relied on.

See the same doctrine strongly stated by Lord Ellenborough in *Strange v Lee*, 3 East 484. [*Elton, Hammond & Co. v Nelson*, 24 June 1812, F. C.; *Bowie v Watson & Co.*, 1840, 2 D. 1061.]

⁶ [See 19 and 20 Vict. c. 60, sec. 7, *supra*, p. 388.]

⁷ *Douglas, Wilson, & M'Auley v Gordon & Co.*, 24 Dec. 1814, 18 Fac. Coll. 127. It was held that notice in the Gazette of such radical change was not sufficient to ground a plea of *mala fides* against the furnishers, the guarantor not having given notice to the furnisher to stop.

III. LIMITATION IN RESPECT OF TIME.—Although guarantees do not fall under the limiting statute of 1695, c. 5,¹ they are strictly limited in respect of time by the words made use of. 1. In a single transaction, if the surety has engaged on the footing of a credit of a certain extent in point of time, the creditor can in no sense extend the time without the surety's consent; and, on the other hand, the time cannot be abridged.² But often the time is specified, without the *terminus a quo* being distinctly set down; as, for example, a person binds himself to guarantee 'the due payment of a bill of A B for six puncheons [376] of spirits at three months.' It seems, in such a case, that the custom of trade will regulate the date of the bills, or *terminus a quo*; that in an inquiry into the custom, it is either the universal custom or the local usage which is to be followed; and that the surety will not be held to authorize such an extension of credit in point of time, as, though frequent, is only given as an indulgence,—this being too arbitrary to be adopted in a court of law.³ 2. Where it is of the nature of a standing guarantee, it will subsist till recalled, or till circumstances alter, unless there be some limitation of time expressed.

It has been questioned, Whether the endorsation of a bill which has been guaranteed by a separate letter, accompanied by delivery of the letter of guarantee, will give to the endorsee the same right as if the letter itself were a negotiable instrument, passing without any latent qualification? It is generally held by bankers, that when they thus acquire right to the guarantee, they are entitled to demand payment from the surety, as if the letter had originally been addressed to themselves; and this has been adjudged by the Court of Session, in reliance on such understanding.⁴ Before the point can be held established, a much more deliberate inquiry must be made into the usage; if, indeed, any usage can establish a point against the principles of law, which this seems to be. It may be, that the very design of expressing the guarantee by letter, instead of endorsing the bill, is to preserve to the writer the full benefit of his remedy against the person to whom the letter is addressed; and it is anomalous at once to confer on such an engagement the privileges of an endorsible and negotiable instrument, and yet not to give to the granter of it the benefit of that strict negotiation which is the counterpart of the privileges of bills.

Guarantees are frequently undertaken in consideration of a premium paid. This is of the nature of an insurance of solvency; the price of the risk of which, though it may be difficult to ascertain it on any settled principle, the parties themselves may be permitted to

¹ [See the statute, *ut supra*.]

² *Bacon v Chesney*, 1 Starkie 192. In a guarantee of a small consignment of goods for London, at eighteen months' credit, on the question whether evidence of the credit being only twelve months, Lord Ellenborough said: 'The claim, as against a surety, is *strictissimi juris*; and it is incumbent on the plaintiff to show that the terms of the guarantee have been strictly complied with. If I engage to guarantee, provided eighteen months' credit be given, the party is not at liberty to give twelve only, and after the expiration of six more to call upon me.'

³ The doctrine of this paragraph may be extracted out of the case of *M'Laggan & Co. v M'Farlane*, 19 Nov. 1813, 17 Fac. Coll. 451.

⁴ *Sir W. Forbes & Co. v M'Nab*, 29 May 1816, 19 Fac. Coll. 137. In this case Cubie had bought from Wilson a quantity of salt, for the price of which he accepted a bill; and M'Nab gave to Wilson a letter of guarantee, in which, after describing the bill, he used these words: 'Which I hereby guarantee to see regularly retired when due.' Sir W. Forbes & Co. discounted the bill on seeing the guarantee, and the letter was delivered up along with the bill. In the meanwhile, M'Nab, the surety, had a letter from the bill-holder acknowledging

that the letter of guarantee had been granted, and adding: 'The goods for the bill not having been delivered, I hereby free and relieve you from all the consequences attending the said bill.' The action was by Sir W. Forbes & Co. against M'Nab upon the letter; and the Court held the letter to be effectual to Sir W. Forbes & Co. Lord Meadowbank, Lord Glenlee, and Lord Robertson doubted very much of the letter being transferable *with privileges*, like the bill of exchange itself. An inquiry into practice was thought to be proper; but the inquiry was made only by way of written answer from bankers to a case, and the persons applied to gave *opinions*, but no evidence of *practice*. These opinions seem to be objectionable on two grounds, when considered as the foundation of a judicial decision: 1. They stated no facts or practice; and, 2. This was a question of law, for merchants could only say that in practice the delivery of the letter was held a transfer of it. It still remained, in point of law, to be determined what should be the legal effect of such transfer; whether the letter so transferred to the banker could, in his hands, produce any other effect than if it had remained in the hands of the original holder? And on this point the question appears to be extremely doubtful. [See More's Notes on Stair, p. 107.]

settle. It does not appear that any question at law has been raised on such undertakings; but many examples of it are in the English books,¹ and many occur in consultation. This is a sort of transaction which has lately been introduced into Scotland, and which may be [377] attended with beneficial effects in periods of alarm to mercantile credit. It is difficult to find any principle on which effect can be denied to such a transaction, while *del credere* commission (which is just a guarantee of solvency for a premium) is supported. There is, however, one old case in Scotland, in which the Court held the stipulation of a premium for undertaking the risk of a borrower's insolvency to be *contra bonos mores*, though not usurious.² Such a judgment would not probably be pronounced now, unless there should appear to be collusion and usury in the transaction.³

DISCHARGE OF GUARANTEE.—The principles already stated concerning the discharge of cautionary obligations hold with respect to guarantees. 1. The acquittance of the principal, the giving of time, the renunciation of any collateral security, the discharging of diligence actually done, will free the guarantee.⁴ One who guarantees a bill will not be acquitted by the bill not having been duly presented, if the acceptor had previously become a bankrupt;⁵ but if he had not become bankrupt, this neglect will discharge the guarantee.⁶ 2. As to the notice to which one who guarantees a bill or note is entitled, although our early cases seem to imply an obligation to give the same notice as to an endorser of the bill or note, this does not accord either with later determinations or with the English cases. The rule deducible from the English cases seems to be, that it is only where the neglect to give notice has produced loss or prejudice to the person who has guaranteed the bill, that he is entitled to relief from his engagement.⁷ The Scottish cases seem to have gone at one time even further than this.⁸ But the rule followed in England, as being most consistent with the principles of this class of obligations, will probably be followed in such cases hereafter.⁹

GUARANTEE ON DEL CREDERE COMMISSION.—Merchants who conduct business for others, as factors or otherwise, sometimes engage to guarantee their dealings (or to stand *del credere*, as the phrase is) on receiving a certain commission. This is called a *del credere* commission. But to a certain extent factors are, by their implied undertaking, held to guarantee the payment of their principal's money without this extraordinary commission.

[378] To 'stand *del credere*' in any transaction is an engagement to be answerable as if the person so binding himself were the proper debtor. This seems to be the correct legal import of the undertaking; and it is as nearly as possible the meaning of the Italian phrase which we have adopted. Where a factor employed to sell goods receives a *del credere* commission, he is liable to the principal for the price to be recovered, whether he ever receive

¹ Thus, in *ex parte Adney*, Cowper 460, the question arose on a guarantee in these terms: 'In consideration of the sum of £1, 10s. 7d., I hereby make myself answerable for the due payment of G. Husband's note, dated 10th June, for £306,' etc. No doubt ever was raised as to the efficacy of this engagement.

So, in *Philips v Astling*, 2 Taunt. 206, the guarantee was in these words: 'We undertake to guarantee a payment of £500, at £5 per cent. say, by a bill drawn,' etc. No doubt was moved as to the validity of this undertaking.

² *King v Kerr*, 1711, 2 Fount. 631. Kerr applied to Simpson for a loan of 800 merks, who refused to lend it without caution; on which Kerr applied to King, who agreed to become security for the debt on Kerr giving him a bond for £100 Scots, in consideration of 'trouble, risk, and hazard.' Kerr paid the bond regularly, and the cautioner was never called on. He, however, demanded payment of his bond, and Kerr defended himself on the plea of usury and illegal contract. The Court did not find it direct usury, to infer the penal effects, but that it was *turpe lucrum et pactum contra bonos mores*, and declared the bond null, and assoilzied from it.

³ [Such transactions are recognised by the Acts of Parliament granted to guarantee associations, and no inconvenience has been found to result from their recognition by law.]

⁴ See above, p. 376.

⁵ *Warrington v Furber* (*supra*, p. 390, note 5), 8 East 242, where a guarantee for the acceptor was held bound in such circumstance.

⁶ *Philips v Astling*, 2 Taunt. 206.

⁷ Bayley on Bills of Exchange, pp. 232-3, 4th ed.

⁸ *Hamilton v Carlisle & Dunlop*, 1766, M. 8227.

⁹ *Houston's Exrs. v Speirs*, 1826, 4 S. 567. This question made a point in the case. It was on one side contended that certain bills which fell under the guarantee, and which ought to have been provided for regularly, not having been announced as dishonoured, the guarantee was discharged; on the other hand, that whatever might be the rule as to a single bill, it does not hold as to a guarantee intended to cover a long course of transactions. The Court held the guarantee to be effectual.

it or not. He is placed, in relation to the principal, precisely in the same situation as if he had actually received in loan the money of the principal; and no payment that would not be effectual as between debtor and creditor, will discharge his responsibility.¹ This sort of guarantee is not, on the one hand, a cautionary obligation, in the common sense of that expression; for the factor with a *del credere* commission is liable directly, and without any benefit of discussion. Neither is it, on the other, to all intents and purposes a *delegatio debiti*; for if the guarantee fail, the principal is entitled to resume his character, and recover from the proper debtor if he have not previously paid to the guarantee.²

A *del credere* engagement may be undertaken by a factor employed to sell the goods of another; or by a bank agent; or by an insurance broker, who engages underwriters to insure a risk for his principal; or by one who undertakes to remit money; or generally by any one whose interference is necessary in the conduct of a transaction involving the credit and responsibility of persons who may be unknown to the principal.

In the case of a foreign factor, where the principal cannot possibly know the buyers, it seems to be held that when nothing is said as to commission, a *del credere* commission is to be paid, and the sales guaranteed.

A *del credere* guarantee may be undertaken not only expressly, but also by implication.³ Where goods are sent to a factor on the footing of a *del credere* commission, and he keeps the goods without declining the guarantee, it will depend on his following the rules of mercantile practice relative to offers and acceptance whether he shall be held bound.⁴

Under an engagement of this nature, 1. The factor is entitled, he being himself [379] solvent, to claim on the bankrupt estate of the buyer, or underwriter, or banker, whose credit he has warranted. 2. If the factor or broker fail before payment by the proper debtor, the principal may claim on the estate of the proper debtor. 3. The principal is entitled

¹ *Scott v M'Kenzie*, 1795, Bell's Cases 138. The case turned on the risk of *remitting the money*, and strongly illustrates the doctrine that a *del credere* commission places the principal and factor in the condition of proper debtor and creditor. M'Kenzie and Lindsay of Dundee sold wheat on account of Claud Scott of London, and took bills at three months' credit. In their account sales they charged commission at 4 per cent., which it was not disputed consisted of 2½ per cent. on the sales, and 1½ for *del credere*. Scott having desired to have a remittance, M'Kenzie & Lindsay purchased a London bill from Bertram, Gardner, & Co., private bankers in Edinburgh, at seventy-five days, on Baillie, Pocock, & Co., of London. This bill was made payable to M'Kenzie & Lindsay, and was by them endorsed to Scott. Before it fell due, both the Edinburgh and the London house, which were in fact the same, failed. At first M'Kenzie & Lindsay wrote for indulgence, as if acknowledging responsibility, but afterwards defended themselves, on the ground that the *del credere* guarantee bound them only for the solvency of the buyers. The Court disregarded the letters begging indulgence, as proceeding on an opinion in point of law, which, if erroneous, ought not to bind the party. Then, on the question of the effect of the guarantee, the Court, holding (in another case, see below, p. 396, note 5) that without a *del credere* commission the factor would not have been responsible for the remittance, were of opinion that the *del credere* bound them, and that no payment but that which would have discharged a proper debtor was sufficient.

This judgment was affirmed in the House of Lords, 1796, 6 Brown's Parl. Cases 280, 3 Pat. 525.

² In *Grove v Dubois*, 1786, 1 Term. Rep. 112, it was laid down by Lord Mansfield, 'that this is an *absolute* engagement to the principal by the broker, and makes him liable in the first instance.' [But the doctrine there delivered has undergone some modification. 'It was at one time thought that an agent acting under a *del credere* commission was not merely in the same position as a surety, responsible only in case of the default of the purchaser, but that he was liable to his principal in the first instance. But that doctrine has been questioned, and at last overturned by subsequent authorities, which have settled that he is in the position of a surety.' Smith, Merc. Law, 7th ed. p. 120, citing *Morris v Cleasby*, 4 M. and Selw. 566; *Hornby v Lacy*, 6 M. and Selw. 166; *Cumming v Forrester*, 1 M. and Selw. 494; *Baker v Langhorn*, 6 Taunt. 519. Observe, however, that a factor is not a cautioner in the sense of an obligation in writing being necessary to bind him. Smith, *ut supra*.]

³ [Accordingly, evidence of mercantile usage has been admitted to prove that a *del credere* engagement was implied in the nature of the employment. *Stein's Assignees v Sheriff*, 1828, 7 S. 47.]

⁴ *Watson & Co. v O'Reilly & Co.*, 1826, 4 S. 475, N. E. 480. Goods were sent to Jamaica, saying, 'We expect you will charge no more than 5 per cent. for selling and guaranteeing.' The letter was received 23d October, and answered 24th November, declining the guarantee. It was sent by the first regular mail packet; but two private ships, authorized by 39 Geo. III. c. 6 to convey letters, had sailed in the interval. The Court held the answer to be in time, and that there was no guarantee.

to enter his claim for the whole debt on the estate of him who agrees to stand *del credere*, at the same time that he enters his claim on the estate of the proper debtor.¹

IMPLIED GUARANTEE.—It has been supposed, that when a factor or agent of any kind has actually received the money of his principal, he is in the same case, in the remitting of it, as if he had agreed to stand *del credere*. But this is not strictly true. He undertakes to manage the remittance, as the other parts of the transaction, with all due discretion and fidelity; but he does not undertake the responsibility of a proper debtor, as in the other case. In making his remittance, therefore, he is free from responsibility, 1. If he follow the directions of his principal, or the course which his principal has sanctioned; or, 2. If he remit the money, either by one of the chartered banks, or even by a private banking-house of established good credit at the time,² acting as carefully for the principal as for himself; or, 3. If he remit in the way settled by common mercantile custom or local usage.³ But where he departs from any of those modes of remitting, he will be held to guarantee the solvency of those through whom the remittance is made.

When the agent pays the money which he collects into his *general* account with his banker, and his banker fails, he is liable, because the money is thus exposed to all the risks of his own trade, and as if still in his own drawer;⁴ but where he places the money specifically for security in a bank, in his principal's name, till he has an opportunity of remitting, he will be safe, provided the bank was in established credit. Or if he draw in favour of his principal on his general account, and his draft is accepted, it would seem that the effect must be the same as if he had carried the money to the banker for the specific purpose of buying a bill for his correspondent; which will discharge his responsibility, if the banking-house be at the time in established credit.⁵ Where the factor takes a bill in his own name, [380] and endorses it to his principal, he is presumed by his endorsement to guarantee the remittance.⁶

SECTION V.—OF JUDICIAL CAUTION.

Bonds of caution in judicial proceedings may ground a demand against the cautioner, where they have been made for securing appearance in an action, or payment of the sum in the expected decree. Or such bonds may become the ground of a claim of relief by the cautioner against the estate of the person for whose appearance or obedience to the judgment he has become surety.

I. BONDS OF CAUTION DE JUDICIO SISTI.—As the practice in Scotland does not on all

¹ [See *Morris v Cleasby*, 4 M. and Selw. 566.]

² *Knight v Lord Plymouth*, 3 Atk. 480.

Baines v Turnbull, 1795, M. 1486, is to be regarded as a special case. Before any general doctrine can be established, going so far as to decide such a case against the factor paying in moneys on account of the principal to a banker in established credit at the time, a very serious reconsideration of the principles would be required. Bell, Fol. Ca. 220.

The view taken in *M'Kenzie's Trs. v Jones, Fox, & Co.*, 1822, 2 S. 82, N. E. 75, seems to confirm the doubts which I have ventured to express. There Gaffney, as agent for Sharp & M'Kenzie, sold cotton to Park & Brothers, who agreed to pay in bankers' bills. He took these drafts on their bankers, not accepted; and they were dishonoured. Gaffney did not stand *del credere*. [See Sm. Merc. Law, 7th ed. 119; Add. on Cont. 6th ed. 427.]

³ *Russell v Hankey*, 1794, 6 Term. Rep. 12. The custom of trade was held to rule this, which was a very strong case, where a person in the country having sent bills of exchange to his London bankers to receive payment, they took in pay-

ment the acceptor's check on his banker; but it turned out that the banker on whom the check was drawn had no account with the person who drew it. The London bankers were held exonerated, in respect of the custom of trade. [But see *Ramsay, Bonnar, & Co. v Mackersy*, 9 March 1843, 2 Bell 30, reversing 2 D. 1003.]

⁴ *Massey v Banner*, 1820, 1 Jacob and Walker 241. This doctrine fully laid down and illustrated by Lord Chancellor Eldon.

⁵ In *Baines v Turnbull*, 1795, M. 1486, a difference of opinion arose between two eminent judges—Sir Ilay Campbell, President, and the late Lord Justice-Clerk M'Queen. Both concurred in this, that the factor is liable in law, as there is no draft drawn, whether the money is in his own pocket or in his bank account; but Sir Ilay held a draft on the account to produce no alteration. Lord Justice-Clerk held it to be equivalent to buying a bill from the house. See note 2.

⁶ This circumstance had great weight in *Baines'* case. See preceding note, and note 2.

occasions of this sort seem to have accorded exactly with the principles of Scottish jurisprudence, a few preliminary observations may be proper before stating the result of the authorities.

Bail in civil cases is of two kinds—either for appearance or for payment. In the civil law it was distinguished (and we have adopted at least the terms) by the expressions of ‘*satisfactio de judicio sisti*’ and ‘*satisfactio de judicatum solvi*.’ The former bound the sureties to present the party in judgment; *reum judicio exhibere; neque necesse fuit litis exitum expectare*.¹ The latter bound them absolutely to the payment of what should be awarded against the person for whom they engaged.²

In Scotland, the caution *de judicatum solvi* is recognised only in maritime actions, [381] before the Court of Admiralty, and this by special statute, 1681, c. 16.³ Caution *de judicio sisti* is competent in *meditatio fugæ* warrants;⁴ and in actions of a mercantile, but not maritime, nature before the Admiralty. Much has been said in favour of a right of imprisoning strangers under a *meditatio fugæ* warrant, till caution should be given *judicatum solvi*; but from the first case to the last this has been uniformly refused.⁵

¹ By the civil law, the prosecutor was bound to find caution that he should prosecute within two months; that he should abide the issue of the trial; and that he should pay to the defendant, if he failed, a tenth part of the sum claimed (Nov. 96, c. 1). The defendant was bound to find caution *de judicio sisti*, which by the old law was fully complied with by presenting him in court, without abiding the sentence, but which Justinian declared should imply, ‘quod in judicio permaneat usque in terminum litis’ (4 Instit. xi. sec. 2). In those causes where, in the latter periods of the law, it was not necessary for the parties themselves to appear, but competent for them to delegate a procurator, the procurator of the pursuer was not admitted unless he had a mandate; in which case, if the mandate was clear and express, he was not bound to find caution; but if he had only a presumed or general mandate, his caution was ‘rem ratam habiturum dominium.’ The procurator of the defender was not admitted without caution *de judicatum solvi*. (Inst. loc. cit. sec. 5.)

² Voet. lib. 2, tit. 8, sec. 16.

The bail required by the English law to liberate from the arrest upon the *capias ad respondendum*, is merely *de judicio sisti*, according to the original meaning of that term in the Roman law. The bailees are taken bound to the sheriff, in a bond to a certain amount, with this condition, ‘that if the said A B do appear before the Justices of our sovereign lord the king at Westminster, on the morrow of the Holy Trinity, to answer C D of a plea of debt of £— sterling, then this obligation shall be void,’ etc. Upon the return of the writ, accordingly, or within four days after, the appearance must be made either by the debtor’s body being brought up or by putting in new bail to the action. The new bail must be at least two in number; and after justifying themselves by oath to be housekeepers, worth double the sum for which they are bail, after payment of all their debts, they enter into a recognizance in court, or before the judge at his chambers, or before a commissioner in the country, jointly and severally undertaking that, if the defendant be condemned in the action, he shall pay the costs and condemnation, or render himself a prisoner, or that they shall pay it for him.

³ Blackstone 291. He proceeds to draw the distinction between the obligation of the *fidejussores* in the civil law *de judicatum solvi*, and the special bail to the action in England;

the former being ‘bound to see the costs and condemnation paid at all events, whereas the English special bail may be discharged by surrendering the defendant into custody within the time allowed by law, for which purpose they are at all times entitled to a warrant to apprehend him.’

⁴ [This is abolished by 13 and 14 Vict. c. 36, sec. 24.]

⁵ *Scott v Sandilands & Manderston*, 1744, M. 1929. The Court found the commitment of Scott illegal, ‘in respect it was until he should find caution to make payment to the defender Manderston; whereas, even had the commitment been regular in other respects, he should have been committed only in case he failed to find caution *judicio sisti*.’

Herries v Lidderdalles, 1755, M. 2044. Herries having come from abroad to this country, of which he was a native, his creditor applied for a warrant against him, on the ground of his having fraudulently come here to avoid his debts. The sheriff imprisoned him till he should find security, not only *de judicio sisti*, to answer in courts, but *de judicatum solvi*, to pay whatever should be awarded against him. The cause was brought before the Court of Session; and although Herries’ situation as a foreigner settled abroad was strongly founded upon as strengthening the necessity for caution *de judicatum solvi*, the Court ordered Herries to be set at liberty upon finding caution *judicio sisti*. It was observed from the bench, ‘that an arrestment *jurisdictionis fundandæ causa* is usual in most countries, and in our country; but to oblige a defender to find caution *judicatum solvi* is not usual, except in maritime cases, before the Admiral Court; that it seemed unreasonable one should be obliged, at the commencement of an action, to give the pursuer more security than he had before; and that it would be dangerous to commerce and to personal liberty if a debtor were always obliged, when found in a foreign country, to find caution *judicatum solvi*.’

⁶ *Rae v Bellamy*, 1763, M. 2051. In Mrs. Bellamy’s case, where the Court refused, during the course of the litigation, to require caution *de judicatum solvi*, it was observed from the bench, ‘that there is neither justice nor necessity for ordering it: no justice, because such order might bear extremely hard upon foreigners, who, though they may find persons inclined from humanity to become cautioners *judicio sisti*, will not always have it in their power to procure caution *judicatum solvi*: no necessity, because when decree is pronounced the

The principle of the Scottish law, upon which all the proceedings against a debtor as *in meditatione fugæ* are grounded, is widely different both from the principle of the Roman and from that of the English law. Those laws require the actual presentment of the debtor himself in court. By the law of Scotland, this does not seem to be necessary.

It was a principle in the very constitution of the Roman judicial proceedings, that the parties should be personally present, and not be represented by a procurator; for neither as an *actio legis*,¹ nor as implying the solemn contract of *litiscontestatio*,² could these proceedings admit of a procurator. The *satisfactio de judicio sisti*, therefore, implied an actual presentment of the person; and when the old forms were relaxed, still a procurator for the defender could not be admitted without caution *de iudicatum solvi*.³

But as an ordinary step of judicial proceeding, no man is in Scotland bound to appear personally in court, except in a criminal action.⁴ All that he is bound to do, whether a native or a foreigner, is to remain within the country; in the farthest corner of which the arm of the law will reach him for the purposes of personal execution, unless he have acquired a right of exemption, by privilege, personal protection, or the sanctuary. If he is not meditating removal from the country, no circumstance whatever can entitle the [382] creditor to insist on bail for his actual appearance. If the creditor swear to his suspicion, and bail is found, it is only to secure the creditor against what he has sworn he suspects,—namely, a fraudulent departure from Scotland; and by this bail the defender is restored to the same state as if there were no ground for suspicion. But in the absence of such suspicion, no warrant can be granted for enforcing personal appearance. In short, if the debtor be preparing to escape from the country, the law will stop him in his flight. But he cannot be obliged, upon a charge of such design, whether well or ill founded, to tie himself to a particular spot; to appear in court at the call of his creditor, which the law does not require him to do; or to forego any legal privilege within the country, which he may either at that moment possess, or be in the legal capacity of acquiring. Neither can a creditor, who has no ground for suspecting flight from Scotland, apply; and it is only against such flight that the law has provided.

The difference in principle between the obligation contained in a bond of presentation, and the caution proper to sustain an action, is very obvious. The liberation on a bond of presentation is a redemption from proper imprisonment in execution; the necessary consequence of which is, that the cautioner in the bond becomes (like the special bail in England) the jailor of the debtor, entitled to insist upon presenting him personally in a particular place, and liable for the debt should he fail so to do. But a cautioner in a commencing action is in a different situation: his creditor has no right of execution against the debtor, who is not a redeemed prisoner, but a person under bond not to leave the country, and that is all. The invasion which the law has been forced to permit of the common rights of the subject, had no other object than to vindicate its own authority—to prevent a person from escaping from the execution of legal diligence. If a judge, as in the case of *Watson and Mollison*, is to be punished for giving a warrant against a man who was only going to leave the part of the country where he dwelt, the law should not be so inconsistent as to authorize caution to be insisted for, that shall have the effect of preventing him from thus changing his residence; or which shall hurry him back from the remotest corner of Scotland, to present himself before his creditor, who is bound at common

pursuer may apply to the judge ordinary; and upon making oath that the defender is *in meditatione fugæ*, he will obtain a warrant to apprehend.⁷

¹ L. 23, De Regulis Juris [lib. 50, tit. 17].

² 3 Instit. xx. secs. 3 and 4.

³ The English law proceeds to the same end upon another principle. The arrest of a defendant in England is grounded

on the fiction of a trespass, for which the person is to be detained in order to punishment. The acceptance of bail is a temporary relief, enabling the defendant to go about his concerns in the meanwhile, under the easier imprisonment of his bailees, whom the law regards as his jailors, bound to present him corporally in court for judgment and execution.

⁴ Balfour 297, c. 1.

law to follow him with his diligence, and entitled only to insist that he shall not leave the territory over which the force of that diligence extends.

According to just principles, caution *de judicio sisti* should not prevent the debtor from taking the privilege of sanctuary, or claiming any intermediate protection which may have been granted to him, or any privilege of peerage or of parliament, to which he may have succeeded or been elected. Against these privileges the *meditatio fugæ* warrant was never meant to be a defence. And if no warrant could be taken out to interdict such privileges, or to prevent a debtor from applying for protection, neither should a warrant issued upon other grounds, and for the purpose of warding off other dangers, act as a prohibition against the taking of sanctuary, or petitioning for personal protection. And so caution *de judicio sisti* ought not, by implication, to secure the creditor against evils which could not be made the object of a direct application. Here, again, the distinction is plain between the bond of presentation and caution *de judicio sisti*. In the former the debtor is enlarged, under the condition that he shall be restored to his creditor, at a particular time, a prisoner—as accessible to his diligence as ever. In the latter, the defender never was a prisoner further than in being confined within the country; and the creditor's rights are uninjured if he remain within it. In the former case the principal as well as the cautioner is truly debtor in an obligation *ad factum præstandum*; and the sanctuary would seem to give no protection against the cautioner in demanding the person of the principal. If the import of the caution *de judicio sisti* be, that the cautioner shall present the debtor in court (and the form of the bond is so), upon the same principle the cautioner should be entitled to bring the [383] debtor out of the sanctuary; but otherwise the cautioner can have no title to take the debtor from the sanctuary.¹

FORM OF THE BOND IN PRACTICE, AND EFFECT OF IT.—But in practice the form of the bond is much more favourable to the creditor. It in general is, that the creditor 'shall appear personally, and attend personally, at all or any of the diets of court.' And it rather seems to be held as law, that a pursuer is entitled to demand caution in those terms. It has been decided, 1. That under such bonds the cautioner is liable unless the debtor be presented personally in court, unprotected, and as open to diligence as at the time of his apprehension on the warrant *de meditatione fugæ*.² 2. That the pursuer may make his requisition either during the litigation or after decree, at any time before the lapse of the period allowed for extracting the decree, or even at any time before extract.³ It is held,

¹ *Telfer v Muir*, 1774, 5 Fac. Coll. 374. Here judgment went agreeably to the above view. Muir was taken upon a *meditatio fugæ* warrant, and found caution *de judicio sisti* that he 'should appear and answer to any action to be brought against him by Telfer within six months;' or in default, the said Muir leaving the country, the cautioners were to pay the debt. The creditor brought his action against the debtor, with a conclusion against the cautioners; but the Lord Ordinary, in pronouncing judgment against the principal, decided that, 'in respect Muir has not left the country, and appears to this action, and that the bond of caution is only *de judicio sisti*, the cautioners were free.' [In *Douglas & Co. v Wallace*, 1842, 5 D. 338, it was held, that although the debtor had taken sanctuary, the cautioner was liable under his obligation to produce him in court. *Cheyne v M'Donald*, 1863, 1 Macph. 960. Here the debtor was presented at the stipulated time, but under the protection of a note of suspension passed and intimated. The cautioner was held liable to pay the sum in the bond, and was not entitled to have process sisted until it should be seen whether the debt was really due. As to the mode of enforcing an extrajudicial obligation *de judicio sisti*, see *Muir v Collet*, 1866, 5 Macph. 47.]

² *Cowan v Aitchison*, 1797, M. 2061; *Tasker v Mercer*, 1802, M. App. Caut. Jud. Sist. No. 8. [In this case the Court were divided in opinion, and the law is not to be considered as settled. Shaw's Bell's Com. p. 295, note (a).]

³ In the case of *Telfer v Muir*, above cited, a second question arose. The decree having passed against Muir, Telfer extracted his decree; but Muir kept out of the way, and Telfer applied for a decree against the cautioners. The Court, 'in respect the pursuer did not at any time during the dependence or before extract require the cautioners to produce the person of Muir in court, found that the cautioners were liberated from their obligation *de judicio sisti*.'

In *Brown & Co. v Wilson*, 1790, M. 2059, decree went in absence against the defender, but was not extracted. At a considerable interval afterwards, a new action was raised against the debtor, and concluding upon the bond against the cautioner, and the sheriff of Dumfries found him liable. When the cause came into the Court of Session by advocacy, 'the opinion of the Court was, that by the mere act of obtaining judgment, without requiring the cautioner to produce the body of the defender, the security of the creditor was not entirely at an end; but that such a requisition might be made

that any action beginning in an inferior court is not concluded by decree pronounced there, if it shall be removed into a higher court by advocacy: the decree is not final, nor the action at an end, till the proceedings have been extracted, or, in other words, the record made up and signed by the clerk.¹

The obligation of the cautioner when the bond is forfeited, is to be answerable for the debt, according to the decree, with costs of suit, and such interest as may be adjudged to be paid. And in bankruptcy the claims will accordingly be made to this extent. The pursuer will, however, be obliged to establish his ground of action, which will not be taken for granted merely from the debtor's absence.

The cautioner's obligation may be extinguished in four several ways: 1. If the debtor die during the course of the action. 2. By the cautioner giving the creditor due notice, and presenting the debtor in court, and protesting for freedom.² 3. If the creditor at any [384] time, even before decree, require implement of the bond (in which he will be indulged on showing cause, and allowing a reasonable time for performance), the cautioner may be free, on accompanying his presentment of the debtor with a protest to that effect, so that the creditor may be put upon his guard. 4. If the pursuer do not, before extracting the decree, require the presentment of the debtor's person, he is presumed to be satisfied that he has no ground for suspicion, and that no other precautions are necessary for securing him: the cautioner, therefore, is free.

When, under a bond of caution *de judicio sisti*, the creditor requires the debtor to be produced, or the cautioner gives notice, and presents the debtor under protest for freedom, he must either suffer imprisonment to abide the decree, or find new caution. The caution after decree has an object somewhat different from that *de judicio sisti*, in so far as the creditor now meditates the execution of personal diligence. But it is not caution *judicatum solvi* that the pursuer is entitled to demand: it is merely that the debtor's person shall be produced at any time within such space as may enable the creditor to execute diligence against him.³ It still may be suggested as a doubt, whether the creditor can be entitled to demand more than that the person of his debtor shall be secured within the country; since the creditor can have no sort of title to any extraordinary privilege which another creditor holding personal diligence would not enjoy.

II. BOND OF CAUTION JUDICATUM SOLVI.⁴—This is an obligation on which no creditor is entitled to insist, except in maritime causes before the Court of Admiralty. That Court

at any time before the elapsing of the period allowed for extracting the decree.' They freed the cautioners.

Stewart v Frazer, 8 July 1809, 13 Fac. Coll. 404. The Court here held that the requisition might be made even after the lapse of the time allowed for extracting, if before actual extract (though in that particular case the decree was not ready for extracting); the proper limitation to the endurance of the cautioner's obligation consisting in the remedy which is open to him, by producing the defender and protesting.

¹ In *Wright v Graham*, 1766, Kames' Sel. Dec. 322, advocacy was found competent any time before extract; and in the case of *M'Culloch*, 10 Feb. 1666, M. 369, it was decided that, during the dependence of an advocacy in the Court of Session, the cautioner was entitled to insist before the inferior court to be freed from his bond by presentation of the debtor.

² *Stevenson v Chisholm*, 11 March 1812, 16 Fac. Coll. 552. Where the bond was, that the defender should appear personally, and also personally attend at all or any of the diets of court when required, Lord Craigie, after ordering an inquiry into the practice of the sheriff courts, held it 'to be the general result of the inquiry now made, as well as the

true purpose and meaning of caution *de judicio sisti*, that the cautioner, after action brought, and after due notice to the pursuer, may produce in court the person for whom he is cautioner, to the effect that the pursuer may either obtain caution of new, or have the defender put in prison, according to the discretion of the Court in which the action has been brought.'

³ *Sir James Cockburn v Inglis*, 1776, M. App. Caut. Jud. Sist. No. 1.

Two cases were decided in 1790, in which, at the final pronouncing of decree, the creditor was found entitled to insist for caution to produce the debtor's person, during such time as should be requisite for carrying the decree into execution by a caption. *Masterton v Hutton* (n. r.), and *Duncan*, petitioner (n. r.).

⁴ [The practice of requiring the party to find caution *judicatum solvi* in maritime cases is abolished by 13 and 14 Vict. c. 36, sec. 24. This kind of caution, however, is still required in many judicial proceedings, e.g. in loosing arrestment, recalling inhibition, and in the Bill Chamber. The cautioner seems to have the right of trying the question at issue for his interest. But see *Macdougall's Tr. v Law*, 1864, 3 Macph. 68.]

has, by 1681, c. 16, a privilege 'to cause parties become enacted and find caution, not only for compearance, but for performance of the acts and sentences of his court.' By the bond the surety binds himself 'as cautioner and surety *de judicio sisti et judicatum solvi* acted in the Books of the High Court of Admiralty for B, in a process presently depending before the judge of the said High Court at the instance of C against the said B; and I, the said B, oblige myself to free and relieve my said cautioner of his cautionary obligation above written, and of all damages and expenses he may sustain thereby.'

1. The cautioner is thus liable for all that the defender may be adjudged to pay by the decree of the Admiral. 2. He is not freed in consequence of the judgment against the defender being brought by suspension or reduction before the Court of Session.¹ 3. He has been held not to be freed by a decree of absolvitor, while it is still under trial by review in the Court of Session.² And, 4. In Lord Stair's time it was held that the cautioner's obligation was discharged by the defender's death before sentence;³ and considered on the analogy of imprisonment, in room of which it comes, this seems just. But in Kilkerran's time, the point having come to be reconsidered, the Court, looking to the practice of Admiralty, and also to that of other trading nations, reversed the rule, and held the [385] cautioner bound, and that it was competent to call the representatives by an edictal citation.⁴

III. BOND OF CAUTION IN SUSPENSION OR ADVOCATION.—The bond in a suspension is, 'that the suspender shall make payment to the charger, or to any other person to whom payment shall be ordained to be made, of the principal sum, etc., as contained in the decree and letters of horning, in case it shall be found by decree of the Court of Session that he ought so to do, after discussing the suspension.' And there is added an obligation 'to pay whatever sum the Lords shall modify in name of expenses, in case of wrongous suspending.'⁵ By the recent Judicature Act,⁶ bills of advocacy against final judgments of sheriffs and other inferior judges are to be passed on caution only for expenses. The bond in an advocacy is, 'that the advocator shall make payment to A, or to any other person, etc., of the expenses incurred in the inferior court, and also of such expenses as may be incurred in the Court of Session, in case it shall be found that he ought so to do.'

The cautioner is not freed by the death of the suspender or advocator;⁷ nor even by the decree being turned into a libel.⁸ But he will not be liable where, at the time of suspending or advocating, there was sufficient ground for so doing, though this has afterwards been removed.⁹

Cautioners in such bonds have not the benefit of the septennial limitation.¹⁰

SUBSECTION VI.—OF BONDS OF PRESENTATION.

The occasion of this bond is the execution of personal diligence against a debtor. The purpose of the cautioner's interposition is to allow the debtor time to settle the debt. And the effect of the bond is to restore the person of the debtor to the operation of the creditor's

¹ *Stewart v Geddis*, 1636, M. 2033; *Myles v Lyal*, 1797, M. 2063.

² *Robertson, Coutts, & Co. v Ogilvy*, 1762, M. 2047.

³ *Hodge v Story*, 1680, M. 2034.

⁴ *Dundas v M'Leod*, 1744, M. 2040.

⁵ [See *Buchanan v Douglas*, 1853, 15 D. 365, as to the nature of the liability undertaken under such a bond. The Court of Session held that the cautioner was only liable for expenses of process; and the House of Lords, holding that the amount of damages was *in arbitrium judicis*, declined to interfere. 2 Macq. 48. See also *Knox v Paterson*, 1861, 23 D. 1263.]

⁶ 6 Geo. IV. c. 121, sec. 41. [By the Court of Session

Act, 1868, caution is no longer required in appeals to that Court.]

⁷ Act of Sederunt, Jan. 1650. *Dickie v Thomson*, 1743, M. 2110.

⁸ Act of Sederunt, 27 Dec. 1709. *Herbertson & Co. v Rattray*, 1793, M. 2157.

⁹ *Somervail v Colt*, 1683, M. 2143; *More v Finnison*, 1685, M. 2145; *M'Dougal v Maxwell*, 1706, M. 2148; *Cowan v Marshall*, 1784, M. 2155, decided by Lord Braxfield, and affirmed by the Court.

¹⁰ *Hope v Fowles*, 1715, M. 2152; *M'Kinlay v Ewing*, 1781, M. 2152.

diligence, as at the time of the cautioner's interposition; or otherwise to secure the creditor in payment of the debt, with interest and expenses.¹

The responsibility on such bonds was formerly much less strict than at present.

1. Not only death, but sickness, or inevitable accident, will excuse the cautioner, provided the debtor is presented as soon as the impediment is removed;² but no impediment will serve as an excuse to which the voluntary act of the debtor has contributed.³

2. Formerly, what was called a *modica mora* was allowed,⁴ but the presentation must now be at the very hour appointed.⁵ The prisoner is by the cautioner's interposition redeemed from actual imprisonment, on the sole condition that he shall be presented at a [386] particular hour, and at an appointed place, and the creditor has a right to insist on strict observance; for the whole effect of his diligence may be defeated by the debtor being allowed one hour's indulgence longer.⁶

3. It may well be doubted, notwithstanding an old case to the contrary,⁷ whether the cautioner is liable, should the debtor be taken in the meanwhile on another caption; for this is in one sense an inevitable accident, and the creditor has all the benefit that he could have had by himself imprisoning the debtor, there being no preference by priority of personal execution.

The claim against the cautioner under this species of bond is for the debt, interest, and expenses; leaving him to operate his relief against the principal debtor as he may.⁸

¹ [Chaplin v Allan, 1842, 4 D. 616; held to be *literarum obligatio*.]

² Polstead v Scott, 1681, M. 1807; Callander v Bruce, 1704, M. 1808.

³ As enlisting, Henderson v Graham, 1710, M. 1809; imprisonment for another debt, Polstead v Scott, *supra*, though this seems doubtful.

⁴ E. Southesk v Bromhall, 1663, M. 1806; Kennoway v Davis, 1672, M. 1806; Ockley v Grierson, 1682, M. 1807.

⁵ Pitblado v Mayne, 1695, M. 1808.

⁶ [See M'Gown v Nelson, 1829, 8 S. 142, where the doctrine stated in the text was applied, subject to a reasonable construction.]

⁷ Polstead's case, above, note 2.

⁸ [In Grant v Campbell, etc., 6 Dow 239, 252, Lord Eldon stated that the *principles* of the law of Scotland as to matters of guarantee do not differ from those of the law of England; and by sec. 6 of the Mercantile Law Amendment (Scotland) Act, the peculiarities of the English law arising from the 4th section of the Statute of Frauds have been introduced into our law of cautionry. By the 4th section of the Statute of Frauds, 'no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.' This statute excluded action on *contract* obligations of a cautionary character, unless the contract or agreement was in writing; but in Pasley v Freeman (3 T. R. 51; Fell on Guarantee, App. 279), and a series of cases, the English courts established the doctrine that false and fraudulent representations as to the credit of another, which had induced the plaintiff to trust him, would sustain an action for indemnification by damages in the nature of a writ of deceit, though the representations were only verbal. They held that cases of this sort, founded on fraud, were not within the Statute of Frauds. In this way many cases of what were practically

obligations 'to answer for the debt or default of another person,' were withdrawn from the statute; and to remedy this Lord Tenterden's Act (9 Geo. IV. c. 14) was passed, which requires (sec. 6) that an assurance or representation on which credit is given, shall, to found action, be in writing, and signed by the party charged with the debt, or his agent, etc. (See Pasley v Freeman, *supra*; Eyre v Dunsford, 1 East 318; Haycroft v Creasy, 2 East 92; Evans v Bicknill, 6 Vesey 174; Clifford v Brook, 13 Vesey 181; Hutchinson v Bell, 1 Taunt. 564; Tapp v Lee, 3 Bos. and P. 367; Hamar v Alexander, 2 N. R. 241; Smith v Harris, 2 Stark. 47; Foster v Charles, 6 Bingh. 396; Fell on Guarantee, 231; Martin's Treatise on Lord Tenterden's Act, ch. 3.) To assimilate the Scotch to the English law in matters falling respectively within the Statute of Frauds, sec. 4, and Lord Tenterden's Act, sec. 6, was the purpose of sec. 6 of the Scotch Mercantile Law Amendment Act, which provides, that 'from and after the passing of this Act, all guarantees, securities, or cautionary obligations made or granted by any person for any other person, and all representations and assurances as to the character, conduct, credit, ability, trade, or dealings of any person made or granted to the effect or for the purpose of enabling such person to obtain credit, money, goods, or postponement of payment of debt, or of any other obligation demandable from him, shall be in writing, and shall be subscribed by the person undertaking such guarantee, security, or cautionary obligation, or making such representations and assurances, or by some person duly authorized by him or them, otherwise the same shall have no effect.' On the other hand, the Statute of Frauds, sec. 4, required the *agreement*, not merely the cautioner's *promise*, to be in writing. By the law of England, all agreements not under seal require proof of a consideration to support action on them, no action lying on *nudum pactum*. Hence, in Wain v Warlters (5 East 10, 1 Smith 299), and Lyon v Lamb (Fell, App. 3), the Courts held the written statement of the consideration essential to a guarantee available under the Statute of Frauds, as *parole* evidence of what was essential to the *agreement* was excluded thereby. Numerous guarantees, drawn by unskilful

persons, fell to the ground through neglect of this technicality. In Scotland, *nudum pactum* (except where the granter is insolvent) is no ground of invalidity in an obligation; and as regards promises within the 4th section of the Statute of Frauds, the English law has been assimilated to the Scotch by sec. 3 of the English Mercantile Law Amendment Act (19 and 20 Vict. c. 97) to this extent, that the consideration for a guarantee need not appear in writing, but not to the extent of validating gratuitous guarantees.

The ruling principle of the Mercantile Law Amendment Acts is to remedy 'inconveniences felt by persons engaged in trade in matters of common occurrence in the course of such trade,' by reason of the difference of the laws of England and Scotland in those matters. (See preambles to both Acts.) But the enacting portions of the Scotch Act as to cautionry are not limited to cautionry in course of trade: they apply to 'all cautionary obligations,' to 'all representations and assurances;' and so do the English Acts to which assimilation was meant to be made. The opinion intimated by Mr. Fraser, that the Scotch Act is confined to cautionary obligations 'in matters of trade and commerce' (Fraser on Parent and Child, Guardian and Ward, p. 515, note *b*), seems a mistake. Unfortunately this valuable Act is so ill drawn, that the exact extent to which the English law of cautionry has become our law is left in great uncertainty also upon another important point. The Statute of Frauds requires the agreement to be 'in writing,' otherwise 'no action' shall lie on the cautioner's obligation. The English courts, in expounding these words, have uniformly regarded writing rather as a necessary evidence of the contract than as a solemnity. (Theobald, Law of Principal and Surety, p. 23; Chitty on Contracts, 65.) They have held it not necessary that the agreement should in the first instance be reduced to writing—not necessary that it should be constituted, but merely that it be proved by writing. Any writing or memorandum or note signed by the party to be charged, or his agent, which contains, either expressly or by reference, the terms of the agreement, is sufficient—though it be merely a recognition or admission *ex post facto* of its terms—if made before action brought on it, notwithstanding that the promise was originally verbal, and the writing was not made until after the promise has been acted on. (Chitty, p. 66; Pitman on Pr. and Surety, p. 77; Leake, Contr. 146; Longfellow v Williams, Peake, Add. Ca. 225; Bill v Bament, 9 M. and W. 36.) 'The memorandum is necessary,' says Mr. Smith (L. C. vol. i., notes to Birkmyr v Darnell), 'only to evidence the contract, not to constitute it. The contract, as was observed by Tindal, C. J., in Laythoarp v Bryant, 2 Bingh. N. C. 744, is made before any signature thereof by the parties.' (See generally on this subject the notes to Birkmyr v Darnell.) The phraseology of the Scotch Act is, that the obligation shall be in writing, 'otherwise the same shall have no effect.' Does this make cautionry a *literarum obligatio* with us? Must it be constituted in writing? Is there no obligation till there is writing? If it is given verbally, and acted on, and the verbal promise afterwards proved by the cautioner's written admission, will it have 'no effect?' Would that merely show that the creditor had been relying on what was no obligation at all? The words seem strong to that result. But the result is one not to be adopted except of sheer force. Cautionry never was a *literarum obligatio* by the law of Scotland. Stair (i. 17. 3) and Erskine (iv. 2. 20) treat it as one of those

contracts which are constituted by consent alone, though in many cases proveable only by writing. (See Dickson, Evid. sec. 597 et seq.) There is nothing in the scope or purpose of the Act that leads us to suppose that a radical change in the nature of the contract of cautionry was meant to be introduced. Looking to this—to the object as declared in the preamble—to the analogy of the English decisions on the Statute of Frauds—and to the fact that holding writing necessary to constitute, and not merely to evidence the contract, would render many of what are available guarantees in England nullities in Scotland, and instead of assimilating the two laws would create a new dissimilarity between them,—the proper construction of the statute seems, in spite of the words, to be that an obligation not originally constituted in writing shall be of *no effect as a ground of legal action or exception*, unless its terms are evidenced by writing; not that a verbal cautionary obligation is *per se* null and void, but only effectual through writing where it requires to be established as the debtor's. If this is not the meaning, the Act ought to be amended at once. Again, it may be a question whether the cautioner's admission on oath of a verbal obligation, followed by *rei interventus*, would constitute a ground of action. The Statute of Frauds seems as clear as our Act, to the effect that nothing but writing will avail to set up the verbal promise as a ground of action; yet the Courts of Equity in England have held that cases where there has been part performance of the parole agreement are excepted out of the Statute of Frauds, not by words, but by its very object, which was to prevent, and not to encourage and assist fraud, and have decreed for specific performance. Again, although in *Bill v Bament*, and *Fricker v Thomlinson*, 1 Man. and Gr. 773, the Common Law Courts have held that the written memorandum must exist before the action, and that in that respect it differs from mere evidence, yet in equity an admission in the party's pleadings of the terms of a verbal agreement takes it out of the Statute of Frauds. (See, on both points, the cases in Chitty's Equity Index, *s.v.* Statute of Frauds, Part Performance, and Specific Performance: and also on the former point, Story, Eq. Jurisp. secs. 759, 760; Nunn v Fabian, 35 L. J. Ch. 140; Law Rep. 1 Ch. 35; Massey v Johnson, 1 Ex. 241, 252. As to the latter, the cases of *Edmonston v Lang*, M. 17057; *Walker v Duncan*, Hailes 985; *Wallace v Wallace*, M. 17056; More's note to Stair i. 17. 3—must be kept in view. As to which *quære*?) It seems probable that on the latter point our courts would follow the equity practice. As to the other point,—the sustaining of *rei interventus* as a ground for giving effect to a cautionary obligation not evidenced by writing,—it is not so clear that our judges would assume the same powers of dispensing with the statutory proof required by the Mercantile Law Amendment Act as the English Equity Courts have assumed in overriding the Statute of Frauds. It is clear that if they do so at all, it will, as a general rule, only be where the terms of the verbal obligation are proved by the oath of the cautioner, and not by parole; for, as the law stood before the Act, no other mode of establishing the obligation was competent, even though *rei interventus* had followed, unless in cases where the guarantee was interposed as an integral part of a contract about moveables, itself proveable by parole. (See Dickson on Evidence, p. 388, and cases there.) But if parole proof be not absolutely excluded by the statute, and the courts exercise the *nobile officium* assumed in Chancery, the

proof of the verbal contract, in cases of *rei interventus* following a guarantee interposed as part of a contract proveable by parole, might probably be by parole. Cases where the interposition of writing is, by the communings of parties, made a condition suspensive of any final consent, will of course be excepted from any attempt to apply the doctrine of *rei interventus*. (See Dickson on Evidence, secs. 603, 835.) And, in general, cases where, by the law as it stood before the Act, *rei interventus* would not have been pleadable to validate the imperfectly proved obligation.

The question, whether our courts are shut out by the Act from creating exceptions to it where there has been part performance unequivocally referable to the verbal cautionary obligation, at first sight appears to be just a question as to their right to repeat in this case what they have already done in dispensing with the formalities required by the Acts 1540, 1579, and 1681, for the sake of substantial justice, in cases where *rei interventus* has taken place on the faith of verbal or improbative written obligations which would otherwise have been ineffectual. The difference, however, probably lies in this, that the restriction to writing as the ordinary *modus probandi* of facts not proveable by parole, does not arise from these statutes, but from the jealousy with which the common law of Scotland from the earliest period regarded the testimony of witnesses. And the statutes appear to have in view, not the prescribing of writing as the indispensable *modus probandi*, but, assuming what had been settled by the common law as to that matter, to have aimed simply at prescribing the formalities which should be observed in writings. But then the common law, while excluding mere parole evidence, and requiring writing if there was nothing but the agreement founded on, recognised another habile mode of proving such obligations by the oath of the party, or even in certain cases by witnesses coupled with *rei interventus* to prevent the chance of misapprehension as to the parties' intention, and supply demonstration of their final and deliberate intention to be bound. This alternative mode of proof the Acts anent the authentication of writings did not touch, but left to the common law. The object of the Mercantile Law Amendment Act is probably to prescribe writing as the exclusive *modus probandi*, and to shut out all other proof. Compare *Porter's Trs. v Stout*, 11 Dec. 1816, F. C., and *Tait, Ev. 228*. Of course the Act does not decide that, in any given case of cautionary obligation, the mere signature of the granter or his agent is *all* that is requisite. Whether the writing must be holograph or tested in terms of the old Acts, remains to be settled by the rules in force before the Act.

With regard to the construction of the requisites of authentication as to the writing and signature, *so far as they are contained in this Act*, the English decisions on the Statute of Frauds will be in point, except so far as they turn on the word 'signed' which is used there, and also in the English Mercantile Law Amendment Act, while our Act employs the more definite word 'subscribed.' Under the word 'signed,' various modes of adhibiting the names of the party to a document have been sustained in England; as, *e.g.*, where the name was written by the party in the body of the writing, in such a way as to authenticate the whole, but without any subscription, it being clear that the want of subscription did not arise from the writing being left unfinished. (*Knight v Crockford*, Esp. N. P. R. 190; *Lemayne v Stanley*,

3 Levinz 1; *Coles v Trecothick*, per Lord Eldon, 9 Ves. jun. 249; *Stokes v Moore*, 1 P. W. 771; *Saunderson v Jackson*, 2 B. and P. 238; *Welford v Beazeley*, 3 Atk. 503.) So Lord Eldon held even a printed name at the top of an invoice sufficient 'signature;' 'for if a man be in the habit of printing instead of writing his name, may he not be said to sign by his printed as well as his written name?' (*Saunderson v Jackson*, 2 B. and P. 238; *Schneider v Norris*, 2 M. and S. 286.) And a mark is enough. (*Schneider v Norris*, *supra*; *Harrison v Harrison*, 8 Ves. jun. 185; *Addy v Grix*, 1 Ves. 6, 3 Atk. 503.) But 'subscribed' with us has always, under the old statutes, meant signed in the party's handwriting below or at the end of the deed (*Tait*, p. 70). And the same doctrine is held in America, in those States which, in their revision of the Statute of Frauds, have substituted 'subscribed' for 'signed.' The effect of the alteration is ruled to be, that the signature is required to be in the party's handwriting, and at the end of the deed. (*Story*, Contr. sec. 1015, note (u), vol. ii. p. 677, citing New York Revised Statutes, p. 2, c. 7, t. 1, sec. 8; *Davis v Shields*, 24 Wendell 322, 26 *ibid.* 341; *Vielie v Osgood*, 8 Barb. 130. But see *contra*, *James v Patten*, 8 Barb. 344.) Suppose the document to run: 'Mr. A B presents his compliments, and begs to say that he will be responsible to C D for all goods supplied to E F?' Or a regularly subscribed letter, with a guarantee in the unsigned postscript? Or one of the memorandums now so common among merchants, with a printed heading in this form: 'Memorandum from A B, merchant, etc., to — —?' Then follow the terms of the offer or order, which are rarely subscribed. These cases will fairly raise the question whether we are to adhere to the etymology of the word, and reject the writing because the party has written his name to the document, but not under it; and whether we can adopt Lord Eldon's doctrine in *Saunderson's* case, so far as regards the requisites of the Act, leaving cases that also fall under the old Acts to be regulated by them *quoad ultra*. (See *Leake on Contr.* pp. 148–9.) In England, it is settled that the signature must express the name of the party; a descriptive signature, as 'your affectionate mother,' in a letter addressed to a son, being insufficient. (*Selby v Selby*, 3 Mer. C. R. 2.) Next, who is to be considered 'a person duly authorized' to sign? The party receiving the obligation cannot be the agent to sign the obligation for the party giving it, though in writing out the document the former be under the eye, and draw it up to the dictation of the latter. (*Wright v Dannah*, 2 Camp. 203. See *Farebrother v Simmons*, 5 B. and A. 333; *Bird v Boulter*, 4 B. and A. 443; *Dixon v Bromfield*, 2 Chitty 205.) And the same reasoning would apply to the principal debtor for whose behoof the promise is given. But *Blackburn, J.* (*Sale*, p. 76), says that the cases quoted are very doubtful law. A person legally incapable of acting in his own individual capacity, or of protecting his own individual interests, may be an agent to sign. (*Watkins v Vince*, 2 Stark. 368; *Emerson v Blonden*, 1 Esp. 142; *Palethorp v Furnish*, 2 Esp. 511; *Lindus v Bradwell*, 17 L. J. C. P. 121; *Lord v Hall*, 19 L. J. C. P. 47; *M'Michael v Barbour*, 3 D. 279; *Pothier*, Oblig. sec. 449; *Stair* i. 12. 19; *L. 7*, sec. fin. D. de Inst. Act.) So persons attainted or outlawed. (*Chitty*, Contr. 171, 195.) An agency to sign cannot be delegated, though the terms of the contract have been adjusted by the principal. (*Henderson v Barnewall*, 1 Younge and Jer. 387.) The authorization may be express

or implied, or it may be by subsequent ratification or adoption. (*Watkins v Vince*, *Bailey v Culverwell*, 8 B. and C. 448; *Trueman v Loder*, 11 Ad. and E. 589; *Maclean v Dunn*, 4 Bingh. 727; Poth. Mand. sec. 29; Stair i. 12. 12.) The authority may be given verbally, and proved by parole, provided the writing itself does not make the alleged agent appear to sign as personally liable; for to admit evidence to show he was only an agent for another, would be to contradict the writing, or prove the true contract by other evidence than the statute allows. If the agent is by competent evidence shown to be duly authorized, the signature of his own name, or of the principal's, will equally bind the principal. (*Emmerson v Heelis*, 2 Taunt. 38, 46; *Acebal v Levy*, 10 Bingh. 376; *White v Proctor*, 4 Taunt. 209; *Watkins v Vince*, *supra*; *Kenworthy v Schofield*, 2 B. and C. 945.) As to the form and substance of the 'writing' in which the obligation must appear, the note or memorandum may consist of several documents, if they are sufficiently connected together by internal reference. It is not necessary that all be signed by the cautioner. A letter referring to certain unsigned conditions, or to a letter of the other party, was held to incorporate the documents referred to, so as to make complete written evidence of the terms of the contract. (*Dobell v Hutchinson*, 3 Ad. and Ell. 355; *De Beil v Thomson*, 3 Beav. 469; *Johnson v Dodgson*, 2 M. and W. 653.) But if, while recognising the existence of an obligation of the general nature stated in the letter referred to, the writer, without stating what the terms of it were, should disaffirm the terms stated in the other letter, this will not be enough. (*Cooper v Smith*, 15 East 103; *Routledge v Grant*, 4 Bingh. 660; *Smith v Gurman*, 9 B. and C. 561.) The documents taken together must amount to a statement of the substance of a specific agreement, and not merely show in general that there was an agreement upon some terms, leaving them to be ascertained by parole. (*Rose v Cunningham*, 11 Ves. jun. 550; *Clerk v Wright*, 1 Atk. 12.) Nor will the writing be enough if it refer to any other terms which do not appear in the writing itself, or some document referred to in it. (*Boys v Amherst*, 6 Mad. 316.) It is not necessary that the reference to the other writing be intended as an admission, if in point of fact it is an admission of its correctness, for a person may well enough furnish evidence against himself. The writing need not be addressed to the other party. (*Moore v Hart*, 1 Vernon 110, 201; *Wankford v Fotherby*, 2 Vern. 322; *Bateman v Phillips*, 15 East 272.) In *Welford v Beazeley*, 3 Atk. 503, Lord Hardwicke held a letter written by a man to his own agent, setting forth the terms of agreement with the plaintiff, enough to satisfy the statute. There is no need for an express or explicit reference to a separate document to incorporate it, if it can without parole be connected with that signed by the party to be charged from what appears in the papers themselves. (*Coles v Trecothick*, 9 Ves. jun. 250; *Clinan v Cooke*, 1 Sch. and Lefroy 22; *Tawney v Crowther*, 3 Bro. Ch. C. 161, 318; *Brodie v St. Paul*, 1 Ves. jun. 326; *Richards v Porter*, 6 B. and C. 437; *Archer v Baynes*, 5 Ex. 625; *Boydell v Drummond*, 11 East 142; *Saunderson v Jackson*, 3 B. and P. 238 (as to which, see *Evans' App. to transl. of Pothier on Obligations*, vol. ii. p. 202, and *Fell*, p. 59); *Jackson v Lowe*, 1 Bingh. 9; *Stead v Liddard*, 1 Bingh. 196; *Allen v Bennet*, 3 Taunt. 169; *Ridgway*, 3 De G. M. and G. 677, 694; *Kenworthy v Schofield*, 2 B. and C. 945.) But

parole evidence, though not admitted to create a connection between two documents not avowed by the documents themselves, will be admitted to identify the document which is the subject of reference. (*Allen v Bennet*, 3 Taunt. 169; *Western v Russel*, 3 Ves. and B. 187; *Hindle v Whitehouse*, 7 East 558; *Powell v Dillon*, 2 B. and B. 416; *Clinan v Cooke*, 1 Sch. and Lefr. 22.) It is not necessary that the writer use any words of direct obligation: a mere narrative of the terms of a past verbal undertaking is enough, even if it be for the purpose of asserting that now, from failure on the other party's side, or other intervening circumstances, they are no longer obligatory.

The essentials of the agreement must be stated; that is, the subject-matter of it, the extent of the liability created thereby, and the names of both parties to it. 'In order that any agreement or memorandum should be sufficient under the Statute of Frauds, it is absolutely necessary that the names of the parties to the agreement should appear on its face. Certainly it is not necessary that both parties should sign it: it is sufficient if it be signed by the party to be charged thereby. . . . Not only is that the fair construction to be put on the statute; but when we look at the mischief intended to be prevented, it is clear that a writing which constitutes a liability on one side, without stating the name of the other party to whom it was given, would lead to the very thing the statute was intended to prevent, viz. fraud' (per Cockburn, C. J., in *Williams v Lake*, 29 L. J. Q. B. 1). In this case, a guarantee delivered to a builder for the price of the building he had undertaken to erect for parties named, but which had not his name on it, was held insufficient under the statute. (See, however, *Bateman v Phillips*, 15 East 272; *Champion v Plumer*, 1 N. R. 252; *Graham v Musson*, 7 Scott 769; *Fell*, p. 43; *Pitman*, p. 76; *Lawranson v Mason*, 3 Wauch's Amer. Rpts. 492; *Theobald on Suretyship*, p. 34; *Walton v Dodson*, 3 Car. and P. 162; *Williams v Carwardine*, 4 B. and Ad. 621; *Leake on Contr.* pp. 12-13 and 320; *Garrett v Haudley*, 4 B. and Cr. 664; *Story on Contracts*, sec. 864, and cases there; *Parsons' Contr.* ii. 3; *Ewing v Wright*, 2 June 1808, F. C.; *Burnett v Burnett*, 1859, 21 D. 813, 818, per Lord Curriehill.) As to parole evidence to identify the debt guaranteed, see *Shortrede v Cheke*, 1 Ad. and Ell. 57; and as to how this is distinguished from creating, or adding to, or explaining the obligation, *Haigh v Brooks*, 10 A. and E. 309; *Holmes v Mitchell*, 28 L. J. C. P. 301.

There has been a great deal of subtle disquisition in England to determine what are and what are not, in the sense of the 4th section of the Statute of Frauds, promises 'to answer for the debt, default, or miscarriage of another person;' or, in other words, what are *collateral* obligations. The words of our Act, 'guarantees, securities, or cautionary obligations made or granted by any person for any other person,' are not quite the same; but no doubt they will create as much questioning as the Statute of Frauds has done as to the precise nature of the obligations referred to. 'Guarantee' and 'cautionary obligation' are the same thing, though in the rubric of *Wilson v Tait*, 1840, H. L., 1 Rob. 137, it is incorrectly stated to have been held that there was a difference between them. All that was determined was, that the mere use of the verb 'I guarantee,' as it was used in the letter forming the ground of that action, did not create a proper cautionary obligation, accessory to an obligation by another, but one

amounting to a clear substantive obligation to pay on demand, and in the first instance, and not merely upon the failure of the other obligant. 'A guarantee,' as Mr. Fell defines it, 'is a promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person, who is in the first instance liable to such payment or performance' (Fell on Guarantee, p. 1); and this is exactly what cautionary is, if we add that the promise is given *by way of accession to the principal debtor's obligation*—that is to say, that it has as its *causa* that which is the *causa* of the principal debtor's obligation, and not any separate and independent cause of obligation peculiar to the cautioner himself. The cautioner might have become bound by other contracts for the identical sum or identical *factum* which the principal debtor is bound to pay or perform; but his obligation is not one of cautionary if it has a cause different from that of the obligation of the principal debtor. This essential characteristic of proper cautionary is clearly explained by Pothier, Tr. des Oblig. sec. 446, who employs it to discriminate between cautionary and the obligation of a *mandator pecuniæ credendæ*. The English lawyers mark the same characteristic by the term 'collateral.' (Theobald, pp. 1-3; Reid v Nash, 1 Wils. 305; Fell, p. 14, sec. 7, and p. 21, note; Pitman, pp. 3-26; Burge's Commentaries on Suretyship, pp. 20-29, and the cases *passim*.) The Statute of Frauds does not define the obligations to which it applies by any legal denomination: thence considerable uncertainty,—some taking it for granted that the words were meant as a description, not perfectly accurate, of collateral obligations, or what we should call cautionary obligations or guarantees;—others, that they include all promises, whether collateral or not, coming within the range of their literal significance; and in reviewing the English decisions, the courts seem to oscillate somewhat between the two canons of construction. In using these decisions as precedents applicable to our Act, this must always be kept in view. A promise to answer for the debt or default of another, is not necessarily a cautionary obligation or a guarantee. The phrase appears to include all cautionary obligations and guarantees; but there are obligations which are not guarantees or cautionary obligations, and yet are literally 'promises to answer for the debt of another.' Some of these latter obligations the English courts, oscillating as we have mentioned, have included in, others of them they have excluded from, the Statute of Frauds. The undertaking of a *del credere* agent is a promise to pay another's debt, if that other—the principal debtor—at maturity, and on being applied to, does not. Yet it is not a cautionary obligation. It is, however, certainly within the *letter* of the Statute of Frauds; yet the English courts have held it not within the *meaning* of that statute, and not to require writing to prove it. (See *Couturier v Hastie*, 8 Welsb. Hurl. and Gord. 40, 9 Ex. 102: In H. L. 25 L. J. Ex. 253; and other cases, *infra*.) On the other hand, take for example the obligation of a *mandator pecuniæ credendæ*—of him by whose order I have lent money to a third party;—his obligation to repay me creates a liability of precisely the same nature as a *del credere* agent's,—a liability to pay the debt of another, who is my principal debtor, if he at maturity fails to do so. This also is not a cautionary or accessory, but an original and independent obligation, as Pothier (*ubi supra*) clearly shows; and yet the English courts have held this obligation to fall within the

Statute of Frauds, apparently because the mandator's promise is strictly and literally a 'promise to answer for the debt of another,' though it is difficult to assign any legal reason for excluding a *del credere* agent's obligation from the statute which would not be equally applicable to that of a mandator. (See *e.g.* *Mowbray v Cunningham*, where Lord Mansfield held this obligation not to be within the Statute of Frauds, as being an original and independent, and not a collateral or accessory obligation; but this was overruled in subsequent cases mainly on the words of the statute, taken literally. See Fell, p. 19; *Matson v Wharram*, 2 T. R. 80—per Buller, J.)

Consequently, while the English decisions often acutely mark the distinction between collateral or accessory obligations and original obligations, and supply us with valuable material for discriminating between cautionary obligations and obligations which are not truly so, we must beware of concluding in every case where they find an obligation to be within the Statute of Frauds, that they hold it to be what we should call a cautionary obligation. Our Act proceeds, not on the English plan of describing the operation of the obligations it applies to, but upon the plan of giving them their legal denominations—as 'cautionary obligation,' 'guarantee'—remitting us to other sources to find what precisely these denominations include. If the framers of the Act had taken care to use nothing by way of denomination which had not a precise legal definition—nothing which did not designate a specific and distinct kind of obligation of which the *differentiæ* are ascertained—there would have been no difficulty. As to 'guarantees' and 'cautionary obligations,' there can be no difficulty. But 'securities for another' is an unhappy phrase. 'Every contract of suretyship is substantially and in fact,' says Mr. Pitman (p. 2), 'a guarantee;' but it seems that in England the word 'guarantee' is chiefly applied to denote contracts of suretyship contained in writings not under seal. The other word, 'securities,' used in our Act, is much looser, and indeed not susceptible of any very precise legal definition at all. 'Securities made or granted by any person for any other person,' are words which may mean simply obligations for another, and yet even in this sense they do not define any specific kind of obligation for another; or they may refer to those cases where a personal obligation for another is coupled with a conveyance of some real or personal property in security thereof; or they may extend to a case which sometimes occurs (see *e.g.* *Napier & Co. v Bruce*, 1840, 2 D. 556; Pothier, Nantiss. secs. 7, 16), where a pledge of personal property is made by one person to secure a creditor against the default of another person, his debtor, but without any personal obligation on the pledger to answer for the debt. (Cautum intelligitur sive personis sive rebus cautum sit, L. 188, De V. S.; but there is no cautionary obligation in such a case between pledger and pledgee.) The subsequent phrase, '*person undertaking* such guarantee, security, or cautionary obligation,' points to a personal obligation, and probably to an obligation *ejusdem generis* with guarantees and cautionary obligations,—an obligation subsidiary and accessory to, and corroborative of, some principal obligation which it secures. It is probably just equivalent to 'suretyship.' It cannot mean an independent obligation for a debt also due by another principal co-debtor; for one who grants such an obligation does not, in doing so, 'undertake a security,' as no man can be security in an obligation which is his own direct debt.

The word had better have been left out, as no doubt attempts will be made to bring in under it obligations which are not cautionary obligations or guarantees at all, as if it had been the intention of the Legislature to introduce into the law of Scotland not only the uncertainties of the English statute, but a good many others of which the English statute is not susceptible. Assuming, however, as there seems warrant for doing, that the Scotch Act applies only to PROPER CAUTIONARY OBLIGATIONS, we shall next indicate some of those cognate obligations which do not fall within this denomination, yet are apt to be confounded with obligations falling under it.

1. There must, in order to the existence of a cautionary obligation, be a lawful principal obligation, civil, or at least natural, on which it is dependent. (L. 478, D. de reg. Jur.; L. 16, sec. 3, D. de Fidejuss.; L. 70, sec. fin., D. d. t.; Pothier, Obl. sec. 366; L. 16, sec. 1, D. Ad. Scum Velleianum.) In *Harris v Huntbach*, which turned on the Statute of Frauds (1 Burr. 373), where a person engaged nominally as surety on behalf of an infant incapable of any liability for the debt—a loan—he was held to be substantially the only contracting party. Such a person knows that the other is not responsible, and his undertaking is therefore to be answerable at all events. 'There is no remedy against the infant,' it was argued. Therefore it is an *original*, not a *collateral* undertaking; and so the Court held it to be. The general principle deduced from this and similar cases by the English writers, is, that if the person undertaken for is not liable, owing to his incapacity to incur responsibility, the defendant's promise cannot be considered collateral, and so does not fall within the 4th section of the Statute of Frauds, nor would it apparently be within our Act. (Chitty, Cont. 45; Pitman, pp. 4-13; Story, Cont. p. 396; Theobald, p. 49; and the opinions of Bayley and Holroyd, J., in *Edwards v Kelly*, 6 M. and S. 204. See Pitman 13-14, and cases there.) Hence, query, if Lord Stair's doctrine (i. 17. 11) as to the liberation of cautioners by the nullity of the obligation of the principal who is a pupil or insane is sound; see Brodie's note, pp. 165-6. Many of the civilians put the principle on a broader basis than Voet (xlv. 1. 9 and 10), to whom Brodie refers. They say, that where one interposes for another, whom he knows to be incapable of obligation to the creditor, he must be held to have the intention of binding himself 'non tam ratione fidejussionis quam ratione suæ solius promissionis . . . eoque qui fidejussores dicuntur non tam fidejussores quam principales rei habendi sunt.' (See Bachovius ad Treutler, vol. ii. Dis. 28, Thes. 3, p. 444; Hunnius ad Treutl. Vol. Poster. Dis. 28. 3. 20, p. 877; Vinn. Comm. in Inst. p. 639, and the DD. quoted by them.) Pothier (Obl. sec. 393) tries to limit the cautioner's liability to those cases where there is a subsisting natural obligation, but overlooks the broader ground that his liability in such cases is not accessory at all. He seems to have been swayed by Cujas (see Pand. Justin. vol. iii. p. 331, notes 6 and 9), who, in common with the majority of the later doctors, perversely misinterpreted L. 25, Dig. de Fidejuss., which appears plainly to imply the doctrine of *Harris v Huntbach*, and was so understood by Accursius, Bartolus, and all the earlier doctors (see Bachov. *ut supra*). See also, on this subject, *Shaw v Maxwell*, M. 2074; *Nimmo v Brown*, M. 2076; *Blackwood v Forbes*, 10 D. 920; *Johnston v Romano*, M. 2076; *Buchanan v Dickie*, 1828, 6 S. 986; *Kinghorn v Cle-*

land, M. 2075; *Ewing v Malloch*, 1 Fount. 132. Our early cases do not always hit the precise principle.

2. The principal may have been originally liable for the debt, and another may become liable for it, not as an *adpromissor* or cautioner, but as an *expromissor*; i.e. his obligation may be accepted by the creditor in room and discharge of the original debtor's obligation. (Vinn. Inst. pp. 637, 181; Smith, Merc. Law, p. 465.) He may have an action of relief against the original principal, yet he is not a cautioner *quoad* the creditor (Vinn. l.c.; Stair i. 17. 3), and his obligation will not be within the Mercantile Law Amendment Act. Whenever the new obligation extinguishes the prior one, it is held not to fall within the Statute of Frauds, and requires no writing. (See Fell, p. 16; Pitman, 13, 23; Theobald, 42; Chitty, 457; *Lane v Burghart*, 1 Q. B. 933; *Goodman v Chase*, 1 B. and Ald. 297; *Reader v Kingham*, 32 L. J. C. P. 108, and cases there.) So, an agreement to convert a separate debt into a joint debt is not within the Statute of Frauds, the effect of it being to create a new debt in consideration of the former being extinguished, and the two parties being co-principals therein. (*Ex p. Lane*, 1 De Gex 300.) So, where the original vendee of goods, contemplating inability to pay for them, transferred them with consent of the vendor to another, who verbally undertook to pay the price, the Statute of Frauds was held not to apply, there being no longer any principal obligation on the original buyer, and the second being liable only as for a new debt of his own, not for the other's former debt. (*Browning v Stallard*, 5 Taunt. 450. See *Walker v Hill*, 5 H. and N. 419; *Brunton v Dullens*, 1 F. and F. 450; *Lacy v M'Neile*, 4 D. and R. 7.)

3. A cautionary obligation, as accessory to another principal obligation, must arise *ex eadem causâ* with the principal obligation, and not from an independent cause of obligation, proper to the alleged cautioner himself. (See Poth. Oblig. sec. 446.) Wherever the obligation of a person for payment of a debt which is also due by another, arises from a cause or consideration passing between him and the creditor distinct from that of the principal or original debtor's liability, whether that distinct cause should have existed contemporaneously with, or have come into existence subsequent to, that of the principal debtor's liability, it is not cautionary. This liability may be contingent and conditional on the failure of the proper debtor to pay; the alleged cautioner may have the *beneficium ordinis* as a *mandator pecuniæ credendæ* and a *del credere* agent have; he may, like the mandator, be entitled to all the *exceptiones in rem* which the proper debtor has; he may be entitled, like him, to the *beneficium cedendarum actionum*;—yet, if his liability be founded on a consideration proper to himself, distinct from the cause of the demand which the creditor has against his proper debtor,—if he contract, in respect of this separate cause, to pay as on his own duty or obligation, and not merely as the surety of the other,—then his obligation is not a proper cautionary obligation, and is not within the Statute of Frauds or the Mercantile Law Amendment Act. In *Castling v Aubert* (2 East 325), the plaintiff, a broker, held policies of insurance under lien for indemnity against acceptances for his principal's accommodation. Defendant succeeded him in his agency, and required the policies, which plaintiff gave up on the defendant's verbal undertaking to indemnify him against the acceptances. Defendant pleaded the Statute of Frauds; but the Court unanimously held it not

to apply. The defendant's undertaking liability was the price at which he purchased the plaintiff's waiver of his lien, and it was therefore an obligation of his own, rather than a promise to answer for the liability of his principal. As Lord Tenterden explains the case in *Thomas v Williams* (10 B. and C. 664), 'the defendant's promise was founded on a new consideration, distinct from the demand that the plaintiff had against the third person, although its performance would have the effect of discharging that demand and releasing that person.' So, in *Williams v Leper*, 3 Burr. 1886, a broker, about to sell a tenant's effects for behoof of creditors, gave a verbal obligation for the rent due by the tenant, to induce the landlord to waive his right of distress and lien over the effects, so as to allow the sale to proceed. The promise was held not within the statute. So, a debtor being arrested on a county court commitment (which does not discharge the debt like an arrest on a writ of *capias*), a verbal promise, in the nature of a bond of presentation, to redeliver the prisoner or pay the debt, was held, the prisoner having been released and not redelivered, nor the debt paid, not to require writing within the Statute of Frauds, the promise being for the promiser's own debt. *Reader v Kingham*, 32 L. J. C. P. 108. So *Bampton v Paulin*, 4 Bingh. 264; *Barrell v Trussell*, 4 Taunt. 117; *Edwards v Kelly*, 6 M. and S. 204; *Anstey v Marden*, 1 N. R. 127. So in the American case of *Johnson v Gilbert*, referred to by Cowen, J., in *Woolff v Koppell*, 5 Hill's N. Y. Reports 458. See *Mallet v Bateman*, 33 L. J. C. P. 243; notes to *Forth v Stanton*, 1 Wms. Saunders 210; *Reid v Nash*, 1 Wils. 305; *Fitzgerald v Dressler*, 29 L. J. C. P. 113, and cases there. Upon the same principle, it was decided that the undertaking of a factor or broker under a *del credere* commission, to answer to the principal for the solvency of the vendee or debtor with whom he deals on the principal's behalf, is not within the Statute of Frauds, and does not need proof by writing. In *Grove v Dubois*, 1 T. R. 112, Lord Mansfield and Buller, J., held it to be an absolute engagement, rendering the broker liable in the first instance; but in *Morris v Cleasby* (4 M. and S. 566), Lord Ellenborough corrected this idea, holding the liability conditional only on the vendee's failure to pay. (See also *Hornby v Lacy*, 6 M. and S. 166; *Cumming v Forrester*, 1 M. and S. 494; *Baker v Langhorn*, 6 Taunt. 519.) But though the broker has the *beneficium ordinis*, it does not follow, as Lord Ellenborough seems to hold, that therefore his obligation is one of guarantee or cautionry. On that opinion of Lord Ellenborough's, Mr. Theobald (p. 65) held that a *del credere* obligation was within the statute, and that it must be in writing. But it is not specifically a cautionary obligation or a guarantee: it is part and parcel of the contract of mandate which has intervened between him and his principal. Naturally, an agent is not liable for supervening insolvency, without negligence on his part; but it is not inconsistent with the nature of mandate, that the agent by special stipulation should charge himself with the extra risk of that or any *casus improvisus* not within his ordinary liability, just as he may by the same means exempt himself from liability for everything but fraud. (Poth. Mand. sec. 50; L. 39, D. Mand.) He may undertake that he will not contract on the principal's account with any one who shall not be absolutely solvent, and may thus relieve the principal from the onus of proving negligence or fault in any case. But still he remains merely a mandatory, and does not become a cautioner

for the debtors with whom he may deal, any more than he does when his liability to answer for the insolvency of a person dealt with arises from his negligence or from fraud. His liability to the principal *habet causam propriam* different from the *causa* of the debtor's liability to the principal, which is what no proper cautionary obligation has. This is the view taken by the American judges in *Swan v Nesmith* (7 Pickering 220) and *Woolff v Koppell* (5 Hill's N. Y. Reports 458), in which it was held that the contract of a factor acting under a *del credere* commission is not within the Statute of Frauds. The very able judgment of Mr. Justice Cowen in the latter case, after referring to *Castling v Aubert*, etc., brings the matter to this, 'that all such contracts have an immediate respect to the agent's own duty or obligation. The debt of another comes in incidentally as a measure of damages,' i.e. his obligation *habet causam propriam* distinct from that of the other's obligation. His reasoning was entirely adopted by Parke, B., and the other judges of Exchequer, in *Couturier v Hastie* (8 Ex. 40); and they also put their judgment on the principle of *Castling v Aubert*, that the object of the extra commission being given was in consideration of greater care and greater responsibility, and though it may terminate in a liability to pay the debt of another, that is not the immediate object with which the consideration is given. (See observations on Couturier's case in *Wickham v Wickham*, 2 Kay and J. 478, and *Mallet v Bateman*, 33 L. J. C. P. 243.)

The same principle discriminates between the obligation of a cautioner and the obligation of a *mandator pecuniæ credendæ*, or, in other words, the obligation that results from a mandate to lend money. Lord Stair (i. 17. 3) refers to this as a method of constituting an improper kind of cautionry. Certainly nothing at first sight can look liker cautionry. But it is not cautionry; and as the principle will be found of practical value, it is proper carefully to develop it. When A gives a mandate to B to lend money or sell goods to C, A is the *mandator pecuniæ credendæ* (D. de Fidej. et Mand.): if B accept the order, there intervenes between A and B a regular contract of mandate, by force of which, when B executes the order, B as mandatory is bound, *actione mandati directâ*, to assign to A all that he as mandatory acquires *ex causa mandati*, and therefore to assign to A the action or claim which arises to him, B, from the loan or sale made to C in execution of A's mandate, as acquired by B *ex causa mandati*. On the other hand, A is obliged to B, *actione mandati contrariâ*, to reimburse and indemnify him in the sums which he has disbursed in execution of A's mandate, and so becomes answerable to B for the amount of that debt which C has contracted to B, by receiving the loan or purchasing the goods from B. Here there is a close resemblance to cautionry: as Lord Stair puts it,—'When the mandant giveth order or warrant to contract with any other party to that party's behoof, that party is the principal debtor, and mandant is cautioner' (i. 17. 3). But though both A's and C's obligations are for the same sum of money—the precise amount B has lent,—and though C owes it absolutely for himself, and A not so much for himself as for C, yet A's obligation is not a pure accession to C's: it has a cause different from C's obligation, viz. the contract of mandate which has intervened between A and B, which is not a mere accessory contract, as cautionry is. A is bound *ex causa mandati*; C, *ex causa mutui* or *empti*. A payment by A to B of the sum is not a payment of C's debt to B, but of his

own proper debt, as mandator, to B. When a cautioner paid without requiring an assignation, the Roman lawyers held the debt as extinguished; for, being not a debt of the same thing, but the very same debt—the *ipsissimum debitum* of the principal debtor, to which the cautioner had only acceded—it was extinguished by the cautioner's payment. It only subsisted after the cautioner's payment, where *non in solutum accepisset sed quodammodo nomen debitoris vendidisset creditor* (L. 31, D. de fidej.; Poth. Obl. sec. 522), and the character of the transaction as a sale of the debt required therefore to belong to it *ab initio*; otherwise, if the money had been paid by the cautioner *in solutum*, the debt was gone, and no assignation would revive it *ex intervallo*. In Scotland, an assignation *ex intervallo* would generally avail, unless where there was a discharge of the debt itself, or the rights of third parties interfered. Yet see *Garden v Gregory*, 1735, M. 3390. But, on the other hand, the Roman jurists held that though the mandator, A, had repaid B, without any request for an assignation, or anything to make it a sale of the *nomen debitoris*, the payment did not extinguish the debt between B and C: it only extinguished A's own debt to B; and B remained, notwithstanding the payment, still creditor of C *ex causa mutui*, not indeed to the effect of being able to recover to his own profit, but to that of A, or to the effect of being able to assign his right of action to his mandant whenever he should require it (L. 28, D. de Mand.). Another difference, which would hold good with us, is, that the claim of B against A, arising strictly *ex causa mandati*, and not being founded on cautionry by A for the debt of C, would not fall under the septennial limitation of cautionary obligations. See *Caves v Spence*, 1742, M. 11021, a pure case of *mandatum pecuniæ credendæ*, where the septennial limitation was held not to apply. So, while C's debt might be lost by the triennial prescription, that would not, if there was no fault in B, extinguish B's claim against A as mandator, which is not liable to that prescription. But if A had been a cautioner, the extinction of C's debt to B by the prescription would necessarily extinguish A's, as being the identically same debt. Again, the duties as to preserving and ceding actions and securities, which B as mandator owes to A as mandant, are not precisely the same as they would be if B were creditor, and A a cautioner for C. (See, on this, Poth. Mand. sec. 47; Oblig. sec. 521.) As to what amounts to a *mandatum pecuniæ credendæ*, see Poth. Oblig. sec. 446; Stair i. 12. 2; Poth. Mand. secs. 15 and 16; L. 2, D. de Mand. As to the right of a *mandator p. c.* to the benefit of discussion, see Poth. Mand. secs. 70 and 84; Oblig. No. 440. If, then, claims of this kind are not cautionary obligations, they will clearly not fall within the 6th section of our Mercantile Law Amendment Act. *Wilson v Ratray*, 13 Jan. 1779, F. C., was a case of the kind, which the Court treated without doubt as a case of mandate. Still, the distinction between a cautionary obligation undertaken to the intending cautioner before the principal debtor's obligation is actually incurred, and a *mandatum pecuniæ credendæ*, may become very nice. Fidejussor et præcedere obligationem et sequi potest (Inst. iii. 21. 3); and, as Vinnius (Inst. p. 643) observes, 'Præcedens fidejussio mandato non absimilis est.' The distinction between a cautionary obligation undertaken for another after the debt was incurred, and a request by A to B to supply C with goods or money, coupled with a promise to pay if C did not, struck both Lord Mansfield and Buller, J., very forcibly. In *Mow-*

bray v Cunningham (cited in *Jones v Cooper*, 1 Cowper 227, and by Buller, J., in *Matson v Wharram*, 2 T. R. 80), Lord Mansfield held that a promise made before the debt accrues was not within the statute; but in *Jones v Cooper* he said: 'There may be a nicety where the undertaking is before delivery, and yet conditional as this is.' (The verbal order was by defendant to plaintiff for goods to be furnished to Smith, accompanied by a verbal promise in these words, 'I will see you paid if Smith does not;' and Smith was made debtor in the plaintiff's books.) 'It turns singly upon the undertaking being to pay in case the other did not pay.' And the promise was held within the Statute of Frauds. But the obligation of a *mandator pec. cred.* is no less conditional on the failure of the principal debtor than a cautioner's obligation is, and the test decides nothing in this case. (Novell. iv. sec. 1; Poth. Oblig. sec. 446.) In *Matson v Wharram*, Buller, J., said that if this were a new case, his leaning would be against holding the statute applicable, but that it was too late to shake the authorities. See *Birkmyr v Darnell*, 1 Salk. 27, 2 Lord Raymond 1085; *Anderson v Hayman*, 1 H. B. 120; Pitman, p. 4, and cases there. But this is a point where we must remember the difference between the wording of the Statute of Frauds and of our statute. In any question under our Act, whether such a case is one of verbal *precedens fidejussio* or of mandate, two points will occur. 1. That in *dubio* the construction should be such *ut res magis valeat quam pereat*. 2. The analogy of the test employed by Pomponius in Dig. xvi. 3. 13 to decide between Deposit and Mandate—viz. which is the *primus contractus*? Till the goods are supplied there is no principal debt, and can be no cautionary obligation. The words quoted above from the Institutes must, as Vinnius observes, be understood 'ita tamen ut præcedens fidejussoris obligatio tum demum vires capiat quum et principalis obligatio, cujus illa accessio est, constituta est. Interim vero in pendente esse obligationem fidejussoris sciendum est.' Vid. Dig. v. 1. 35; Poth. Oblig. No. 399. So, in *Jones v Cooper*, it was urged that there was no debt under the promise until the goods were supplied, and a liability incurred by the principal debtor. An order given, though merely accepted and then neglected, might take effect as a mandate; but as no principal debt would exist till it was fulfilled, it could not till then take effect as cautionry. An obligation capable in its own nature of producing an effect before the existence of any principal debtor or principal obligation can hardly be cautionry. See Theobald, pp. 51–3; Pitman, pp. 4–8. See also *Thomas v Cooke*, 3 B. and C. 728—per Parke, B. As to the general rule of distinct consideration, see Parsons, Elem. Merc. Law, p. 74.

4. *Correi* or co-principals are not cautioners, even for the excess beyond their respective shares, but are only *quasi* cautioners in respect of their having similar rights of relief *inter se*, and a similar right to the *beneficium cedendarum actionum*. These rights of relief arise, not because they are cautioners, but on the various special grounds incident to the different transactions from which their liability arises. Thus, in the case of co-purchasers, joint-adventurers, etc., that one who has paid the whole has his action of contribution against the others *ex socio*. Where one only of the *correi* has received money, the others have relief against him *ex mandato*, or on the natural obligation of recompense (Poth. Oblig. sec. 282; Stair i. 8. 2–9), not because they are cautioners. The right

to the *beneficium cedendarum actionum* arises to them and to cautioners from the same natural grounds of equity. Co-obligants bound in *solidum* are all directly and immediately, and in the first instance, bound to the creditor. Cautionary obligations are conditional on the failure of the principal debtor. The creditor may select any one of the *correi* to demand payment from him as if he were the only debtor. (Poth. Oblig. sec. 270.) It is settled in England that the Statute of Frauds applies only to engagements in which the promiser is liable conditionally on the default of some other person. (Story, Contr. sec. 861; Chitty, 455; Fell, p. 18.) So, by the law of Scotland, where the liability is not conditional on the failure of another, but immediately exigible, the obligation creating it is not a guarantee. (*Wilson v Tait*, 15 S. 221, H. L. 1 Rob. 137; *Howison*, M. 11030.) Where a party permits himself to be considered expressly as a joint-purchaser of goods which are intended for the sole use of another, his obligation—as not merely a collateral, but an original obligation—as, in short, that of a *correus in solidum*, and not of a cautioner—is not within the Statute of Frauds, even although the want of any real interest on his part in the purchase is known to the creditor at the time of the transaction. See the case of *Scholes v Hampson & Merriot*, reported by Mr. Fell, p. 27. There Hampson, an intending buyer, was refused goods on credit unless some one would be answerable for the payment. He brought to the sellers one Merriot, who was not, as they knew, connected with Hampson in business, and Merriot requested the seller to let Hampson have what cottons he might want, and agreed verbally that the credit should be given to them jointly, and the invoices were made out in their joint names as co-purchasers. The cottons were delivered to Hampson, who made part payments from time to time, and failed; and the action was against him and Merriot for the balance. Hampson let judgment go by default; the question was as to Merriot's liability. It was objected for him, that he was known not to be a partner, and was only a surety, and that his verbal obligation was, as for the debt of Hampson, void under the statute. But Chambre, J., overruled the objection, holding the case not within the statute, as an original and not an accessory obligation. It does not matter, as to the legal character of the obligation, what the relative liabilities of the parties *inter se* may be: if the obligation, as in a question with the creditor, is that of a direct obligant, the obligation is not cautionry; and 'the liability of such a contracting party is not affected by the creditor knowing that the debt is not the debt of such party, the creditor not having done anything which may operate as his discharge.' (Such notice only imposes the equitable duty on the creditor of doing nothing to impair his right of relief. *Wythes v Labouchere*, 3 De G. and J. 593; *Pooley v Harradine*, 26 L. J. Q. B. 156; *Oakley v Pashetter*, 4 Cl. and F. 207.) See per Lord Fullerton and the Lord Chancellor in *Tait v Wilson*, *supra*. The very definite distinction between cautioners and *correi* has been thrown into considerable confusion by the opinions of the judges of the Court of Session in *Paterson v Bonar* (1844, 6 D. 987) and *Scottish Ins. Co. v Pringle* (1858, 20 D. 465), from misapprehending, as it seems, the meaning of the House of Lords in *Macartney v M'Kenzie*, 5 Wils. and Sh. 504, who did not mean to say that *correi* expressly bound as such were sureties, but merely that they had the right of sureties in respect of the *beneficium ced. actionum*,—sureties only, in Eng-

land, and not *correi*, having that right at *Common Law* (Pitman, p. 183), and the error of the Court below being, that they forgot that *correi* as well as cautioners by the Civil Law had that right. (Poth. Oblig. 520–523; L. 17, D. de fid.; L. 47, D. de Locat.; L. 95, sec. 11, D. de Solut.; *Blackwood v Milne*, 1752, M. 3396; *Gilmour v Finnie*, 11 S. 193.) The House of Lords merely set this error right: they could not mean anything so absurd as to confound the obligations of a *correus* and a cautioner as identical; but they spoke in the language of the English law, the precise effect of which the judges of the Court of Session (except Lord Medwyn) seem to have misunderstood.

5. To be a cautionary obligation, it must be for the whole or part of the same specific debt for which the primary obligation is undertaken (L. 9, t. 42, D. de fid.), and granted expressly to or in favour of the same person who is creditor in the primary obligation (L. 16, D. d. t.), otherwise it is not within the Statute of Frauds, nor will be within our Act. See *Reid v Nash*, 1 Wils. 305; *Fish v Hutchinson*, 2 Wils. 94; *Williams v Leper*, 3 Burr. 1809—per Aston, J.; Theobald, p. 40; Poth. Oblig. 368–9. So, if A is due B a sum, and B is due C another, and it is agreed between A, B, and C, that A pay C instead of B, and that shall discharge B's claim against A, the promise by A to pay to C is not within the Statute of Frauds; for it is a promise not to pay the debt due by B to C, but to pay his own debt, originally due to B, to C as delegated creditor. (*Hodgson v Anderson*, 3 B. and Cr. 842.) It is not cautionary, but delegation. So, a promise by one to pay the debt of another on the debtor's order, out of the debtor's own funds in the promiser's hands, is not cautionry, for the promiser undertakes no personal liability of his own for the debt. (*Andrews v Smith*, 2 Cr. M. and R. 627; *Bird v Gammon*, 3 Bingh. H. C. 883; *Parkins v Moravia*, 1 C. and P. 376; *Dixon v Hatfield*, 2 Bingh. 439.) So, a promise by A to B to pay a debt due by B to C, the promise not being made to C the creditor, but only to B the debtor, is not cautionry, nor within the Statute of Frauds. (*Eastwood v Kenyon*, 11 Ad. and E. 438; *Hargreaves v Parsons*, 13 M. and W. 561, 570; Dig. xlv. 16. 1; *Reader v Kingham*, 32 L. J. C. P. 108; *Fitzgerald v Dressler*, 29 L. J. C. P. 131.) In *Reader v Kingham*, the Court recognised the principle (doubted in some cases), that to bring a promise for the debt of another within the Statute of Frauds, the promisee must be the original creditor, or at least the promise must be made to his agent for his benefit; where made to a third person under circumstances in which there would be a *jus quæsitum* to the original creditor, a narrower question would arise. (See per Byles, J., in *Reader v Kingham*, *supra*; *Finnie's case*, 3 Macq. 75; *Peddie v Brown*, 3 Macq. 65; *Stair i. 10. 5*; *Smith*, M. L. p. 466, note (q).) Mr. Story (Contr. sec. 861, referring to American cases) is of opinion that a person may, by a transaction solely between him and another man's creditor, the debtor being ignorant or perhaps resisting, assume an *original* and not merely a collateral liability for the debt; and certainly an agreement to insure a debtor's solvency is of this nature, but it is founded on a distinct consideration. Where a creditor pays a cautioner a consideration for guaranteeing the solvency of his debtor, the contract is not properly cautionry, but insurance. (Pardessus, Droit Comm. sec. 585.) The insurer of a debtor's solvency differs from a cautioner in not undertaking any obligation 'for another:' he does not undertake the debtor's obligation, but one arising from a separate

SECTION IV.

OF BILLS OF EXCHANGE AND PROMISSORY NOTES.

Bills of exchange, inland bills, and promissory notes, the simplest of all obligations in form, and the least trammelled with solemnities, are, in respect of performance, the most strict, and in execution the most rapid, of all the obligations known in law. For although in England¹ there is not the same expeditious mode of obtaining payment of a bill as in the case of a bond, warrant of attorney, statute staple, or statute merchant; in Scotland, by means of a legislative provision of great simplicity, bills are enforced by every sort of diligence known to the law, without any necessity for a previous action, and in the most summary way possible.

These instruments may be regarded either as simple modes of constituting money obligations, or as methods of conveying or assigning debts, or as the great instrument of exchange in money transactions between one country and province and another. The only circumstance in their history which it is of much consequence to point out is, that as a branch of practical jurisprudence, or as a circulating medium in trade, bills of exchange were unknown to the Romans; that without their aid foreign trade cannot proceed to any great extent; and that this affords one of the best proofs of the remarkable difference between the state of trade in ancient and in modern times.

1. BILLS OF EXCHANGE are used for transmitting money from country to country, and for adjusting the exchange or differences in the value of the circulating medium of countries with each other, and the premium to be paid according to the balance of trade or the demand in the market for means of remittance. This is the proper mercantile instrument, governed by the general law-merchant, as involving the interests of persons resident in different countries. It is a billet or request in writing, addressed by a person, called the DRAWER, in one country, to his debtor, friend, or correspondent in another, called the DRAWEE; desiring him to pay to a third person, called the PAYEE or PORTEUR, on a particular day, or within a certain number of days, weeks, or months, or on the bill being presented to him, a particular sum. And this being presented to the person to whom it is addressed, and by him signed in token of his agreement or ACCEPTANCE of the order, it constitutes a debt against him in favour of the *porteur* or payee; completes the assignment of the sum due to the drawer in

consideration. See Dig. 45, 116, where 'Paulus notat, non sunt duo rei Mævius et Titius (the debtor and the insurer) ejusdem obligationis; also 12. 1. 42. He has no relief against the debtor, as he does not engage *ex mandato* of the debtor. He can only recover as assignee of the creditor, who is bound *ex æquitate* to assign: he has the *beneficium cedendarum actionum*. He can plead against the creditor all the *exceptiones in rem* the debtor can plead: his obligation depends on the subsistence of an obligation on the debtor. But still these things, though common to cautionry, do not make insurance cautionry. Whether an obligation, conditional on the debtor's failure, and founded on no separate consideration proper to the promiser, would be considered as not cautionry, because not interposed *ex mandato* of the debtor, express or implied, but solely at the request of the creditor, is *inter apices juris*.

6. A proper cautionary obligation must be conditional on the failure of the principal debtor, and not prestable independently of his failure. See Poth. Oblig. sec. 372; Tait v Wilson, 1836, 15 S. 221, H. L. 1 Rob. 137.

7. A person who enters into an undertaking for and on behalf of and as taking burden on himself for another, does

not thereby undertake a cautionary obligation. Pardessus, Droit Commenc. vol. ii. p. 94, sec. 586; vol. i. p. 169. His obligation is a principal obligation. If the person for whom burden is taken adopts the obligation, the person taking the burden is not liable, as a cautioner would be, for the subsequent failure by the other to fulfil it. See Gray v Hutton, M. 2270. But Maxton v Crs. of Mackintosh, M. 2133, and Keir v Ferguson, 3 Br. Sup. 435, seem to have confounded this obligation with cautionry; at least the specialties in the cases are not sufficient to sustain the judgments. See also Bushell v Beavan, 1 Bingh. N. C. 103; and the observations of Lee, J., in Gordon v Martin, Fitzgib. 302, 2 Barnard 13, Fell 30, Pitman 16; Gregory v Williams, 3 Meriv. 582.

See further, on what is and what is not a collateral promise in reference to the Statute of Frauds, sec. 4—Fell, pp. 9–34; Theobald, pp. 1–5, and 36–65; Pitman, pp. 2–26; Leake on Contr. 126–30; Chitty, Contr. 462–9; Parsons' Contr. vol. ii. pp. 9–12, vol. iii. 19–27; Parsons' Elem. Merc. Law, pp. 72–5.]

¹ [But see the Summary Procedure on Bills of Exchange Act, 18 and 19 Vict. c. 67.]

favour of the payee; and has the effect of transmitting the money as if it had been sent by a carrier, and lodged in the hand of the person drawn upon, for the use of him in whose favour the bill is drawn.

[387] 2. After such bills had been in use for some time, and dealers had become familiarized with the use of them, the INLAND BILL¹ seems to have been introduced upon the same model. This instrument is designed for making those payments of the price of commodities sold in the inland trade of a country which it is convenient so to settle, with an allowance of the usual credit, or delay of payment given to dealers in that particular article. Here there are properly only two parties, the seller and the buyer; though a payee is often introduced as in the proper bill of exchange. The former addresses his request or bill to the latter, desiring him to pay the price at a precise day; the latter signs the bill in token of his acceptance. And the bill so completed remains in the repositories of the seller, or is assigned over by endorsement, under the proper discount, in payment of debt or for ready money; and if not paid on the day of payment, it may be put to immediate execution. This instrument furnishes so easy a mode of settling debts and constituting a transmissible obligation, that it has gradually come to be used in all sorts of transactions, whether connected with trade or not.

3. Last of all, though the simplest in form, came PROMISSORY NOTES, which are more strictly appropriate to the purpose of constituting a debt, or settling the price of a commodity bought on credit, or adjusting and reducing to a transmissible form the balance of an account between dealers. Here the debtor, called the MAKER of the note, promises on a particular day, or within a certain time, to pay to the creditor by name a certain sum. This is the form in which bank-notes are conceived, with this difference, that they are made payable to the bearer.²

In the history of bills in England, as well as in Scotland, this progress may be distinguished.³ The privilege of endorsation, by which the usefulness of bills and notes is

¹ [See 19 and 20 Vict. c. 60, sec. 12, by which bills of exchange drawn in any part of the United Kingdom or adjacent islands, and payable within the same limits, are declared to be inland bills.]

² [Besides bills and notes, there is another form of order to transfer money, viz. bank checks. These are orders addressed to a banker to pay a certain sum to the bearer of the check. There is no day of payment, the order being general; and the presumption of knowledge of dishonour applicable to ordinary bills taken by an endorsee after the day of payment, is not held to apply to one receiving a check after its date, though that may be a circumstance to weigh with a jury in evidence. *Rothschild v Corney*, 9 Barn. and Cress. 390, Bell's Pr. sec. 308. Some points of chief importance in relation to bank checks are now regulated by statute. And first, in consequence of the decisions of the courts holding bankers responsible in the case of payment of a check drawn payable to order on a forged endorsation, a clause was inserted in a Stamp Act, 16 and 17 Vict. c. 59, enacting, 'That any draft or order drawn upon a banker for a sum of money payable to order on demand, which shall when presented for payment purport to be endorsed by the person to whom the same shall be drawn payable, shall be a sufficient authority to such banker to pay the amount of such draft or order to the bearer thereof; and it shall not be incumbent on such banker to prove that such endorsement, or any subsequent endorsement, was made by or under the direction or authority of the person to whom the said draft or order was or is made payable either to the drawer or any endorser thereof' (sec. 19). The risk of loss in case of a check

being stolen or fraudulently appropriated being thus thrown upon one of the other parties, a practice was established amongst merchants of writing the name of the banker of the payee, or the symbol '— and Co.,' across the face of the check, to signify that the banking firm drawn on should only pay the order to the payee's banker, or to or through some banker, according to the form of the direction. In a case where a crossed check was stolen, and the words 'and Co.' erased by the thief, and the check was paid, the banker was held free from responsibility. But now, by 21 and 22 Vict. c. 79, the crossing of a banker's check (as defined in sec. 1 of the Act) is held to import a restrictive direction to the effect that the banker upon whom such check or draft shall be drawn, shall not pay the same to any other than the person with whose name such check is crossed, or where no name is inserted to any other than a banker. Sec. 2 enables the lawful holder of a check to cross it in the usual way, or to insert the name of a banker in the blank before the words 'and Co.' By sec. 4, the banker is not to be responsible for paying a check which does not plainly appear to have been crossed, or to have been obliterated or altered, unless he shall have acted *malâ fide*, or been guilty of negligence.]

³ See Bayley on Bills of Exchange, p. 1; 9 and 10 Will. III. c. 17; 3 and 4 Anne, c. 9.

In Scotland, 1681, c. 20, giving the privilege of summary execution to foreign bills of exchange; 1696, c. 36, extending the privilege to inland bills; 12 Geo. III. c. 72, extending the privilege to promissory notes, made perpetual by 23 Geo. III. c. 18, sec. 55. ['Although a promissory note, while in its

infinitely increased, followed in the same order, being first admitted in bills of exchange, taken to order; afterwards to bills of exchange, even without being taken to order; afterwards to inland bills; and finally to promissory notes.

Bills and notes are mercantile instruments. They are on that account exempted from the more cumbrous forms of authentication necessary in common deeds. But the greater danger of forgery to which they are thus exposed ought to be counterbalanced, by requiring the strictest conformity to such requisites as law and mercantile custom have established in respect to their constitution.

The two great privileges of bills and notes are summary execution and transmission by endorsement. And in respect to both of them, it is important to keep strictly to the forms and evidence which correctly belong to the instrument.

1. In England, payment of bills is enforced only by means of an action. In Scotland, as already explained,¹ a summary process by registration of the protest, having the bill prefixed, is competent any time within six months; an extract of which contains a warrant for issuing the king's letters of horning, which is followed by caption. In cases where the interposition of a judge is required to settle any debateable point, the person against whom the diligence is issued may apply to the Lord Ordinary on the Bills for suspension of the diligence. On cause shown, and on a cautionary obligation being lodged in court (see above, p. 401), execution will be suspended, to the effect of having the matter tried in court. To entitle a bill or note to the privilege of summary execution, it must be without any vitiation or taint apparent on the face of it; and the subscriptions of the parties must [388] be regular and full subscriptions: for although subscription by initials has sometimes been sustained as sufficient constitution even of money obligations, bills so signed are not legal grounds for warrants of summary diligence.

2. The power of transmitting such an instrument by ENDORSATION confers on it great value as a medium of circulation in trade. But this extraordinary facility ought to be confined to proper bills and notes made in correct form.

The ease with which money transactions may be conducted by means of bills and notes, has induced persons to adopt those instruments in the constitution of ordinary money obligations. And although, at first, the courts of law hesitated whether to give sanction to this introduction of mercantile facilities into ordinary transactions unconnected with trade,² it is now settled that there is no distinction in the law of bills and notes, on account of the parties or the transaction not being connected with trade. The law of England and of Scotland in relation to this most useful instrument is now the same, with such slight varieties in practice and operation as necessarily arise from the different systems of judicial proceeding.³

SUBSECTION I.—OF THE FORM AND REQUISITES OF BILLS AND NOTES, AND OF OBJECTIONS APPEARING EX FACIE.

In considering bills and notes,⁴ the first particular to be examined is the form and external appearance of the instrument. But it is an important observation to be kept in mind, that in bankruptcy the *debt* is to be distinguished from the *instrument*.

original shape, bears no resemblance to a bill, yet when endorsed it is exactly similar to one, for then it is an order by the endorser of the note upon the maker to pay to the endorsee. The endorser is, as it were, the drawer; the maker the acceptor; and the endorsee the payee.' Sm. Merc. Law, 7th ed. 204.]

¹ See above, p. 4, for the doctrine of registration for securing execution, 1681, c. 20; 1696, c. 36; and 12 Geo. III. c. 72, secs. 41 and 42. [Also 1 and 2 Vict. c. 114, by which charges on registered protests are substituted for letters of horning.]

² *Sarsfield v Witherly*, Carth. 82.

³ Since the former edition of this work, there has been published a very good and useful treatise on the Law of Bills of Exchange, Promissory Notes, etc., in Scotland, by Robert Thomson, Esq., advocate. In that work all the cases, English and Scottish, which have been determined on this important subject are digested with great conciseness; and the doctrine, with the distinctions and peculiarities of the law of the two countries, very ably and clearly stated.

⁴ [As to the peculiar rules relating to bankers' notes, see Sm. Merc. Law, 7th ed. p. 219.]

1. Where independently of the instrument there is a debt, it may be claimed and established notwithstanding any objection fatal to the bill. Of this, usury affords an example: the *bill* may be null under the statute, as usurious; but the *debt* may notwithstanding be proved by evidence of goods furnished or money paid.¹ So, a bill that is vitiated is good for nothing; but the debt may be proved independently of it.² So also, a bill which has fallen by the sexennial prescription is utterly gone;³ but the debt may be established by other proofs. But,

2. Where the debt exists only by force of the instrument, an objection fatal to the bill seems to annihilate the claim.⁴ This rule seems to apply to an accommodation bill, to which the bankrupt has put his name as cautioner for him for whose use the money was borrowed.

The external requisites of a bill may be referred to the form of words used, the paper on which it is written, the genuineness of the subscriptions, the authenticity of the written instrument itself, or the subsistence of the obligation.

I. FORM OF BILLS AND NOTES.—No particular form is necessary.⁵ Provided the words amount to an undertaking, obligation, or promise absolutely to pay a precise sum of money at a definite time, it is a good note or bill.⁶ A note or bill cannot be drawn conditionally, [389] to the effect of enjoying the privileges of a bill, though when holograph it may constitute a good voucher of debt. It must also be for money, and not for commodities;⁷ and so strictly has this been adhered to in England, that a note payable in money, 'or Bank of England notes,' was held null.⁸

Where there are words added to the obligatory clause of a bill which qualify its terms, and make the bill conditional, they will destroy it as a bill; but where the words are explanatory merely, and touch not the essence of the obligation, they will not have this effect. So, words importing a discharge when paid, do not hurt the bill;⁹ so of a bill addressed to one as cautioner.¹⁰ Finally, a clause of interest does not vitiate the bill; so it has always been held in England.¹¹ On this point there was a great vacillation in the earlier decisions of the Court of Session; but the judges in the latest case recorded repelled

¹ See above, p. 330.

² *Murdoch, Robertson, & Co. v Lee, Rogers, & Co.*, in H. L., 26 Dec. 1801, 4 Pat. 261. A bill vitiated by an alteration was held to be no legitimate ground of action, without prejudice to the pursuers bringing any action on or in respect of the original debt. See p. 417, note 1.

³ 12 Geo. III. c. 72, sec. 37.

⁴ See *Long v Moor*, 3 Esp. 155, note.

⁵ [For examples of irregularly drawn obligations of this class, see *M'Cubbin v Stephen*, 1856, 18 D. 1224; *M'Kinney v Van Heck*, 1863, 1 Macph. 1115; *Bankier v Robertson*, 1864, 2 Macph. 1153; *Macfarlane v Johnstone*, 1864, 2 Macph. 1210; *Morgan v Morgan*, 1866, 4 Macph. 321. The following illustrations are taken from Smith, Merc. Law, 7th ed. p. 205:—(1.) An acknowledgment of debt followed by the words 'to be paid,' whether on demand or on a specified day, held to constitute a note, in *Cashborne v Dutton*, Selw. N. P. 8th ed. 371, and *Brooks v Elkins*, 2 M. and W. 74; and see *Wheatley v Williams*, 1 M. and W. 533; *Ellis v Mason*, 7 Dowl. 578. (2.) The following formulas were held not to be promissory notes:—'I have received the sum of £20 which I borrowed from you, and I have to be accountable for the said sum with interest;' *Horn v Redfearne*, 4 Bing. N. E. 433. 'I O U £45, 13s. which I borrowed of Mrs. Melanotte, and to pay her five per cent. till paid;' *Melanotte v Teasdale*, 13 M. and W. 216. 'Mr. Silree has this day deposited with me £500, on the sale of £10,300 3 per cent. Spanish, to be returned on

demand;' *Silree v Tripp*, 15 M. and W. 23. 'I undertake to pay to Mr. Robert Jarvis the sum of £6, 4s. for a suit of clothes ordered by D. P.;' *Jarvis v Wilkins*, 7 M. and W. 410. 'At twelve months after date I promise to pay R. & Co. £500, to be held by them as a collateral security for moneys now owing them by J. M., which they may be unable to receive on realizing the securities they now hold, and others which may be placed in their hands by him;' *Robins v May*, 11 Ad. and E. 213. The two last-mentioned documents were held to be of the nature of guarantees.]

⁶ The statute 17 Geo. III. c. 30, made perpetual by 27 Geo. III. c. 16, providing that bills and notes under £5 shall specify the name and place of abode of the payee, and be attested by a subscribing witness, and be made payable within twenty-one days, is an English Act not applicable to Scotland. [This Act, and the corresponding provisions of 8 and 9 Vict. c. 38 in relation to Scotland, are repealed or suspended by 26 and 27 Vict. c. 105.]

⁷ *Lesly v Robertson*, 1713, M. 1397; *Douglas v Erskine*, 1715, M. 1397; *Bruce v Wark*, 1729, M. 1399. This does not seem inconsistent with the other two cases.

⁸ *Ex parte Jamieson*, 2 Rose, Bankrupt Cases, 225.

⁹ *Trotter v Shiell*, M. 1402.

¹⁰ *Gibson v Campbell*, 1753, M. 1406.

¹¹ *Kennedy v Nash*, 1 Starkie 452; *Cameron v Smith*, 2 Barn. and Ald. 305; Sm. Merc. Law, 7th ed. p. 263.

this objection to a bill, moved by the general understanding and practice of merchants regarding the stipulations of interest on bills.¹

The material parts of a bill or note are: the date, at least where that date in any degree regulates the term of payment;² the term of payment; the sum; the name and address of the payee; the name and address of the person drawn upon. These must be clear, correct, and intelligible, in order to entitle the instrument to the summary execution of a proper bill or note.

II. STAMP.—The bill or note must be written on the proper stamp required by law; and it is peculiar to those stamps, that they cannot be affixed, nor, on pretence of mistake, an erroneous stamp corrected, after the bill or note is written. But on this subject reference may be made to what has already been said concerning the stamp laws.³ The consent of the parties will not remove the objection on the stamp laws.

III. SUBSCRIPTION.—A bill of which the signature is forged is no legal ground of action or of diligence, and will not sustain a claim in bankruptcy.⁴ But if one have given sanction and currency to acceptances or endorsements forged by a particular person, as binding on him, he will be liable as having adopted that subscription, and authorized it as his own;⁵ and it would seem that not only action, but summary diligence, may proceed on such a bill, the plea of forgery being effectually met by that of adoption and virtual procuration.⁶

Bills and notes can be effectually drawn, accepted, or endorsed, only by the subscription of the name of the person so drawing, accepting, or endorsing, or by the subscription [390] of a procurator authorized by him. But sometimes illiterate persons become parties to such instruments; and it is necessary to observe how they may effectually bind themselves. In strict law, no bill ever ought to have been sanctioned under any other than the full legal subscription. But considerations of hardship, grounded on a prevailing usage with illiterate persons to sign bills and notes by the initials of their names, and even by marks, and the want of a due discrimination between the admission of such writings as documentary evidence, and the sustaining of them as bills, have led to great confusion in this matter.

1. The subscription of the initials of the parties is not effectual to constitute a bill; but if it appear from the instrument that it was signed before witnesses, an action, or on bankruptcy a claim of debt, will be sustained on evidence, *first*, of this being the customary mode of subscribing used by the party; and, *secondly*, that the initials actually were subscribed by him.⁷ Such instruments, however, are properly to be considered as evidence only of simple contracts or obligations, not as bills. They cannot authorize summary execution, because they require extrinsic proof of their authenticity; differing in this respect from forged bills (see above), as showing their defect *ex facie*.⁸

¹ *Sword v Blair*, 1790, M. 1433. See Chitty, 537.

² [By 19 and 20 Vict. c. 60, sec. 10, 'where any bill of exchange or promissory note shall be issued without date, it shall be competent to prove by parole evidence the true date at which such bill or note was issued; provided always that summary diligence shall not be competent on any bill or note issued without a date.']

³ See above, p. 337.

⁴ *Wilson v Hart*, 1826, 4 S. 504, N. E. 511. Bill of suspension passed without caution on report of engravers that the subscription was forged.

⁵ *Barber v Gingell*, 3 Esp. N. P. 60, where the drawee having answered several bills accepted by one Taylor writing his name, this was held sufficient to answer the plea of forgery, as being an adoption of the acceptance.

Leach v Buchanan, 4 Esp. 226; *Jones v Ryde*, 1 Marsh. 159.

In one case in Scotland, bills had been to a great extent, and during a considerable course of time, accepted by a forged

signature, and at last the forger absconded. In answer to the plea of forgery, it was attempted to make out a case of currency given by acquiescence on the part of the person whose name was forged; and the proof which was chiefly relied on was the notice sent to him as endorser, intimating the dishonour of the bills. But it appeared that the forger had always contrived to intercept the letters, and provide for the bills, so that it was not possible to establish acquiescence against the person whose name had been forged. The action of course failed. *Park's Representatives*.

[*Millar v Little*, 1831, 9 S. 328; *Meiklem v Walker*, 1833, 12 S. 53; *Rathbone v Glennie*, 1833, 11 S. 574; *Trout v Begg*, 1838, 1 D. 356; *Fraser v Maclellannan*, 1849, 12 D. 208; *Finlay v Currie*, 1850, 13 D. 278; *Boyd v Robertson*, 1854, 17 D. 159.]

⁶ [*Dixon v Knox*, 1854, 16 D. 869.]

⁷ *Thomson v Shiell*, 1729, M. 16810; *M'Ilwraith v M'Miken*, 1785, M. 16820.

⁸ *Monro v Monro*, 14 Nov. 1820, F. C. A bill signed by

2. Neither will a bill signed by a mark be sustained as a ground of diligence,¹ though it may be received as an *adminicle* of documentary proof in an action.²

If a person sign his name upon a blank paper stamped with a bill stamp, he will be held the drawer or acceptor, as it may be, of any bill which shall afterwards be written above his name to the sum of which the stamp is applicable.³ These in trade are called skeleton bills, and are too frequently in use.

The same rule is applicable to those cases in which, intentionally, or even by carelessness, drawers or acceptors allow a bill to be so altered as to deceive third parties into a belief of their having signed a bill to a greater extent than the actual amount of the original instrument. Where a blank, total or partial, is left in a bill, or the sum is so written as to be capable of alteration without detection, the parties will be liable to summary diligence by the bill-holder. This proceeds not on the principle of mandate, but on the obligation to indemnify loss occasioned by fault or negligence; the fault or negligence being a good answer to the plea of interpolation. And so, if the falsification is so clumsy as not to deceive a person of ordinary vigilance, the exception will be good.⁴

[391] Bills blank in the drawer's or payee's name were formerly held to fall under the Act relative to blank writs; 1696, c. 25. But the view now taken is, that this statute does not apply to the case of bills; and that the acceptance is an undertaking to pay the person who shall have right to the document, like a note payable to bearer.⁵ On this ground even an executor has been allowed, after the death of the drawer, to sign a blank bill found in his repositories, and raise diligence on it.⁶ See below, p. 421.

IV. VITIATIONS AND ALTERATIONS.—Alterations or erasures of bills and notes in *material parts*, without consent of the parties, are fatal, independently of the objection on the stamp laws. Thus, the alteration of the *date* of the bill was held to annul the bill.⁷ An alteration

initials, and with the subscription of witnesses, was held insufficient to authorize summary diligence.

¹ *Stewart v Russell*, 11 July 1815, 18 Fac. Coll. 496. Here a charge on a bill for £400, drawn and endorsed by a mark, without the subscription of witnesses, was suspended.

² *Cockburn v Gibson*, 8 Dec. 1815, 19 Fac. Coll. 47. Here a bill signed by a mark before witnesses was held not to authorize summary diligence; but the debt not being denied, decree was given in an ordinary action, which had been raised and pursued at the same time with the charge on the bill. [See, as to subscription by mark or initial letters, *Dickson on Evidence*, secs. 667, 784.]

³ *Collis v Emmet*, 1 Hy. Blackst. 313, where, on a shilling stamp, the name of Emmet having been signed to a blank, a bill of £1551 was afterwards written by Ewing & Co., to whom it had been delivered; and this bill was regularly transferred to Collis & Co., who sued Emmet on it. Emmet was found liable. *Sm. Merc. Law*, 7th ed. 214.

Russell v Langstaffe, Douglas 496; *Usher v Dauncey*, Bayley 128, N. 59; *Powell v Duff*, 3 Camp. 182.

Little & Co. v Muir, 23 Feb. 1803. A bill in similar circumstances was in Scotland held to be binding, first by Lord Meadowbank, and afterwards by the Court. The plea chiefly relied on was the prohibition of blank writs by 1696, c. 25. But this plea was repelled.

[*Grasswick v Farquharson*, 1846, 8 D. 1073. Such bills held to be a warrant for summary diligence in *Cameron v Morrison*, 1869, 7 Macph. 382.]

⁴ Compare *Scacchia*, Tr. de Comm. sec. 2, gl. 5, quæst. 15, with *Pothier*, Tr. du Cont. de Change, vol. ii. p. 134.

The decisions of the Court of Session have proceeded on the principles so well laid down by *Pothier*.

Pagan & Hunter v Wyllie, 1793, M. 1660, where the bill was for eight pounds, but room enough left to convert the eight into *eighty-four*. It was held binding on the acceptor to the full extent.

Graham v Gillespie, 1795, M. 1453, Bell 105, where an opportunity occurred for drawing the distinction. A bill for £58 having been written out with a blank at the place of the stamp, an opportunity was given to fill up the sum of 'four hundred and' before the words 'fifty-eight,' so as to make the bill appear a fair bill for £458. Another bill was manufactured in nearly similar circumstances, but so clumsily that it was palpable at first sight. Both bills had been discounted by the Thistle Bank of Glasgow. The Court sustained the former, and found the latter ineffectual.

⁵ *Ogilvie v Moss*, 1804, M. App. Bill of Ex. No. 17, where the drawer not having signed as such (though he had endorsed the bill), the Court repelled the plea that the bill was null as a blank writ.

⁶ This was first determined in the negative. *Robertson & Ross v Bissets*, 1777, M. 1676.

But in 1801 the point was solemnly decided in favour of the representative. *Fair v Cranston*, 1801, M. 1677.

And afterwards, the Court would not even hear an argument, lest they should seem to unsettle the point. *M'Donald's Trs. v Rankin*, 13 June 1817, 19 Fac. Coll. 351.

⁷ *Murchie v M'Farlane*, 1796, M. 1458. The date was here altered from 7th to 17th June. The effect was to prolong the credit.

In England, the case of *Master v Miller*, 4 Term. Rep. 320, 2 H. Blackst. 141, was of the same complexion. *Sm. Merc. Law*, 7th ed. 274. The bill was originally dated 26th March, and was afterwards, in the hands of the payees, altered to

on the term of payment, from payable *at sight* to payable *one day after date*,¹ was also [392] held to annul the bill. An alteration of the sum was held fatal:² the substitution of another drawer³ or endorsee is also fatal.⁴ As to vitiation of receipts on the back, see case below.⁵

Where the alteration is not material, as not on an essential part of the instrument, or merely to correct a mistake, and in furtherance of the original intention, it will not invalidate the bill: thus, to add *to order* where omitted,⁶ or to convert a promissory note into a bill in conformity with the original agreement,⁷ or to adjust the date as at first intended.⁸

20th March without the acceptor's knowledge, and afterwards endorsed. The effect here was to shorten the credit. The bill was held to be vacated. See the doctrine applied to other instruments (viz. a sale note), *Powell v Divett*, 15 East 29. [As to guarantees, see *Davidson v Cooper*, 11 M. and W. 795; *Crookewit v Fletcher*, 1 H. and N. 893. As to the limits within which it is competent to use an altered bill or instrument in proof of extrinsic circumstances, see *Smith*, L. Ca. 6th ed. p. 835 et seq.]

Hamilton v Monteith, 1824, 3 S. 345. Bill held null by a vitiation of the figure 5 in 25 December.

Robertson v Annan, 1825, 4 S. 40, N. E. 42. Vitiation from 'as cautioner' to 'conjunctly and severally' held to annul a bill.

Hamilton v Kinnear & Son, 1825, 4 S. 102, N. E. 104. Vitiation from 1826 to 1825. Bill of suspension passed without caution or consignment.

Corrie v Barbour, 1825, 4 S. 228, N. E. 231. Similar decision on an obvious vitiation from 1 to 8 October.

Walton v Hastings, 4 Camp. 223. In England, bill held null for alteration of date from 5th to 10th July.

¹ See *Murdoch, Robertson, & Co. v Lee, Rodger, & Co.* In this case, an acceptance of £1000 having been given for the purpose of liquidating a balance due on a banker's account, it was, when due, renewed for the principal sum and interest. It was allowed to lie over for some years as the voucher of the debt due; and the cashier of the bank, when he came to demand payment, finding it payable on *demand*, altered it to payable *one day after date*, merely to preserve interest. The Court, taking the whole case into view, pronounced judgment, in an action *grounded on this bill*, for a sum equivalent to the amount of the original bill and interest. 11 Feb. 1800.

In the House of Lords the matter was taken more strictly; and the action as grounded on the bill dismissed, 'but without prejudice to the pursuer's bringing any action on or in respect of the original bill for £1000 granted by Lee, Rodger, & Co., as effectually as if they had amended their libel according to a permission granted by the Court of Session so to do. The Lord Chancellor on this occasion said, that had an action been brought in England upon the second bill, it would have been sufficient, laying all the other circumstances of the case out of consideration, to have stated that the bill, in consequence of the alteration, was not the contract of the parties; that the alteration of that bill (a voluntary if not a criminal act of the pursuer) had annihilated it, and it could not be restored or made a ground of demand.' 26 Dec. 1801, 4 Pat. 261.

Long v Moor, a similar case in England. 3 Esp. Cases 155, in note.

[*Whitehead v Henderson*, 1836, 14 S. 544; *Armstrong v Wilson*, 1842, 4 D. 1347; *M'Rostie v Halley*, 1850, 12 D. 816; *M'Cubbin v Turnbull*, 1850, 12 D. 1123.]

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² *Graham v Gillespie & Co.*, *supra*, p. 416, note 4. [*Edinburgh and Glasgow Bank v Samson*, 1858, 20 D. 1246, where an alteration made by the drawer on the sum in figures, to make it correspond with the sum in writing, was held to be *in essentialibus*, so that the bill could not support an action against the endorser.] See cases, next note.

³ *Callendar v Kirkpatrick*, 10 Dec. 1812, Fac. Coll.; *Fleming v Scott*, 1823, 2 S. 446, N. E. 398.

⁴ *Macara v Watson*, 1823, 2 S. 360, N. E. 318. Alteration of the endorsee's name from William to Thomas.

⁵ *Lowe v Campbell*, 1825, 4 S. 299, N. E. 302. [Among modern instances of what is held to be a material alteration, see *Mason v Bradley*, 11 M. and W. 590, where the name of one of the makers of a promissory note was cut off; *Warrington v Early*, 2 El. and Bl. 763, where the addition was of the words 'interest at six per cent. per annum' in the corner of a note for the payment of a sum 'with lawful interest'; *Birchfield v Moore*, 3 El. and Bl. 683, where a place of payment was added to the acceptance, and the acceptor was held not to be liable even to a *bona fide* holder for value; and *Hirschfeld v Smith*, 1 L. R. C. P. 340, where an addition was made of the rate of exchange at which a bill drawn on Paris was to be paid. If the alteration be material, it makes no difference that it would operate, if at all, to the benefit of the maker. *Gardner v Walsh*, 5 El. and Bl. 83, overruling *Catton v Simpson*, 8 Ad. and El. 136, 1 Smith L. Ca. 6th ed. 832. As regards alterations affecting the statement of consideration or value, a distinction has been suggested which we think sound in principle, viz. that the addition of a consideration where none was expressed is not material, but that an alteration of words importing value received or consideration, so as to express a new or different consideration, is a material alteration. See the cases in *Smith*, *ubi supra*.]

⁶ In England, it must in such a case appear to have been at first intended to make the note negotiable. *Kershaw v Cox*, 3 Esp. Cases 246, where these words omitted, but strong evidence to show it a mere mistake. *Bathe v Taylor*, 15 East 412. See *Knill v Williams*, 10 East 431, 1 Ross L. Ca. 700. In Scotland this is always to be implied. See below, Of Endorsation, p. 426. Sm. Merc. Law, 7th ed. 274.

⁷ *Webber v Maddocks*, 3 Camp. 1, where Maddocks agreed to give Webber a bill of exchange for £110, and having sent him a promissory note, Webber instantly returned it, and it was altered into the form of a bill.

⁸ In England, *Jacob v Hart*, 2 Starkie 45. Altered from 3d May to 3d April after acceptance, but with acceptor's consent, and as originally intended. *Brett v Piccard*, Ryan and Moody 37. Altered from 1822 to 1823. Sm. Merc. Law, *supra*.

In Scotland, *Henderson v Hay*, 1802, M. 17059. Bill dated October 1799; time of payment made March 1780; altered to what was obviously meant 1800. Sustained.

It is scarcely necessary to state cases, to show the different circumstances in which the consent of the parties will be held as established; but if the alteration is made by the whole parties, or with their full consent, it will be effectual, provided the stamp laws are not violated; and on that ground, perhaps, such a case as that of *Bryce* may admit of reconsideration.¹

The place of payment of a bill is material in many respects; and where there is an alteration of the instrument so as to add a place of payment in the body of the bill,² or to add a place of payment to the effect of making qualified an acceptance originally quite general,³ or otherwise to convert a general acceptance into a qualified acceptance,⁴ or [393] to substitute a place of payment for that mentioned in the original acceptance,—these will be held as material alterations.

SEXENNIAL PRESCRIPTION.—In Scotland within these fifty years, a limitation of bills and notes has been introduced by statute.⁵ The Act declares, 'That no bill of exchange, inland bill, or promissory note, shall be of force, or effectual to produce any diligence or action, in that part of Great Britain called Scotland, unless such diligence shall be raised, or action commenced thereon, within the space of six years from and after the term at which the sums in the said bills or notes become exigible.' But it is provided, 'That it shall and may be lawful and competent, at any term after the expiration of the said six years, in either of the cases before mentioned, to prove the debts contained in the said bills and promissory notes, and that the same are resting owing, by the oath or writ of the debtor' (secs. 37, 39).

1. The term of six years runs from the last day of grace in bills payable at a fixed term.⁶

2. If the bill be payable *on demand*, it has been held to be due, and the six years to run from the date of the bill.⁷ The expression in the Scottish statute, 'from the term at which the sums in the note or bill become exigible,' has been held to support the above construction. In England it seems to be held otherwise; a bill payable on demand not giving 'cause of action' till a demand is made.⁸

3. If payable *at sight*, it is exigible only when it shall have been presented; and there-

¹ *Bryce v Dickson*, 16 Nov. 1810. Spital, in drawing a bill for the price of cattle, which by the bargain was to be payable at Lammas, made it by mistake payable at Candlemas. The mistake was immediately perceived, 'Candlemas' delete, and 'Lammas' written. It was then signed by the drawer and acceptors. One of the acceptors (who was only surety) pleaded that the bill was null, and so the Court found.

In a subsequent case, *Fairweather v Alison*, 12 Feb. 1817, 19 Fac. Coll. 289, a bill, of which the term of payment was altered by the acceptor in accepting it, was sustained against the representative of the acceptor after his death.

[See *King v Creighton*, 1841, 4 D. 62, 2 Bell 81. Even if the alteration be made with the consent of all the parties interested, still, if the alteration is material, it creates a new contract, and the bill is liable to objection on the stamp laws. As to what alterations are material in a question of sufficiency of stamp, see 1 Smith L. Ca. 6th ed. 833.]

² *Tidmarsh v Grover*, 1 Maule and Sel. 735, a bill accepted payable at Bloxam & Co.'s. On their failure, the drawer erased Bloxam & Co.'s, and substituted Easdale & Co.'s. The bill held null.

See *Rex v Treble*, 2 Taunt. 328; *Saunderson v Bowes*, 14 East 500, Sm. M. L. 274.

³ *Cowie v Halsall*, 4 Barn. and Ald. 197. The bill here was accepted generally. The drawer, without the consent of the acceptor, added, 'payable at Mr. Bedlake's, 48 Chiswell Street.' This held to vitiate the bill. Abbot, Ch. J., said:

'An acceptance is a material part of a bill of exchange, and may be either general or special. By a general acceptance, the acceptor undertakes to pay the bill at any place where he may be called upon. By a special acceptance, he undertakes to pay at the place named in the bill. This alteration made it a special acceptance.' Bayley, J., thought this a material alteration, 'for it might subject the party to some inconvenience. The holder would present the bill at bank, where of course, under these circumstances, it would be dishonoured; and he might then, after sending by the post notice of the dishonour, immediately sue out a writ and arrest the acceptor.' Sm. M. L. 274.

⁴ See 1 and 2 Geo. iv. c. 78; *Turner v Haydon*, 1825, 1 Barn. and Cress. 1; *M'Intosh v Haydon*, 1826, 1 Ryan and Moody 362.

⁵ 12 Geo. III. c. 72, made perpetual by 23 Geo. III. c. 18, sec. 55.

⁶ *Douglas, Heron, & Co. v Grant's Trs.*, 1793, M. 4602; aff. in H. L., 6 Brown's P. C. 276. See, in England, *Wittersheim v Countess D. of Carlisle*, 1 Hy. Blackst. 631.

⁷ *Stephenson v Stephenson's Trs.*, 1807, M. App. Bill of Ex. No. 20.

⁸ In an analogous case, where one was to account for goods sold, it was held in England that the cause of action arose only with the demand for an account. *Topham v Braddick*, 1 Taunt. 572. See also 15 Ves. jun. 487.

Mr. Selwyn has quoted a case as establishing a different

fore prescription will run only from the presenting.¹ Whether the day of presentment or the last day of grace is the period *a quo* in such a case, is doubtful. See below, Of Presentment.

4. To preserve the bill from prescription, it is not sufficient to protest the bill, or even to register the protest. There must be within the six years a demand, either, 1. By legal diligence executed;² or, 2. By judicial process raised by the creditor; or by judicial demand, *i.e.* by an action, neither blank in the summons,³ nor informal;⁴ or by the production of the grounds of debt, and the entry of a claim in a ranking and sale;⁵ or by claiming in a sequestration; or, generally, by claiming in a multiplepoinding, or any other process of competition. Action of suspension by the debtor has not been held to stop the prescription of a holograph bond,⁶ and the analogy seems to hold as to bills.⁷ Judicial proceedings have been held necessary, notwithstanding outlawry.⁸

5. There is a difference between the Scottish prescription of bills and the limita- [394] tion of the English law. By the words of the Scottish Act, the bill is annihilated as a ground of diligence or action, and the proof of the debt confined to writ or oath. In England the limitation may be discharged by *any* acknowledgment of the debt, even the slightest, and by parole.⁹

According to the words of the Act, there cannot in Scotland, after the expiration of six years, be any action grounded on the bill or note itself. In any action for payment after that time, the *debt* ought to be libelled: yet this strictness of judicial proceeding has not always been required so rigidly as it ought to have been. The law correctly appears to be, 1. That although the bill may be produced in the way of adminicle or documentary evidence, the proof on which alone judgment can proceed is the writ or oath of the debtor. 2. That if an action is laid on a bill or note after the term of prescription has expired, decree pronounced in absence strictly ought to afford no legitimate ground of adjudication or other diligence; and the debtor should be entitled, without caution or consignment, to suspension of a charge on such a decree. 3. That a reference to oath on such a libel is not, strictly speaking, a reference of the debt; but in the relaxed method of libelling actions in the Court of Session, it has been held an effectual reference to sustain decree.¹⁰ The most important question connected with this point relates to the engagement of one who, as surety for the person truly indebted, becomes a party to a bill or note; and there may seem to be room for distinguishing two cases. 1. Where two or more persons engage as debtors in a bill, without the creditor being aware of the one being the principal, the others cautioners, it has been held not to be enough for one, on a reference to oath, to swear that the money was not received by him, his interference being only as cautioner, and depending on the mere act of his subscription of the document now extinct and annihilated.¹¹ 2. Where

doctrine, in the case of a promissory note—*Christie v Fonsick*, 1 Selwyn, N. P. 126—but he has not given the circumstances or argument on which the judgment proceeded.

¹ *Holmes v Kerrison*, 2 Taunt. 323. [Sm. Merc. Law, 7th ed. 243.]

² *Douglas, Heron, & Co. v Richardson*, 1784, M. 11127. Here bills with registered protests were produced in a ranking: the protest registered was found insufficient to interrupt the prescription; the production in the ranking sufficient.

³ *Baillie v Doig*, 1790, M. 11286.

⁴ *Gordon v Bogle*, 1784, M. 7532. Here one of the interruptions pleaded was a *blank* precept before the Admiral, afterwards filled up with the debt in the bill.

⁵ *Douglas, Heron, & Co. v Richardson*, *supra*, note 2.

⁶ *Wright v Wright*, 1717, M. 11268.

⁷ [*Ross v Robertson*, 1855, 17 D. 1144.]

⁸ *Brodie v Sheddin*, 20 Feb. 1821, 20 Fac. Coll. 232.

⁹ See the cases to this effect collected by Mr. Selwyn, vol. i. p. 127.

¹⁰ *Laidlaw v Hamilton*, 1826, 4 S. 636, N. E. 644. Here the libel was on a bill of £220, dated 24th January 1814. The bill was prescribed. A reference was sustained, and the deposition was, that the bill had been signed by Hamilton, but only as cautioner, and he had never received value. The judges were divided in opinion: some holding that the libel was incorrect, and the debt consequently not established by the oath; the majority, that the bill was only demonstrative of the question whether the debt expressed in the bill was owing, and so the oath intelligible and relevant. [See *Christie v Henderson*, 1833, 11 S. 744; *Paxton v Forster*, 1842, 4 D. 1515; *Wood v Howden*, 1843, 5 D. 507; *Darnley v Kirkwood*, 1845, 7 D. 595.]

¹¹ *Philp v Milne*, 1800, M. App. Bill of Ex. No. 9. Here a bill in the hands of an onerous endorsee was prescribed; but

the creditor is aware of the engagement being merely as surety, it may be contended, that the co-obligant being not properly debtor, but only engaging as surety, and by a limited obligation, the duration of his responsibility must be measured by the natural course of the engagement, while the creditor cannot rely on any more extended obligation. But the Court has not sanctioned this distinction. In several cases the same rule has been applied which decided the questions with onerous endorsees.¹

[395] 6. It is held in England, that as payment by one of several obligants in a bill is payment for all, so admission by one is admission by all, and the law raises the promise to pay where the debt is admitted to be due.² This is not law in Scotland.³

In Scotland it has been decided, that decree taken within the six years against one of several joint acceptors of a bill, 'interrupts the prescription as to all of them.'⁴

7. No document on the bill or by relative writing will preserve the bill in force, or in strict terms interrupt the prescription. It can have the effect only of establishing the debt itself. But, 1. As this, like the other short prescriptions, is grounded on the presumption of payment, it will not avail the creditor that there is on the back of the bill a marking of a partial payment, or of the payment of interest within the six years; for these do not exclude the presumption that payment was made before the bill was discharged by operation of the Act, in consequence of the expiration of the term.⁵ 2. Such markings, provided they are in the debtor's handwriting, on the very last day of the six years,⁶ or after the expiration of the term,⁷ are bars to the plea of prescription; or rather, proofs of the subsistence of the debt. 3. It seems to follow that such proofs ought not to suffer the limitation proper to a bill; but the Court has considered such a constitution of the debt by relation to the bill, as subject to a prescription as short as that of the original bill.⁸

9. The years of minority of the holder are not computed in the six years (sec. 40 of the Act 12 Geo. III. c. 72).

the joint acceptor, though he had interposed as cautioner merely, not pretending that the bill was paid, but defending merely on the ground of the annihilation of the bill, and the necessity of proving a debt against him. The Court seem to have taken (if the report is accurate) an incorrect view of the law,—'the general opinion being, that the bill was as much due now as on the day it was accepted; and that it was not a relevant defence that it was originally granted without value.'

Gibson v Forrester, 8 June 1820, F. C. Here the case was decided by the Lord Ordinary on the precedent of *Philp's*. But the Court distinctly placed it on this footing, that proof of the subsistence of the debt was required; and although there was no reference to oath, the want was supplied by special defences, which, as a judicial admission, were held equivalent to oath; and that the import of this defence was an admission of the debt.

See cases, next note.

¹ *M'Neil v Blair*, 1825, 3 S. 459, N. E. 319. Blair, with the full knowledge of the creditor, became surety for Jeffrey, by subscribing as acceptor of a bill. At the distance of more than six years an action was raised, and the debt was referred to Blair's oath, who swore to the bill having been signed by him as cautioner, with the knowledge of the creditor. The Court held Blair liable, and that his obligation was not limited by the sexennial prescription. This case was appealed, and compromised, by a great sacrifice on the part of M'Neil.

Laidlaw v Hamilton, *supra*, p. 419, note 10. [*Galloway v Moffat*, 1845, 7 D. 1088; *Drummond v Crichton*, 1848, 10 D. 340.]

² *Whitcomb v Whiting*, Douglas 629, where, four persons being bound in a joint and several note, one of them paid interest and part of the principal within the six years (which in England is held as a discharge of the limitation), and the question was, Whether action lay against the others? The Court (Lord Mansfield, and Willis, Ashurst, and Buller, J.) held them all liable.

So, in *Jackson v Fairbank*, 2 H. Blackst. 340, the payment of a dividend by the bankrupt estate of one of the obligants in a note was held such an acknowledgment as to take the case out of the statute as to the other.

³ *Houston v Yuill*, 1822, 1 S. 487, N. E. 417; *M'Indoe v Frame*, 18 Nov. 1824, 3 S. 295.

⁴ *Gordon v Bogle*, 1784, M. 7532. [*Paxton v Forster*, 1842, 4 D. 1515.]

⁵ *Ferguson v Bethune*, 7 March 1811, 16 Fac. Coll. 226. It is held otherwise in England. Chitty 479; 1 Selwyn 107.

⁶ *Campbell v Campbell*, 19 May 1797, M. 1648.

⁷ *Russell v Fairie*, 1792, M. 11130; *Scott v Gray*, 1784, M. 11126. Also the above case of *Ferguson*, *supra*, note 5.

⁸ This question was raised on the bench in *Russell and Fairie's* case (preceding note). The question was debated on the bench, and the judges much divided in opinion; seven judges and the Lord President holding the limitation to take place, while the other seven judges were of a different opinion. But the point was decided as above, *Horsburgh v Bethune*, 13 Feb. 1811, 16 Fac. Coll. 194.

See also *Ferguson v Bethune* (above, note 5); though, as to this point, that case is not reported with sufficient precision to be entirely satisfactory.

SUBSECTION II.—OF THE DRAWING, ACCEPTANCE, AND ENDORSEMENT OF BILLS AND NOTES.

These three points comprehend the main part of the doctrine of bills and notes:—

I.—DRAWING OF BILLS.

1. The subscription of a drawer is necessary in order to obtain a warrant for summary execution.¹ It has already been said, that the representatives of the drawer may sign the bill, if found unsigned in his repositories.² It may be signed by the drawer after the [396] death or bankruptcy of the acceptor,³ or at any time before producing in judgment.

2. The act of drawing a bill in favour of a third party implies an undertaking to the payee, and all acquiring right to the bill, that the person drawn on shall accept, and that he shall pay the bill; or that if he shall fail in either particular on due negotiation, the drawer himself will retire the bill. This evidence may be counteracted by the writ or oath of the holder of the bill.⁴

3. When one draws a bill in a representative character, as factor or otherwise, he must, in order to be free from personal responsibility, limit his draft to that character: for the law holds that the act of drawing the bill affords legal evidence of an obligation against the drawer in his own person; and that recourse, according to a general rule, and without distinction, must be competent upon all bills which do not *ex facie* bear the exception.⁵

4. Foreign bills are drawn in sets, that they may be transmitted safely. Each set or double of the bill must bear a condition that it shall be payable only while the others there enumerated remain unpaid; as, 'Pay this my first exchange, second and third not paid;' or, 'Pay this my second of exchange, first and third not paid.' All the copies must be delivered to the payee or endorsee, otherwise he may have difficulty in negotiating. The bill that is first presented and accepted is alone entitled to payment, and payment of it discharges the drawee;⁶ so that no banker is in safety to discount one set of a draft before acceptance, without the rest being delivered to him or destroyed, or without taking indemnity against the risk of another being first presented.

5. During the last war, bills drawn or negotiated from France were prohibited to be paid.⁷

¹ Erskine (iii. 2. 28) goes too far in saying that a bill without the drawer's name is null. See *Ogilvie v Moss*, 1804, *supra*, p. 416, note 5. *Drummond v Drummond*, 1785, M. 1445; *Hare v Geddes*, 1786, M. 1446, were cases in which it was objected to a claim in bankruptcy that the bill was null, as wanting the drawer's subscription; but the objection was repelled. In the first case an action was brought on the bill.

² See above, p. 416.

³ *Sandilands*, 1742, M. 1436; *Elchies*, Bill, No. 28. *Henderson v Cathcart*, 1748; *Elchies*, Bill, No. 41.

⁴ [The drawing of a bill is, moreover, an assignation in favour of the payee of the drawer's in the hands of the drawee, although the latter should refuse to accept. *Carter v M'Intosh*, 1862, 24 D. 925.]

⁵ See Bayley on Bills, 54–58. *Connell v M'Lelland*, 1782, M. 1485, where a factor, having drawn a bill in his own name, was held responsible to an onerous holder.

Douglas v L. Dunmore, 1800, where the governor of a West India island drew a bill on the treasury; but not having ex-

pressed his ministerial character, he was held to have made himself liable to the endorsee, the bill having been dishonoured when presented. M. App. Bill of Ex. No. 11.

[*Webster v M'Calman*, 1848, 10 D. 1133; *Chiene v Western Bank*, 1848, 10 D. 1523. If a man draw a bill or make a note in the name of another without authority, it would seem that he will not be personally liable on it. Sm. Merc. Law, 7th ed. 215, citing *Wilson v Barthrop*, 2 M. and W. 863; *Pothill v Walter*, 3 B. and Ad. 114; *Jenkins v Hutchinson*, 13 Q. B. 752; *Lewis v Nicholson*, 21 L. J. Q. B. 311. By 25 and 26 Vict. c. 89, sec. 47, a note or bill is to be deemed to have been made on behalf of a registered joint-stock company, if it be made in the name of the company by any person acting under its authority, or if it be made by or on behalf or on account of the company by any person acting under its authority.]

⁶ *Lambton & Co. v Marshall*, 1799, M. App. Bill of Ex. No. 8.

⁷ 54 Geo. III. c. 9, sec. 2. See *Duhamel v Pickering*, 2 Starkie 90.

II.—ACCEPTANCE OF BILLS AND NOTES.

The only proper acceptance of a bill by the person on whom it is drawn, is by his full subscription.¹ The mere subscription of the name is a sufficient acceptance: the full form is 'Accepted,' or 'Accepts,' with the name subscribed. Or where it seems necessary to take unusual precaution, it runs thus: 'Accepted for the sum of so much,' with the name subscribed. When accepted in any of these forms, the bill or note may be protested, if not duly paid; and on that protest diligence may be summarily issued against the acceptor.

In England, a separate acceptance may be taken without endangering the remedy on the bill, because in all cases an action is necessary; and the production of the bill, with [397] such evidence as is deemed sufficient to establish that the person drawn upon undertook to answer the request, may as easily be made the ground of the judgment on which execution is to follow, as if written on the bill itself. But even a written acceptance, separate from the bill, would not be sufficient in Scotland to authorize a decree of registration; there being, in the ordinary course of procuring a decree of registration, no judicial authority to take cognizance of such extraneous evidence; and a parole acceptance, whatever effect it may have in constituting a debt or in completing an assignment, can have none at all in constituting an accepted bill, on which execution can pass summarily.² This keeps the rule of acceptance in Scotland to that state of correctness which ought never to have been departed from in England,³ and which is now restored by statute (1 and 2 Geo. iv. c. 78), whereby 'no acceptance of any inland bill of exchange shall be sufficient to charge any person,' unless it be by writing on the bill, or on one of its parts, if there be more than one.

It is necessary, however, to observe a distinction respecting the acceptance of bills, from which important consequences are deducible. Considering a bill as an order on the drawer's debtor to pay his debt to a third person, the acceptance, or what is equivalent to acceptance, will complete the transfer of the debt. And therefore,

1. Although it cannot in strict law be said that acceptance may be by anticipation,⁴ yet when a debtor promises by letter clearly and unequivocally to accept a particular draft, and such draft is given to the payee, accompanied by the letter, or taken by a third party in reliance on the promise, it is at least a letter of credit that will avail the payee of the draft, and discharge the person drawn on from the necessity of accepting another draft for the debt.⁵

¹ See below, Of Acceptance by Procuration, p. 424. [Add. on Cont. 6th ed. 796.]

² [By the Mercantile Law (Scotland) Act, 19 and 20 Vict. c. 60, it is enacted, sec. 11, that 'no acceptance of any bill of exchange, whether inland or foreign, made after the 31st day of December 1856, shall be sufficient to bind or charge any person, unless the same be in writing on such bill, or if there be more than one part of such bill, on one of the said parts, and signed by the acceptor or some person duly authorized by him.' See the provision of the statute as to England and Ireland, 19 and 20 Vict. c. 97, sec. 6.]

³ Lord Kenyon said: 'It was much to be lamented that anything has been deemed to be acceptance of a bill of exchange besides an express acceptance in writing; but he admitted that the cases had gone beyond that line, and had determined that there might be a parole acceptance.' 1 East 103. And Lord Ellenborough has said, 'that if the law in this respect were to be framed *de novo*, it might perhaps be desirable to have nothing else taken as an acceptance than an acceptance in writing on the bill itself, that every one to whom it passed might see, on the face of the instrument itself, whether or not it were accepted; but that it is now much too

late to recur to that, after the various decisions in the time of Lord Hardwicke and Lord Mansfield.' 4 East 67.

⁴ See *Johnson v Collins*, 1 East 103, 104. [Sm. Merc. Law, 7th ed. 234, 235.]

Shepherd (Frazer's Tr.) v Campbell, Frazer, & Co., 1823, 2 S. 346, N. E. 804. C., F., & Co. wrote, 'Your draft on C., F., & Co. will meet due honour,' etc. This letter was shown to John Frazer, who advanced £500 on a draft drawn conformably. The fund on which C., F., & Co. relied failed, and they refused to accept the bill. They were held liable for the amount of the bill.

⁵ *Pillans v Van Mierop & Hopkins*, 3 Burrow 1663, where the defendants, London merchants, wrote that they would accept such bills as a foreign house should draw on the credit of White for £800. The foreign house was held to have made an effectual draft, which was to be held as accepted, although White in the meanwhile failed, and the London house attempted to retract; the foreign house having advanced money on the faith of the engagement. Lord Mansfield, Mr. Justice Wilson, and Mr. Justice Yates, laid down the law clearly.

Lord Mansfield went further in *Pierson v Dunlop*. Dunlop had written to MacLintot acknowledging receipt of a navy

But the promise must be unequivocal and clear.¹ It should follow that the holder of [398] the draft to which the promise applies ought to be preferred on the fund in the hand of the person drawn upon.

2. A verbal acceptance is also, in this view and to this effect, even by anticipation, good;² and though in Scotland such an acceptance will not ground summary diligence, it seems to be effectual to transfer the fund in the hands of the person drawn upon.

3. It is said that a *refusal* to accept, written on a bill, is an acceptance; but it can be so only in two cases: either where the presenter of the bill is deceived into a belief that it is an acceptance, and not a refusal;³ or where the drawee is possessed of a fund, and his refusal to accept is evidence of notice, so as to give the *porteur* right to the fund as assignee.⁴

Acceptance may be implied from detention of, or refusing to redeliver, a bill left for acceptance.⁵

Acceptance is sometimes made conditional. Thus:—

1. Where the person drawn upon does not choose altogether to reject the bill, and expects to receive those funds on the faith of which the bill is drawn, he accepts conditionally; as, 'to pay when in cash by a particular remittance;' or, 'to pay on arrival of a particular ship;' or, 'to pay when goods consigned shall be sold,' etc. Such acceptance is held good on the condition being performed,⁶ not otherwise.⁷

2. Acceptance may be so far qualified as to vary from the tenor of the draft. Thus,

1. It may be for a part only of the sum drawn for, to which extent it will be effectual;⁸ or,
2. It may vary in the mode of payment;⁹ or, 3. It may vary in time of payment.¹⁰

3. A bill may be accepted conditionally in respect to place.¹¹ But, 1. The condition must be in writing, in order to qualify the drawee's obligation to third parties taking the bill for value without notice of the condition.¹² 2. The *porteur* is not *bound* to take such

bill, and saying that his draft would receive due honour; and he verbally said to the holder of the draft, that it would not be accepted till the navy bill was paid. The navy bill was paid. Lord Mansfield said, in the course of the argument, when the letter to MacLintot was maintained to be an acceptance: 'I rather think it a letter of credit, and that to make it an acceptance it should have been sent to the holder of the bill.' After argument, he said: 'I consider what the defendants did as an acceptance. It has been truly said, as a general rule, that the mere answer of a merchant to the drawer of a bill, saying "he will duly honour it," is no acceptance, unless accompanied with circumstances which may induce a third person to take the bill by endorsement; but if there are any such circumstances, it may amount to an acceptance, though the answer be contained in a letter to the drawer.' Cowp. 571. [Sm. *ut supra*.]

¹ *Bees v Warwick*, where 'your draft shall merit due attention' was held insufficient (2 Starkie 411). In *Shepherd's* case, p. 422, note 3, the expression was different.

² *Lumley v Palmer*, 2 Strange 1000, where a solemn argument was ordered, to settle the point. Lord Hardwicke, as Chief Justice, had directed the jury that verbal acceptance was sufficient. But the Chief Justice had ruled it otherwise in the Common Pleas. The Court, in their argument, held a verbal acceptance sufficient, and that the judge's direction to the jury to that effect was agreeable to constant practice. Lord Hardwicke said afterwards, that on a conference with the Chief Justice of the Common Pleas he had changed his opinion, and agreed with the Court of King's Bench. The point taken for granted by the Court and bar. *Sproat v Matthews*, 1 Term. Rep. 182. [Sm. Merc. Law, 7th ed. 234.]

³ And so it seems to have been held by Lord Mansfield. In the last edition of Mr. Justice Bayley's Treatise, p. 78, there is this note:—'In Ann. 75 is this note: "Underwriting or endorsing a bill thus, *I will not accept this bill*, is held by the custom of merchants a good acceptance; but by Lord Mansfield, in *Peach v Kay*, in sittings after Trin. Term 1781, it was held by all the judges that an express refusal to accept, written on the bill, where the drawee apprised the party who took it away what he had written, was no acceptance; but if the drawee had intended it as a surprise upon the party, and to make him consider it as an acceptance, they seemed to think it might have been otherwise.''

⁴ [See *Carter v McIntosh*, 24 D. 925.]

⁵ Mere keeping of a bill, however, does not seem sufficient, unless it amount to *detention*, or unless the bill be destroyed, knowing that the payee relies on its acceptance. *Jeune v Ward*, 2 Starkie 327, and note 330. See Bayley 149, 150.

⁶ *Pierson v Dunlop*, above, p. 422, note 5; *Sproat v Matthews*, 1 Term. Rep. 182; *Milne v Prest*, Holt 181, 4 Camp. 393, Bayley 155. [Sm. M. L. 234-6.]

⁷ *Banbury v Lesset*, 2 Strange 1211, where a bill was accepted to pay as remitted, but no remittance. The opinion of Lord Chief Justice Lee was, that the drawee was not bound. See *Sproat v Matthews*, 1 Term. Rep. 182.

⁸ Bayley 135, and cases there cited.

⁹ *Petit v Benson*, Bayley 136.

¹⁰ *Walker v Atwood*, Bayley 136.

¹¹ See above, p. 418, and below, p. 433.

¹² *Mason v Hunt*, Dougl. 286.

conditional acceptance; and he is not *safe* so to do, without giving immediate notice to the drawer and other parties, so as to prevent them from pleading a discharge of their responsibility. 3. Where the condition is verbal, the endorser must have notice, otherwise he will not be liable.¹ 4. But acceptance as a cautioner is deemed an absolute acceptance; and the qualification, whatever effect it may have in a question of relief between the parties themselves, has none at all as against the holder of the bill.²

It has sometimes been said, that an acceptance once written on a bill cannot be retracted, cancelled, or cut off, even while the bill is in the drawee's own power. In one sense this may be true,—namely, that a debtor to the drawer is bound so absolutely, that he cannot free himself by cancelling his signature. But to this extent the right of the holders will depend on the notice given of the assignment, not on the acceptance. To the extent to which it has been carried, the doctrine seems to be irreconcilable with principle, and to be justified only by the rule, that the drawee can write nothing on a bill which substantially injures and defaces it, without being held to accept it; and that the act of accepting requires no delivery to make it effectual, but from the moment of its appearing on the bill is beyond recall. It is a doctrine inconsistent with all the foreign authorities;³ and in England it is much doubted.⁴

Acceptance may be by an agent having a PROCURATION. But the holder is not bound to take such acceptance without seeing the procuration; nor, indeed, is he safe so to do without giving notice to the other parties: for he would thus take on himself the risk of the authority; and if it were not binding, he would discharge the other parties. If the agent's acceptance be taken, the effect of such acceptance will be determined by the following rules:—

1. The acceptance made in virtue of an express procuration will as effectually bind the principal as if made by himself. Such procurations are commonly granted by letter or power of attorney to confidential clerks, or factors, or riders for manufacturing houses, to draw, accept, endorse bills, or make promissory notes for the principal. It is a dangerous power, and ought not only to be granted with reserve, but acted upon by third parties very scrupulously.

2. The doctrine of the older authors⁵ is certainly more wholesome, that such power must be in writing; but mercantile practice has introduced a degree of looseness in this point, to which there is no authority for denying effect. On the contrary, it has been sanctioned in England in several cases, both in the common courts and in the House of Lords;⁶ insomuch that not only verbal authority to subscribe is held sufficient, but a power of procuration is inferred from the practice of so subscribing recognised by the principal. And in a recent case, where the Court of Session had found that there was no [400] power of procuration without a special mandate, this law was denied in the House of Lords.⁷

¹ Lord Ellenborough said the plaintiff had a right to refuse this acceptance, for the drawee of a bill has no right to vary the acceptance from the terms of the bill unless they be unambiguously and unequivocally the same. *Boehm v Garcias*, 1 Camp. 425. See also *Sebags v Abithol*, 4 Maule and Sel. 460; and *Gammon v Schmoll*, 5 Taunt. 344.

² *Campbell v Gibson*, 1753; *Elchies*, Bill of Exch. No. 54. *M'Dougal v Foyer*, 13 Feb. 1810, where one of the acceptors signed 'David Foyer, as cautioner for them (the other acceptors).' The judges were clearly of opinion that cautionary obligations in bills of exchange could have no other effect than that of settling the question of relief.

³ Dupuy de la Serra, *l'Art des Lettres de Change*, c. 10, p. 81; 2 Pothier 114; *Conte de Change*, No. 44.

⁴ *Bentink v Dorrien*, 6 East 200. There was no occasion to

decide the point; for the plaintiff had, by noting the bill for non-acceptance, barred himself from the benefit of it as an accepted draft. But Mr. Justice Lawrence took occasion to say, that when the general question shall arise, it will be worth considering how that which is not communicated to the holder can be considered as an acceptance, while it is yet in the hands of the drawee, and where he obliterates it before any communication made to the holder. See in Chitty, p. 242, the English cases collected. [*Sm. Merc. Law*, 7th ed. 237.]

⁵ Beawes, *Lex Mercat.* No. 86; Forbes 15.

⁶ Bayley on Bills, 226; Bayley, *Principal and Agent*, 117; Chitty 31 and 34. [*Anderson v Buck & Holmes*, 1841, 3 D. 975.]

⁷ *Davidson v Robertson and others*, in the House of Lords,

3. A general authority as agent or factor for a merchant residing abroad, will be sufficient to bind the principal by his acceptance; but a limited power must be strictly observed.¹

4. The person who accepts per procuration should be careful to express his representative capacity, otherwise he may render himself individually liable.²

5. The recall of such procurations will deprive of efficacy any draft or endorsement made by him who held it; nor does any advertisement or notice of such recall seem necessary in order to protect the principal from its abuse. Any one who trusts to the power without seeing the procuration in possession of the procurator, acts at his own risk. See hereafter, Of Mercantile Agency.

6. In England it has been held, that a collateral undertaking may be constituted by a subscription as acceptor, in circumstances which do not admit of a proper acceptance. Thus, after the person drawn on has accepted, there can be no proper acceptance by another person; but a signature as acceptor will raise a collateral undertaking.³ In Scotland a different view has been adopted; and instead of a collateral undertaking, the subscription has been held to import a joint undertaking, as acceptor of the bill or maker of the note.⁴ The English doctrine is consistent with mercantile practice and understanding, but not quite so with the stamp law; the Scottish doctrine is not quite reconcilable to either. It would present, for example, a question requiring some consideration, Whether a person subscribing, as in the case of *Don and Watt*, having no notice of the dishonour of the bill, would be liable for the payment of the bill at any time within the sexennial prescription?

7. A partner of a company has power to accept bills and make notes for the company in the ordinary course of trade, and of the company's dealings; although it should be stipulated in the contract that only one of their number should have that power. But this is subject to qualifications. 1. If the party to whom the bill is accepted is aware of the stipulation in the contract, he must show that he gave value for the acceptance or [401] note.⁵ 2. If the party is aware that the partner is using the company firm for his own private purposes, he must prove the assent of the company in order to recover on the bill.⁶ And this rule will be applied even where the company is indirectly benefited.⁷

A partner accepts either by signing the firm, or by subscribing his name for 'himself and partners.'⁸

4 July 1815, 3 Dow 218. There was no occasion to give judgment on this point, the case being remitted for reconsideration. Lord Chancellor Eldon said: 'Here a greater error has occurred than he ever remembered to have met with, if the commercial law was the same in Scotland as in England. In one of the interlocutors there is a finding, that an endorsement per procuration requires a special mandate.' His opinion was that no such thing was absolutely necessary; for if, from the general nature of the acts permitted to be done, the law would infer an authority, the law would say that such an authority might exist without a special mandate, and that an endorsement per procuration might be good though there were no such mandate. The cause was remitted to receive such evidence as might be properly offered with respect to the several points of the case.

This doctrine must, however, be confined to mercantile cases. *Lowson v Matthew*, 1823, 2 S. 502, N. E. 443.

¹ Chitty 31 et seq.

² As in the case of a drawer mentioned above, p. 421 (3). See below, Of Collateral Undertaking.

³ See below, p. 428.

Jackson v Hudson, 2 Camp. 447, where Jackson drew a bill on Irving, and he accepted. Hudson wrote under this VOL. I.

acceptance, 'Accepted, Jos. Hudson;' and Hudson was sued as acceptor, the plaintiff stating it as a case of suretyship by Hudson, without whose interposition he refused the goods to Irving. Lord Ellenborough held this to be neither an acceptance by a drawer, nor for honour of the drawer, but a collateral undertaking that the bill should be paid.

⁴ *Don v Watt*, 26 May 1812, 16 Fac. Coll. 647. A note payable to Don, expressed in the singular, 'I promise,' etc., and signed A. Watt, was subscribed on the back by T. Watt. The Court of Session held this a joint and several note.

Watters, petitioner, 7 March 1818, 19 Fac. Coll. 489. Here the name of Watters was on the back of the bill: he was held an acceptor.

See also *M'Dougal v Foyer*, 13 Feb. 1810, 15 Fac. Coll. 579.

⁵ *Grant v Hawkes*, 1817, at Guildhall before Lord Ellenborough, Chitty 42.

⁶ Chitty, p. 43 et seq.; *Green v Deakin*, 2 Starkie 347; *Blair Miller v Douglas*, 22 Jan. 1811, 14 Fac. Coll. 154. See below, Of Partnership.

⁷ *Johnston, Sharp, & Co. v Philips*, 3 Feb. 1819, reversed in House of Lords 22 July 1822, 1 Sh. App. Ca. 244.

⁸ [See *Johnstone v Cliftonhall Coal Co.*, 1852, 15 D. 84.]

ACCEPTANCE SUPRA PROTEST.—A friend or agent of any of the parties to a bill may accept it *supra* protest for their honour, and then he will be liable to all the parties in the bill, except to him for whose honour he has accepted; and on paying under such protest, will have a good claim against the person for whom he has accepted, and against all who in the bill are responsible to him. Or an accepted bill may in the same way be paid *supra* protest, and then the person paying will have his remedy against that person for whom he has so interposed, and against all who in the bill are responsible to him.¹

III.—ENDORSEMENT AND TRANSFER OF BILLS AND NOTES.

The transfer of bills and notes by endorser is one of the most distinguishing privileges of those instruments, and that by which, next to bank-notes, they have become the great circulating medium of the trading world. In England, the words 'to order,' or 'to bearer,' in the bill or note, make it transferable by endorsement as against all the parties to it.² And it is held, that without words making it assignable, the endorsement will be good only against the endorser himself, but not so as to transfer the bill, or make the drawer or acceptor liable to the endorsee.³ In Scotland, a note or bill is held endorsible although it bear no words of assignment.⁴

An endorsement is an order written on the back of the bill, directing the contents to be paid to a particular person; or the mere subscription of the name of the holder implies such order as may be written there. Such endorsement is at once a transfer of the bill or note, and an obligation to indemnify the endorsee or holder, if the bill should not on due negotiation be paid.

1. An endorsement which states the name of the endorsee is called a full endorsement; an endorsement which does not is called a blank endorsement. The latter is equivalent to an order making the note payable to the bearer;⁵ and it has been held, that while the first [402] endorsement continues blank, the bill is assignable by mere delivery, notwithstanding subsequent full endorsements, on their being cancelled.⁶

2. An endorsement in full may be restrictive or conditional.⁷ 1. It is not restrictive merely by omitting the words 'or order,' an endorsement by such endorsee being good.⁸ 2. An endorsement, 'Pay to A B only,' or 'Pay to A B for my use,' is restrictive, and gives

¹ On the acceptor's failure, and a protest for better security, acceptance for the drawer's honour held to give the acceptor for honour right to the dividends from the original acceptor's bankrupt estate. *Ex parte Wackerbath*, 5 Ves. jun. 574; [Sm. M. L. 237. See editor's note, *infra*, p. 448.]

² Bayley 97; Chitty 140, 141. [Add. Cont. 6th ed. 788.]

³ *Hill v Lewis*, Salkeld 132. Lord Holt held a note without the words *to order* to be well transferred by endorsement only, so as to make the endorser chargeable to the endorsee.

This doctrine seems to explain the difficulty in *Kershaw v Cox*, where the insertion of the words would in Scotland have been held immaterial. [See Sm. M. L. 226.]

⁴ *Crichton v Gibson*, 1726, M. 1446. [By the Mercantile Law (Scotland) Act, 19 and 20 Vict. c. 60, it is enacted, sec. 15, that 'where any bill or note has been lost, stolen, or fraudulently obtained, the holder of such bill or note suing or doing diligence thereon shall be bound to prove that value was given by him for the same; but such proof may be made by parole evidence.']

⁵ *Scott & Co. v Kilmarnock Bank*, 27 Feb. 1812, 16 Fac. Coll. 528, where a bill with a blank endorsement was discounted at the Kilmarnock Bank by a stranger, and the bank was held entitled to recover from the acceptor.

Peacock v Rhodes, 1781, Douglas 611, where a draft endorsed in blank was stolen, and afterwards bought by Peacock for value. Acceptance and payment were refused; but the Court held there was no difference between a note endorsed in blank and a note payable to the bearer. 'The law,' says Lord Mansfield, 'is settled, that a holder coming fairly by a bill or note has nothing to do with the transaction between the original parties. I see no difference between a note endorsed blank and one payable to the bearer. They both go by delivery, and possession proves property in both cases.' [Sm. Merc. Law, 7th ed. 200, 230.]

⁶ See below, p. 428. [The transfer of a bill or note by delivery, without endorsement, seems to imply a warranty that the bill or note is genuine; and where such transfer is in payment of a prior debt, that debt will not be looked upon as satisfied unless the bill or note be discharged when it comes to maturity. Sm. Merc. Law, 7th ed. 233, and cases there cited.]

⁷ [To this head we may refer the usage of crossing checks with the words '& Co.,' to the effect of making them payable only through a banker, as to which see note, *supra*, p. 412.]

⁸ Bayley 104, 105, and the cases there cited.

no power to re-endorse.¹ 3. An endorsement 'without recourse on the endorser' is a good transfer; but the condition is effectual to protect the endorser from a claim if the bill be dishonoured.² 4. The payee may annex a condition to his endorsement, which will bind the person drawn on, if it be so annexed before he accepts, and the non-performance of which will reinvest the debt in the payee.³

3. An endorsement for a part seems to be bad, unless the other part has been paid.⁴

4. Where a bill is payable to a company, any of the partners may, even for his own account, endorse it effectually by the firm,⁵ provided the endorsee has no notice of the abuse of the partner's power, or no indication from the circumstances of such misapplication. But the endorsement will be bad, if applied with the knowledge of the endorsee to a private engagement of the partner who makes the endorsement; to the purpose, for example, of guaranteeing a previous debt not of the company, but of the partner himself.⁶

5. Endorsations may be made by procuration: as to which, see above, p. 424.

6. Bills and notes may be carried by endorsation, both before and after the term of payment.⁷ And it has been held, 1. That even an onerous endorsee before the term of [403] payment will be liable to the same exceptions which may be pleaded against the endorser, if he is aware of the bill having been dishonoured by refusal to accept.⁸ 2. That if he acquire by endorsation after the term of payment, very slight evidence will be sufficient to presume his knowledge of the dishonour.⁹ 3. That if there be any marks of dishonour on the face of the bill, the endorsee taking it after the term of payment will be liable to all the objections competent against the endorser.¹⁰ But, 4. The decisions have been different in

¹ Bayley, p. 102. [An endorsement in these terms, 'Pay A B or order, value in account with C D,' is not restrictive. The words 'value in account,' whether in the bill itself or in the endorsement, mean value received in account, and do not qualify the right of the transferee. *Buckley v Jackson*, 3 L. R. Ex. 135.]

² *Goupy v Harden*, 7 Taunt. 159.

³ In *Robertson v Kensington*, 4 Taunt. 30, Sir W. Forbes & Co. had drawn on Kensington & Co. to the order of Robertson, at forty-five days, for £180. Robertson endorsed it thus: 'Pay Clerk & Ross, on my name appearing in the *Gazette* as ensign in any regiment of the line between the 1st and 64th, if within two months from this date, 19th November 1808.' The bill was afterwards presented for acceptance, and accepted. It was afterwards discounted in the Bank of England. Kensington & Co. paid it when due, although Robertson's name had not appeared in the *Gazette*. Robertson brought his action against Kensington & Co., and the Court gave him judgment. Bayley 103. [Sm. Merc. Law, 228.]

⁴ *Hawkins v Cardy*, Lord Raym. 360, where a bill was for £46, 19s., and endorsed with an order to pay £43, 4s. to Hawkins.

See *Johnson v Kennion*, where the endorsation held good for the part unpaid. 2 Wilson 262. [Sm. Merc. Law, 228.]

⁵ *Swan v Steele & Wood*, 7 East, Rep. 210; *Ridley v Taylor*, 13 East 175, where there was something very like an indication that the property or means of the company were applied to the use of the individual partner.

⁶ *Stein v Calder*, 2 Feb. 1794. A bill endorsed with the firm by a partner, manifestly out of the line of the company's trade, was held not binding on the company.

See also *M'Nair v Henderson & Co.*, 19 Jan. 1803.

Blackwood & Co. v Bower, 11 July 1805, and 17 June 1806,

same parties. A partner using the firm in his own concern, held not to bind the company; but this altered on the bill appearing in the company's books.

Blair Miller v Douglas & Co., 22 Jan. 1811, where the firm used by a partner for his private debt, and known so to be without any communication to the other partners. The company held not liable.

Clarke v Shepherd, 1821, 1 S. 179, N. E. 170.

The same doctrine held in England, *Sheriff v Wilks*, 1 East 48; *Hope v Cust*, 1 East 53, where Fordyce, a separate trader, and also partner with others, being indebted on private account to Hope, gave him a guarantee in the company's name. Under the direction of Lord Mansfield, held bad.

⁷ *Freer v Richardson*, 1806, M. App. Bill of Ex. No. 19.

As to English law see Bayley 118; Chitty 163. There is an exception in England of bills and notes under £5, which cannot be endorsed after the term of payment. 17 Geo. III. c. 20, sec. 1.

See *Mutford v Walcot*. Lord Holt said he remembered a case where a bill was negotiated after the day of payment; and he had all the eminent merchants in London with him at his chambers, and they all held it to be very common and usual, and a very good practice. 1 Lord Raymond 575.

⁸ *Crossly v Ham*, 13 East's Rep. 498. See above, for the case of an endorser taking without value. [Sm. Merc. Law, 7th ed. 231.]

⁹ *Taylor v Mather*, 3 Term. Rep. 83, note. [*Macdonald v Langton*, 1836, 15 S. 303.]

¹⁰ *Brown v Davis*, 3 Term. Rep. 80. Here the payee of a bill having endorsed it, had it returned from the endorsee noted for non-payment. The drawer gave him money, with which he retired the bill; but instead of returning it to the drawer, he endorsed it for value to Brown. Lord Kenyon held the evidence of knowledge not sufficient. On a motion for a new trial, it was held that it must be left to the jury, on

England and in Scotland, on the inference deducible from the mere circumstance of the bill being acquired after the term of payment. In England the point was much questioned at one time,¹ but is now held settled, that the endorsee, as having notice by the bill being past due, is liable to the objections competent against the endorser.² But in Scotland it is still held, though not settled, that the mere circumstance of the endorsation being after the term of payment, unaccompanied by any marks of dishonour on the bill, does not expose the endorsee to the exceptions pleadable against his endorser.³

7. But although a bill may itself be transferred after the term of payment by endorsation, [404] this shorthand and privileged mode of assigning does not seem competent for carrying a protest which has been taken on the bill; or any other proceeding for the purpose of obtaining diligence; or the diligence itself.⁴ These seem to require a conveyance by assignation.

8. A collateral engagement may be undertaken by signing as endorser in circumstances which do not admit of a proper endorsement. Thus, no one can properly endorse who has no right to the bill. But the subscription as an endorser, with the intention of giving credit to the bill, is an effectual collateral undertaking.⁵ See above, p. 425.

9. A blank endorsement makes a bill or note transferable by mere delivery. And it has this effect, notwithstanding subsequent endorsements in full. On these being cancelled, the full efficacy of the blank endorsement is restored;⁶ so that it is a proper precaution to fill up all the preceding blank endorsations, to prevent accidents, in case of the bill being lost.⁷

the slightest circumstance, to presume knowledge, such as any mark of discharge on the face of the bill.

See *Walker v Wilson*, 30 Nov. 1811, 14 Fac. Coll. 361, where this doctrine is taken for granted on the bench.

¹ In *Brown v Davis*, 3 Term. Rep. 80, Buller and Ashhurst, Justices, held that where a note or bill is overdue, its being out of the common course of dealing is alone such a suspicious circumstance as makes it incumbent on the endorsee to satisfy himself that it is a good one; and that, if he omits this, he will stand in the place of him who was holder when it was due.

Mr. Justice Buller had directed a verdict on the principle that the endorsation, subsequent to the term of payment, made the endorsee take it on the endorser's credit. Lord Kenyon, as already stated, had required evidence of notice. And in a previous case, the Court of King's Bench had held an endorsement after action brought on a note or bill sufficient to give the endorsee a right of action, unless he had notice of the action. *Columbies v Slim*, Chitty 165.

² Bayley 118.

Brown v Turner, 7 Term. Rep. 630. Pritchard endorsed to Brown for a prior debt a bill accepted by Turner, and past due. Lord Kenyon thought that a fatal objection competent against Pritchard must affect Brown, his endorsee, in those circumstances; and the Court sanctioned his direction by refusing a new trial. His Lordship has, in *Boehm v Stirling* (7 Term. Rep. 429), explained the grounds of his opinion, and his sanction to the rule laid down by Mr. Justice Buller. See Bayley, edit. Beawes, 63. [Sm. Merc. Law, 269.]

Tinson v Francis, 1 Camp. 19. Lord Ellenborough says, after a note or bill is due, it comes *disgraced* to the endorsee, and it is his duty to make inquiries concerning it. If he takes it, though he gives a full consideration for it, he takes it *on the credit of the endorser*, and subject to all the equities with which it may be encumbered.

The case of *Charles v Marsden*, 1 Taunt. 224, turned upon the validity and effect of a plea that the bill was for accommodation.

³ *M'Gowan v M'Kellar*, 1823, 4 S. 498, N. E. 503, 580. A bill endorsed five years after the time of payment, but without any noting or mark of dishonour on it. The endorsee was held not liable to latent exceptions competent against the endorser.

[By the Mercantile Law (Scotland) Act, 19 and 20 Vict. c. 60, sec. 16, 'when any bill of exchange or promissory note shall, after the passing of this Act, be endorsed after the period when such bill of exchange or promissory note became payable, the endorsee of such bill or note shall be deemed to have taken the same subject to all objections or exceptions to which the said bill or note was subject in the hands of the endorser.']

⁴ *Freer v Richardson*, 1806, M. App. Bill of Ex. No. 19 (*supra*, p. 427, note 7). The Court took occasion to say that the bill was carried by the endorsation, but not the protest. It came into competition with arrestments, and the endorsees were preferred.

⁵ *Don v Watt*, 26 May 1812, 16 Fac. Coll. 647. Watt having bought goods from Don, gave his note for the price at seven months' credit. Watt's father signed his name, 'Thos. Watt,' on the back of the note, without any previous endorsation. He was held liable.

⁶ *Smith v Clarke*, 1 Espin. Cases 180. A bill was endorsed in blank. After some other endorsements it came to Jackson, who sent it to Muir & Atkinson, but did not endorse it. They discounted it with Smith, who struck out all the endorsements but the first, which continued in blank. Lord Kenyon held this good. See also *Chaters v Bell*, 4 Esp. Rep. 129. See also 1 Camp. 175. [An exception is admitted where the bill has been discounted in circumstances which imply gross negligence on the part of the banker. *Crook v Jadis*, 5 Barn. and Ad. 909, qualifying the law as laid down in *Gill v Cubit*, 3 Barn. and Cress. 466. See Sm. Merc. Law, 7th ed. 227.]

⁷ [As to the effect of delivery without endorsement of a bill specially endorsed, see Sm. Merc. Law, 7th ed. p. 227.]

SUBSECTION III.—OF THE PARTIES BY WHOM, AND AGAINST WHOSE ESTATES, A DEMAND MAY BE
MADE ON BILLS AND NOTES.

A demand on bills or notes is commonly made effectual by means of summary diligence or by ordinary action. But where the parties are bankrupt, the debt must be proved on the bankrupt estate, by producing the bill and making affidavit to the debt.

Such demand or claim may, according to circumstances, be made by any of the several parties whose names appear on a bill or note: in real transactions, by the *porteur* or payee, by an endorsee, by the drawer, or by one paying for honour; in accommodation bills, by the holder before payment, or for relief by the person who has paid for behoof of the person accommodated, in whatever character he may appear on the bill.

No one can be made liable as a party to the bill, unless his name or firm be on it.¹

I.—DEMAND ON BILLS AND NOTES IN REAL TRANSACTIONS.

1. DEMAND BY THE PAYEE.—The payee is the person in whose favour the draft is made, the proper original creditor in a bill of exchange or promissory note. A bill may be drawn blank in the name of the payee, and afterwards effectually filled up by a *bona fide* holder with his own name.²

1. AGAINST THE ACCEPTOR. 1. A demand by summary diligence or by action [405] may be made by the payee or *porteur* of a bill or note, for the sum in the bill or note, with interest from the day of payment (or, on a bill or note payable on demand, from the presentment), if the bill is due, but has not been protested; or also for the costs of protest, correspondence, and diligence occasioned by the dishonour of the bill if protested. 2. If the acceptor has become bankrupt, a claim may be made on his estate; either, if the term of payment of the bill be past, for the sum with interest (limited in the case of sequestration to the date of the bankruptcy), or for the sum in the bill, with a rebate of interest if the term of payment be not yet arrived.

2. AGAINST THE DRAWER the claim of the payee is for the sum in the bill, with interest, costs, and damage. In order to give this remedy, the bill must be duly protested, and notice of dishonour given.

3. In the responsibility of these two parties, there has been some difference in respect to damages. The damages consist not merely of costs, to which both acceptor and drawer are clearly liable, but of the expense also of exchange, re-exchange, etc.; and this by 1681, c. 20, a bill-holder is entitled to recover.³

EXCHANGE is the difference in the value of money at the place where the bill is drawn and at the place of payment.

¹ *Telford (Stirling Bank) v James, Wood, & James*, 1822, 1 S. 290, N. E. 269. Arnot, general agent of James, Wood, & James, drew a bill in his own name for the price of goods of theirs sold to Paterson; but their name was not on the bill. He discounted it with the bank. He and Paterson failed, and the bank brought an action against James, Wood, & James, as liable for Arnot their agent's act. They were held liable. But this was reversed in the House of Lords, May 1825.

² *Cruchley v Clarence*, 2 Maule and Selwyn 90. Clarence drew a bill of £200 in Jamaica on H. Man of London, leaving a blank for the payee's name. It was afterwards negotiated in England by Vashon, who endorsed it to Cruchley for an old debt, and Cruchley filled up his own name in the blank. Lord Ellenborough said, as the defendant (the drawer against whom action was brought) had chosen to send the bill into

the world in this form, the world ought not to be deceived by him. The drawer, by leaving the blank, undertook to be answerable for it when filled up in the shape of a bill. The rest of the Court concurred. [Sm. Merc. Law, 7th ed. 215.]

³ 1681, c. 20. In providing for summary diligence on the registered protest on non-acceptance or non-payment of foreign bills from or to this realm, the effect is described as 'for the whole sums contained in the bill, as well exchange as principal.' And further, it is declared leasome to the party charger to pursue for the exchange, if not contained in the said bills, with re-exchange, damage, interest, and all expenses, before the judge ordinary; or in the case of suspension, to eik the same to the charge at the discussing of the said suspension, to the effect the same may be liquidate, and decree given therefor, either against the party principal, or against him and his cautioners, as accords.

RE-EXCHANGE is a damage accruing from the dishonour of the bill, and the necessity of having recourse back on the place of drawing. In settling this claim in bankruptcy, the law of Scotland is not perplexed by many of the distinctions which the rejection of contingent debts occasions in England; but the matter in bankruptcy is on the same footing as between the parties in the ordinary case. Re-exchange may arise in two ways: by a re-draft or bill drawn by the payee from the place of payment back upon the drawer; or by the accumulation of the exchange of the several countries through which the bill may have been negotiated.

The former is the direct re-exchange which must necessarily be in contemplation of the drawer as the consequence of the dishonour of his bill. The evidence which grounds the claim is the protest against the acceptor and all concerned for non-payment (or non-acceptance), and for all costs, damage, interest, exchange, and re-exchange; together with the new bill or re-draft.¹ The bill or re-draft is composed of the sum in the former bill, the commission or exchange, the foreign interest from the term of payment to the term of payment of the new bill, the costs of protest, correspondence, stamps, etc., and the exchange on the return.² This re-draft is to be made directly on the place of the original draft, where there is regular commercial intercourse rendering that practicable: otherwise it may be [406] drawn in the next best or most direct practicable course; and the additional expense will form an effectual charge against the drawer, provided due notice of this has been given. But it is not necessary in Britain that there should have been money actually raised abroad by re-draft. It is sufficient that there is a course of exchange, direct or circuitous; and on the part of the bill-holder, a liability to pay re-exchange.³ The damage will be fixed by the course of exchange according to mercantile usage; and this either on the knowledge of special jurymen, or on evidence. It will be no answer to the claim of re-exchange, that the dishonour arose from inevitable accident, the order of the foreign Government, etc. With all this the payee of the bill is held to have nothing to do.⁴

The rule is, that the drawer must answer to all the direct damage accruing from the dishonour of his bill; and this has been justly held in England to comprehend circuitous

¹ It was further necessary, by the French mercantile ordinance (Ordon. de 1673, tit. 6, art. 4), that proof should be shown of an actual exchange having taken place, by certificates of traders, bankers, agents, etc., to the fact of the loan having been made; Jousse, *Nouv. Com.* p. 141. This continues to be required by the modern French commercial code. *Code de Commerce*, l. 1, tit. 8, secs. 177, 186.

² The bill is accompanied by a note of those charges; and this note may (though this is not necessary) be certified by the banker or merchant who has transacted the matter. On a contest arising, evidence of the exchange, foreign interest, etc. etc., will determine the matter.

³ *De Tastet v Baring*, 11 East 265. Two bills of exchange were drawn at London on Lisbon. They were endorsed at London to one who again endorsed them to Baring; and Baring at London endorsed them to De Tastet. He again endorsed to Trives & Co., who at Lisbon presented the bills to the person drawn on, who refused to pay, and so they were protested, and returned to De Tastet as endorser. He did not appear to have paid any re-exchange, and counts were laid to cover the question as on his responsibility for it. The defence was grounded on the fact that Lisbon was at the time blockaded by a British squadron, and no exchange existed between the two countries. On the other hand, one or two instances were shown of an exchange through the medium of other bills on Holland or America. Lord Ellenborough directed a verdict for the plaintiffs, if they had paid re-

exchange, or were in mercantile dealing *liable* for it, reserving the question whether in a state of hostility exchange could legally be demanded.

The jury was special, and in it were several very eminent merchants, whom Lord Ellenborough encouraged to take an active part in examining the witnesses, which they did, and gave verdict for the defendant, *i.e.* rejecting the claim of re-exchange. This proceeded on the ground that the plaintiff, as endorser, was not liable for re-exchange, there being no course of exchange between the countries at the time.

[*Sm. Merc. Law*, 7th ed. 264, and cases there cited.]

⁴ This determined in England, in 1794, by the Court of Common Pleas, in *Mellish v Simcon*, 2 Hy. Blackst. 378, where two bills of exchange were drawn by Simcon on Boyd & Co. in Paris, payable to the order of Mellish & Co. The bills came into the hands of Audroine at Paris, and Boyd & Co. refused acceptance, but promised payment when due. Then the French Convention having passed a decree prohibiting the payment of bills drawn from countries at war with France, the bills were not paid. The bills came back on Mellish & Co. with a great accumulation of re-exchange, and they paid them. The defence, in an action by Mellish & Co. against Simcon, the drawer, was rested on the prohibition by the French Government. Lord Chief Justice Eyre and Mr. Justice Buller, Heath, and Rooke, were of opinion that the drawer's engagement was for payment at all events.

exchange, or the accumulation of the several exchanges in the fair return of the bill back through the several holders.¹ It has been contended against such responsibility, that the intermediate negotiation is a fortuitous event, which the endorser could not foresee nor prevent.² But this cannot correctly be said of a mercantile document intended to circulate by endorsement, and serve the purpose of money. The drawer must be taken to have in contemplation all the loss which may arise in the fair course of negotiation, either before or after acceptance. This remedy, however, must always be under the restraint of equity; and where there appears any manifest breach of equity in the negotiation, redress will be given.³

But it has been questioned whether the acceptor's estate is liable to a claim for [407] re-exchange. The foreign jurists seem to hold the claim good against the acceptor.⁴ It is not a demand which naturally arises against the acceptor by the *porteur*, for his proper recourse is against the drawer. But as the drawer will, on answering that demand, have his claim against the acceptor, provided he have funds in his hands for indemnification,⁵ it does not appear that any bar would lie to a claim by the *porteur* against the acceptor's estate, in the case of the drawer becoming bankrupt; for it seems to be implied in the nature of the acceptor's engagement to this peculiar sort of instrument, that he is tacitly bound for the common mercantile damage arising from its dishonour. In England, however, there are cases denying to the bill-holder a claim for re-exchange against the acceptor, and restraining the remedy to a claim against the drawer.⁶ And these will certainly deserve very great attention when such a question shall arise in Scotland.⁷

¹ In the case above cited of *Mellish & Co. v Simcon*, the bill drawn at Paris had been negotiated through Holland, and when dishonoured it was returned from Paris to the Dutch endorser, with a re-exchange of £300, and from Holland to the English endorser at another re-exchange of £8. 2 Hy. Blackst. 378.

² Glen on Bills of Exchange, 240, 241.

³ On this question, both of direct and circuitous re-exchange, the equitable considerations which ought to rule the responsibility of the parties are stated very fully by Dupuy de la Serra, *L'Art des Lettres de Change*, p. 110. The whole of the 15th chapter of that treatise is worthy of perusal. See also Ordon. 1673, tit. 6. Des Interets de Change et Rechange, with the 'Nouveau Commentaire' de M. Jousse, p. 134 et seq. See also Code de Commerce, liv. 1, tit. 8, sec. 13, De Rechange.

⁴ Pothier says: 'L'accepteur est censé avoir accédé par son acceptation.' Tr. du Cont. de Change, No. 117, vol. ii. p. 142. Dupuy de la Serra, *L'Art des Lettres de Change*, c. 15 and 16.

⁵ This in effect admitted in England. See 2 Brown's Chan. Cases, 599.

⁶ *Woolsey v Crawford*, 1810, by Lord Ellenborough, 2 Campbell 445. The bill was drawn in Quebec upon the defendant in England. It was endorsed in Canada by the payee, and was returned to Canada dishonoured, in consequence of which the payee was forced to pay £20 per cent. of re-exchange, and £6 of interest. Lord Ellenborough said: 'You may as well state that, by reason of the bill not being paid, the plaintiff was obliged to raise money by mortgage. You must proceed for re-exchange against the drawer. He undertakes that the bill shall be paid, or that he will indemnify the holder of the consequences. The acceptor's contract cannot be carried further than to pay the sum specified in the bill, and interest, according to the legal rate of interest when it is due.'

Napier v Schneider, 12 East 420, was a case of a bill from Scotland on the defendant in England. The Court of King's Bench refused to refer it to the Master to tax principal, interest, and costs, including re-exchange. The Court were clearly of opinion that this could not be allowed against an acceptor in England, who by his acceptance only charges himself with a liability to pay according to the law of that country; and if he do not pay, the holder has his remedy against the drawers.

⁷ [The following is a list of the authorities on the interesting and still unsettled question of the acceptor's liability for re-exchange. On the one side, denying the liability of an acceptor for re-exchange, there stand the cases of *Napier v Schneider* and *Woolsey v Crawford*, *supra*; and of *Dawson v Morgan*, 9 B. and Cr. 618, per Lord Tenterden; and *ex parte Moore in re Tyler*, 2 Br. Ch. Ca. 597 (per Lord Thurlow). On the other side, *Francis v Bucker*, Amb. 672, 2 Br. Ch. Ca. 599 (a decision by Lord Camden); and *Walker v Hamilton*, 1 De G. F. and J. 602 (a decision by Lord Campbell and the Lords Justices of Appeal). In America an acceptor is held not liable for re-exchange. *Sibley v Tut*, 1 MacM. Eq. R. 320, cited by Kent and Parsons, *infra*. There appears to be no case on the point in Scotland. Turning to the writers of authority on the law of bills, we find Mr. Justice Bayley (Tr. on Bills, p. 353, N. 49, p. 356) suggesting that the acceptor *ought* to be liable by the law of England. Mr. Smith (Merc. Law, p. 268) treats the question as doubtful. Mr. Justice Byles (Bills, p. 389, 8th ed.) says, 'The acceptor is not liable to re-exchange;' and so among the American writers, Ch. Kent (Comm. vol. iii. p. 116), Mr. Justice Story (Bills, sec. 398), and Parsons (Contracts, vol. i. 288; Tr. on Notes and Bills, 652, 661) hold the acceptor not liable for re-exchange. Among our own writers, the non-liability of the acceptor is strongly urged in Glen on Bills, 2d ed. p. 272, in a note by the editor, a writer of considerable authority on the subject; and the contrary opinion is as strongly urged

4. The payee is entitled to recover on an accepted bill, though not signed by the drawer, the name of the creditor being in the bill.¹

II. DEMAND BY THE DRAWER.—The DRAWER is the proper creditor in an inland bill between two parties. It sometimes happens that such bills are sent to the drawer accepted; and that they lie over without being signed by him either as drawer or endorser. If such a bill be found in the repositories of the drawer after his death, his representative may subscribe his own name, and claim the amount;² and it is said that new diligence may proceed on a bill so completed.³

The drawer, when obliged to indemnify the holder of the bill, has his remedy against the person drawn on. His claim is in the nature of damages, and will extend not only to the principal, interest, and expenses, but also to the exchange and re-exchange which he has been forced to pay on account of the refusal to accept when the bill ought to have been accepted, or on account of the failure to pay after having accepted. See above, p. 429 et seq.

III. DEMAND BY ENDORSEES.—STRANGERS to the original transaction acquire the payee's right to insist for payment by means of endorsement, which confers a right to the contents of the bill, free from every exception of which notice is not given at the time, or which is not necessarily implied in the circumstances in which the endorsement is made.⁴

1. Against the acceptor the endorsee has full right to enforce payment, without any previous notice, at whatever time he may make his demand, within the term of the sexennial [408] limitation; and any one who stands in the character of acceptor, is so far in less favourable circumstances than an endorser, that the bill-holder is not bound to any rules of negotiation or notice.

2. Against the drawer, or any other previous endorser,⁵ the endorsee has claim for principal, interest, exchange, re-exchange, and costs. And it is not necessary for an endorsee to prove, in claiming against an endorser, that he has actually paid re-exchange. It is enough if he be liable for it. He is not in mercantile practice liable if there be no course of exchange at the time.⁶

PRESENTMENT, PROTEST, AND NOTICE.

It is essential to the payee's or endorsee's demand against the drawer or previous endorsers, 1. That the bill or note shall have been duly presented for payment, and in some cases for acceptance; 2. That when dishonoured, a notarial protest shall have been taken of the non-payment or non-acceptance; and, 3. That notice shall have been given of the dishonour and claim of recourse. This is called, in Scottish law, 'the due negotiation of the bill,' and proceeds on a contract (implied in the receiving of the bill or note, and available to every person who on paying it would be entitled to an action) that the bill shall be

in Thomson (p. 448, Wilson's ed.). Forbes (p. 199 of 2d ed.) seems to have thought the drawer and endorsers alone liable in re-exchange. Mr. Bell in the text above gives an uncertain decision, but in the Principles (sec. 342) he is distinctly of opinion that the acceptor is not liable. Pothier (*Contrat de Change*, No. 117) holds to the opinion that the acceptor is liable, but in the *Traité des Obligations* he obviously implies that only the drawer and endorsers are liable. The solution of the question seems to depend mainly on the consideration, whether or not the liability of a signatory to a bill of exchange for damage is to be determined with reference to the anterior contract for which the bill is granted. According to the rules as to damage for non-implementation of the contract of sale, the purchasers of goods would not be liable for damage of the nature of re-exchange; and if there be liability, it must

be deduced by treating the granting of a bill not as a mode of payment, but as an independent contract.]

¹ *Drummond v Drummond*, 1785, M. 1445.

² See above, p. 416.

³ *Fair v Cranston*, *supra*, p. 416, note 6.

⁴ [But see the limitations on this doctrine imposed by secs. 15 and 16 of the Mercantile Law Act, *supra*, pp. 426 and 428.]

⁵ [The consequence of this rule is, that a person employed to cash a check for another, and putting his name on it, becomes liable for the contents if the check is dishonoured. *Sed quære*, if the signature was intended as a mere memorandum of receipt for the money? *Macdonald v Union Bank*, 1864, 2 Macph. 963.]

⁶ See above, *De Tastet v Baring*, p. 430, note 3.

presented in proper time; that no extra time shall be allowed for payment; and that notice shall without delay be given of the dishonour, and of the claim of recourse thence arising; otherwise, that the holder of the bill or note shall be held to renounce all claim of recourse, and to rest satisfied with the acceptor's obligation alone.¹

I. PRESENTMENT OF BILLS is either for acceptance, or for payment, or for both.

1. PRESENTMENT FOR ACCEPTANCE.—The neglect to present a bill, null for want of the proper stamp, will not discharge the debt; though, if presented, the bill would have been paid, and the acceptor afterwards failed.²

Where the bill is unobjectionably drawn, it is to be observed,—

(1.) That a presentment for acceptance is not necessary where the bill is drawn at a day certain; nor is it a good answer to a demand against the drawer or prior endorsers, that it was not presented till the day of payment arrived.³

(2.) That where the draft is within a limited time after sight, the recourse will be lost by a neglect to make presentment within a reasonable time.⁴ What is a reasonable time will depend on the custom, with all the circumstances; as that the delay was occasioned by the draft being kept in circulation, etc. It has been doubted whether this be a proper jury question, or a point of law to be inferred by the judge from the facts found by the jury;⁵ and the matter seems still to be unsettled. The bill must be put in circulation, not locked up for any length of time.⁶ But both a foreign and an inland bill may be put [409] into circulation before acceptance, and kept in circulation without acceptance, as long as the convenience of the successive holders requires.⁷

(3.) That where the draft has been sent to an *agent* to be negotiated, or where the payee is directed expressly to present it, the payee or agent must present it, otherwise be answerable for the debt.⁸

(4.) In presenting a draft for acceptance (differently from presenting for payment), it may be left with the drawee for twenty-four hours, unless in the interim he either accept, or declare a resolution not to accept.⁹

¹ Bayley 171, 172. [Add. Cont. 6th ed. 799.]

² *Wilson v Vysar*, 4 Taunt. 288.

³ Molloy, b. 2, c. 10, sec. 16; Beawes, *Lex Mercat.* p. 454, sec. 18, 4th ed.; Bayley 182; Chitty 206; 1 Selwyn, N. P. 410; *Jameson v Gillespie*, 1748, M. 1494.

Proof of mercantile usage to this effect in the case of *G. Hamilton & Co.* See below, note 8.

⁴ See authorities in preceding note.

⁵ *Darbishire v Parker*, Dict. of Mr. Justice Lawrence, 6 East 2; *Fry v Hill*, 7 Taunt. 397; Goupy, note 7. [*Nielson v Leighton*, 1843, 5 D. 513. See *Sm. Merc. Law*, 7th ed. 243-4.]

⁶ *Muilman v D'Eguino*, 2 H. Blackstone 565.

⁷ *Goupy v Harden*, Holt 842, as to foreign bill. Here £1000 was remitted to Paris from London by bills on Portugal at thirty days' sight. The drawers were in great credit, and the bills were put in circulation unaccepted, and were in negotiation in various parts of the Continent. They were in circulation for six months, at the end of which there was notice of the persons drawn upon having refused to accept the bills. The holders brought action against their own agents, who had at their desire procured the drafts, and in so doing had endorsed them. *Answer*: 1. That they endorsed only as agents. This held no defence, the endorsement being general. 2. That the bill had been neglected to be presented in due time. The Court of Common Pleas (Gibb, Ch. J.) held that, the bill having been put in circulation, there was no laches. 7 Taunt. 159.

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Fry v Hill, 7 Taunt. 397, as to inland bills, where the same rule was sanctioned.

⁸ *Bank of Scotland v G. Hamilton & Co.*, 16 Jan. 1810. A draft for £780 on Bogle of Glasgow, discounted at the branch of the Bank of Scotland at Greenock by Dunlop, the agent there, payable three days after date, was in regular course sent to G. Hamilton & Co., the bank agents at Glasgow, for negotiation. G. Hamilton & Co. did not present it for acceptance (as it is not customary for *porteurs* of bills at dates so short to present them), but kept it by them till the day of payment should arrive, with a view to present it at once for acceptance and for payment. Before that day the drawers failed; and when on the day of payment the bill was presented, Bogle, the person drawn upon, refused to accept. It was not clear whether he would have accepted if the draft had been presented at first, but he had then no funds, and the practice had been to make provision for such drafts against the day of payment. The action was by the Bank of Scotland against the two agents, G. Hamilton & Co. the agents at Glasgow, and Dunlop the agent at Greenock; and the point was to settle the responsibility between them. The Court held that, as *agents*, Messrs. G. Hamilton & Co. were bound immediately to present the bill in question for acceptance, and that, having failed to do so till the day of payment arrived, they were bound to relieve the Greenock agent. 15 Fac. Coll. 497, under the name of *Dunlop v G. Hamilton & Co.* [*Houldsworth v British Linen Co.*, 1850, 13 D. 376.]

⁹ 1 Lord Raymond 281, Sm. 244. In the case of *Falls v*

(5.) That if the drawee cannot be found, the bill should be protested at the market-cross;¹ and if there be two persons of the same name, and both refuse, there should be a protest against both.²

(6.) That in all cases, whether presentment for acceptance be necessary or not, if the draft has actually been presented without a protest and notice at the time, recourse is excluded.³

2. PRESENTMENT FOR PAYMENT.—Unless presentment is made on the day of payment;⁴ or, if there be no day, within a reasonable time after receipt of the bill; and by a person holding right to the bill, or entitled to give a legal receipt for the money;⁵ and at the place where, by special appointment or implication, the money is to be paid; or to the proper debtor in the bill personally,—there can be no legitimate protest, and the recourse is lost. [410] And where the bill still remains with the *porteur* or endorsee, it must so be presented for payment, although acceptance may have been refused.⁶ It is not enough to supersede the necessity of presentment, that the drawee has previously said he will probably not accept.⁷

It is important in this matter of presentment to explain the doctrine respecting days of grace, and the various terms of payment at which bills may be drawn.

DAYS OF GRACE are a prolongation of the term of payment (formerly by mere indulgence, now for a long time as matter of right), where a bill is drawn payable at a certain distance of time after date, or after sight. The number of those days differs in different countries; and the rule is according to the usage of the country where the bill is payable. In Britain three days of grace are allowed, excluding the day on which the bill falls due.

USANCE means the customary time at which bills are drawn between two countries. Between Britain and France the usance is thirty days; with Hamburgh, a calendar month; with Leghorn, three calendar months; and so on. Double and treble usance is an extension of the term to double or treble the customary period. Half-usance is a shortening of the time by one half.

The time is to be reckoned exclusive of the day of the date, or presentment for acceptance. The days of grace are curtailed by the occurrence of Sunday or a holiday on the last: the bill is then payable on the second.

With these explanations, the rules of presentment for payment are these:—

1. DAY OF PRESENTMENT.—A bill payable *on demand*, or without any mention of time, is paid on presentment: no days of grace are allowed; and unless put into circulation, it must be presented for payment within a reasonable time.⁸ It is still unsettled in England in this, as in the question of presentment for acceptance (above p. 433), whether the question is of fact for the jury or of law for the judge, to direct that, in the circumstances, the delay has been reasonable or otherwise.⁹

Where the bill is payable in the place of its date, the chief elements of a decision on what is reasonable will naturally be, *first*, the usage of the place; and, *secondly*, how far that

Porterfield, 1766, M. 1593, there is an example of undue delay in getting back a bill so left for acceptance. It was a bill drawn at three days after sight, and so endorsed to Messrs. Falls, which they sent to the drawee for acceptance. He was not in town, and his clerk said he would be home soon, when he doubted not the draft would be accepted. It so lay for a fortnight, and it was at last protested. The Court found the endorsees had lost recourse.

If the drawee have lost a bill so left for acceptance, he ought to give a note for the amount, if he had intended to accept it; if not, protest should be taken as for non-acceptance.

¹ [Gordon v Stephen, 1845, 8 D. 146.]

² Forbes, Treatise on Bills, 120. [See 2 and 3 Will. iv. c. 98.]

³ Blessard v Hirst, Burr. 2670; Goodall v Dolley, 1 Term.

Rep. 712. This expressly decided by Lord Ellenborough at Nisi Prius in *Roscoe v Hardy*, 2 Camp. 459; and by the Court of King's Bench, 12 East 434. [*Bancks v Scott*, 1818, Hume 77; Sm. Merc. Law, 7th ed. 249.]

⁴ [By 6 and 7 Will. iv. c. 58, when bills have been accepted for honour, they need not be presented to the acceptor till the day following the day on which they became due; and if the day on which they fall due be a Sunday, etc., not till the following day.]

⁵ *Coore v Callaway*, 1 Esp. Rep. 115.

⁶ Pothier, No. 133; Beawes 460.

⁷ *Prideaux v Collier*, 2 Starkie 57. [Sm. Merc. Law, 7th ed. 259.]

⁸ Bayley 187; Chitty 345.

⁹ See Chitty, pp. 345, 346; Bayley 187.

usage ought to be controlled, if inconvenient or unjust, in a case where the least unnecessary delay may be fatal to the right of third parties, for whom the bill-holder is bound to act. The observation of Lord Ellenborough respecting this rule of mercantile law is entitled to the greatest regard,—namely, that it is always to be considered whether, under the circumstances of the case, the bill has been presented with reasonable diligence; and the result of this in England seems to be, that a person receiving a bill or note has the whole of the next day (or, in the case of a banker, the banking hours of next day) to present it.¹

Where the bill is to be sent to another place for presentment, the rule is, that it [411] must be sent by the post of the next day after receiving it.²

Where the bill is payable *at sight*, it does not seem to be settled whether days of grace are to be allowed or not. On the Continent, days of grace seem to be allowed.³ In England, the mercantile usage seems at one time to have been otherwise, as established by the verdict of a special jury;⁴ and so Beawes lays down the law.⁵ But it is still considered as a point unsettled.⁶

Where the bill is payable a certain number of months, weeks, or days *after date*, or *after sight*, the day of presentment for payment is the last of the days of grace, and a reasonable time before the expiration of that day.⁷ The time is to be computed by calendar months,

¹ *Rickford v Ridge*, 1810, 2 Camp. 537. Ridge on 13th June got Rickford & Co., bankers at Aylesbury, to cash a check of Mingay, Nott, & Co. of London, on Smith, Payne, & Co., bankers, London. The check was not sent to London by the post, which set off at six in the evening, but by a coach at eight in the morning of the 14th. Rickford's correspondents, Praid & Co., got it between three and four afternoon of the 14th. They presented it for payment at eleven next morning, the 15th, when the answer was, 'No effects.' Mingay, Nott, & Co. paid till four o'clock, and then stopped, but no application was made to pay this check. Notice of dishonour was sent on 16th. It was proved to be the usage to send out checks and bills for payment only once a day, generally before letters by post are delivered, and checks and bills by post lie till next day; and that had the check arrived by post of 14th, it would not have been presented before the 15th. The practice was allowed to be different east of St. Paul's.

Lord Ellenborough: The holder of a check is not bound to give notice of dishonour to the drawer for the purpose of charging the person from whom he received it. He does enough if he presents it with due diligence to the bankers on whom it is drawn, and gives notice of its dishonour to those only against whom he seeks his remedy. 'The question here is, Whether, if the check had arrived by post on the 14th, the bankers were bound to present it for payment the same day? This must be decided by the law-merchant. I cannot hear of any arbitrary distinction between one part of the city and another. It is not competent to bankers to lay down one rule for the eastward of St. Paul's and another for the westward. They may as well fix upon St. Peter's at Rome. It is always to be considered whether, under the circumstances of the case, the check has been presented with reasonable diligence. This is what the law-merchant requires. The rule, that the moment a check is received by the post, it should invariably be sent out for payment, would be most inconvenient and unreasonable. In Liverpool and other great towns, different posts arrive at different hours; but it would be impossible to have clerks constantly ready to carry out all the bills and checks that may arrive in the course of a day. Nor, if it were possible, is it requisite that, all other business being laid

aside, parties should devote themselves to the presenting of checks. The rule to be adopted must be a rule of convenience; and it seems to me to be convenient and reasonable, that checks received in the course of one day should be presented the next. Is this practice consistent with the law-merchant? It cannot alter it. Bankers would be kept in a continual fever if they were obliged to send out a check the moment it is paid in. The arrangement mentioned by the plaintiff's witnesses appears subservient to general convenience, and not contrary to the law-merchant, which merely requires checks to be presented with reasonable diligence.'

Williams v Smith, 1819, 2 Barn. and Ald. 496. Here, for precaution, Newbury country notes received at Wantage were sent in halves by Saturday and Sunday's post—received in London on Monday—not presented till Tuesday, when the Newbury Bank had failed. Held that the receiver of the notes had till the day after to send them to London, and the London banker till the day after he received them (Tuesday) to present them.

See *Robson v Bennett*, 2 Taunt. 388. [Sm. Merc. L. 7th ed. 245-6. In the case of a check, any delay in presentment will not exonerate the drawer unless the banker has failed in the interim, and the maker would thus sustain a loss. *Robinson v Hawksford*, 9 Q. B. 52; *Serle v Norton*, 2 M. and Rob. 401.]

² See the above cases of *Rickford* and of *Williams*, preceding note.

³ Jousse, Com. sur l'Ord. 1763, p. 70. Pothier, No. 172, where he argues the point.

⁴ *Janson v Thomas*, Bayley 42.

⁵ Lex Merc. 256.

⁶ Bayley, 198, gives the rule absolutely for days of grace. Selwyn, N. P. 4th ed. 330; Chitty 343-345. The bias of authority seems to favour the indulgence of days of grace.

⁷ *Cruickshanks v Mitchel*, 1751, M. 1577. It once was doubted whether a bill is to be presented and protested till after the days of grace were expired, but decided that it must be *within* the days.

Confirmed, *British Linen Co. v Hepburn & Co.*, 19 May 1807, where the notary's clerk had presented the bill in due time;

with a due attention to the difference of style in foreign bills; or by usances, if so the bill be drawn. If by days, the day on which the bill is dated is excluded; if by weeks, they are to be reduced to days, reckoning seven days for each week; and the days of grace are to be reckoned according to the number allowed by the law of the country where the bill is payable. Where the last day of grace falls on a Sunday or other holiday, the presentment must be on the second.¹

2. HOUR OF PRESENTMENT.—The bill must be presented within a reasonable time before the expiration of the day on which it falls due. And if, by the known custom of the place, [412] bills are payable only within limited hours, a presentment beyond those hours will not be sufficient.² If the bill is payable at a banker's, it must be presented within the hours at which in that place banks are open.³ It has been held a sufficient presentment, though after bank hours, if a person is there to answer, and refuses.⁴ Where the person drawn on is a common trader, much greater latitude is given.⁵

3. PLACE OF PRESENTMENT.—Presentment at the place mentioned is *sufficient* to charge all the parties, and seems to be *necessary* for recourse against drawer and endorser. Whether it be also necessary to a demand against *the acceptor*, where loss has arisen by the neglect, has been much doubted. 1. If a place for payment be specified in the bill, it must be presented there;⁶ and it has been held sufficient incorporation of this condition in the bill, that, the note being partly printed, the place of payment is printed as part of the note from the first.⁷ 2. But where the place is only mentioned on the margin, or at the foot of the bill, this has been said to be a mere notice of the place in which the person drawn on may be found.⁸ 3. Where the place is mentioned only in the acceptance, it was doubted whether presentment there was necessary, if there was not an absolute restriction, 'and not elsewhere:' some judges holding such a condition to be acceded to when the acceptance so qualified was received; others, that such direction did not qualify the acceptance.⁹ The latter was the

but the notary thinking it not lawful to make his instrument of protest but on a presentment by himself, which was not made till the day after the days of grace, the protest proceeding on that presentment was held bad.

¹ *Tassel v Lewis*, 2 Lord Raymond 743; *Smith & Payne v Laing, Arthur, & Co.*, 1786, M. 1612.

² Bayley 180.

³ *Parker v Gordon*, 7 East 385, where a bill was not presented at a banker's (being in a part of London where bankers shut at six o'clock) till after six. It was held bad by Lord Ellenborough. And the Court of King's Bench, on a motion for a new trial, held, that if a party take an acceptance payable at a banker's, he binds himself to present the bill during the banking hours. Lawrence and Le Blanc, however, said he was not bound to take such an acceptance.

See also *Elford v Teed*, 1 Maule and Selwyn 28. [Sm. Merc. L. 7th ed. 248.]

⁴ *Garnett v Woodcock*, 1 Starkie 475. Here a bill of £670 in the hands of an endorsee, drawn on Woodcock of London, was accepted payable at Dennison & Co.'s, bankers. It was presented between seven and eight in the evening, and a boy answered, 'No orders!' The defence was on the want of due presentment, and Parker and Gordon's case was cited. Lord Ellenborough held it sufficient that a person was stationed there to answer, and that then there was no difference between a banker and a merchant. And the Court of King's Bench refused a new trial.

See *Henry v Lee*, 2 Chitty's Rep. 125. [*Macartney v Hannah*, 1817, Hume 76.]

⁵ *Barclay v Bayley*, 2 Camp. 527, where a presentment at

eight o'clock held reasonable in point of time. *Jameson v Swinton*, 2 Taunt. 224; *Bancroft v Hall*, Holt's Cases 476; *Morgan v Davison*, 1 Starkie 114. [Sm. Merc. Law, *supra*.]

⁶ This is fixed by many cases: *Sanderson v Bowes*, 14 East 500; *Dickenson v Bowes*, 16 East 110; *Roche v Campbell*, 3 Camp. 247; *Trecothick v Edwin*, 1 Starkie 468, Bayley 174.

⁷ *Trecothick v Edwin*, 1 Starkie 468. [But see *contra*, *Masters v Barretto*, 8 C. B. 433.]

⁸ In the case of a promissory note, it seems to be settled that a memorandum at the foot does not qualify the contract, and that it is not necessary to prove presentment at the place there mentioned. *Saunderson v Judge*, 2 H. Blackst. 509; *Price v Mitchell*, 4 Camp. 200; *Richards v L. Milsington*, Holt 364.

See *Exon v Russell*, 4 Maule and Selwyn 405; *Hardy v Woodrooffe*, 2 Starkie 319.

⁹ The doctrine of the King's Bench in favour of the latter agreement will be found in *Fenton v Gouadry*, 13 East 459; *Lyon v Saundies*, 1 Camp. 423; *Head v Sewell*, Holt 363; *Huffan v Ellis*, 3 Taunt. 415; *Sebag v Abithol*, 4 Maule and Selwyn 462, 1 Starkie 79.

The opposite doctrine, as adopted in Common Pleas, will be found in *Gammon v Schmoll*, 5 Taunt. 344, 1 Marshall 80; *Callaghan v Aylett*, 2 Camp. 549, 3 Taunt. 397.

The point was brought into the House of Lords, and the opinion of the whole judges taken. The determination was, that the holder of a bill, accepted 'payable at a certain place,' without other words, must present the bill at that place, that being a condition of the acceptance. *Rowe v Young*, 2 Brod. and Bing. 165, 2 Bligh 391. But this was so contrary to

general understanding of merchants. It is now settled by statute: (1.) That where [413] the acceptance mentions a place of payment simply, presentment at that place is not a condition. And, (2.) That where such place is mentioned restrictively, with the addition 'only, and not elsewhere,' presentment there is a condition necessary for charging the acceptor.¹ 4. Where there is no place mentioned, the bill-holder must present to the person; or at his counting-house, during business hours; or at his dwelling-house, if not in trade.²

But the acceptor will still be chargeable, if no loss in such cases has occurred from the neglect.³

4. ABSENCE OR DEATH OF THE DRAWEE, ACCEPTOR, OR MAKER.—The holder must, in case of absence or removal, use all diligence to find out the residence of the drawee or acceptor of a bill, or maker of a note.⁴ If not to be found, or dead, inquiry should be made after his representative, and the bill should be presented to him; and his refusal, if he shall refuse, protested, and notice given.⁵ If he has absconded, and is not to be found, and has no house or place of trade, the bill may be considered as dishonoured.⁶ Although bankrupt or insolvent, and his bank or shop shut, the bill must be presented.⁷

II. PROTEST OF BILLS AND NOTES.—Protest is a semi-judicial act, which in Scotland is performed by a notary-public before two witnesses, and evidenced by an instrument written on stamped paper; but which must, of course, in each country be completed in the form and by the officers which the law of that country requires.⁸ The purpose and effect of it is, 1. To state the demand and the answer, in order to establish the fact of the acceptor's failure to accept or to pay the bill; and, 2. To make a solemn assertion of the bill-holder's claim of recourse against the drawer and endorsers.⁹ The protest is, in Scottish law, the sole foundation of summary execution; and in other countries, as well as in Scotland, it is the proper ground of the action or claim of recourse, and cannot be dispensed with, or the want of it supplied by the testimony of witnesses or oath of party.¹⁰ It forms a [414]

general understanding, that by 1 and 2 Geo. iv. c. 78 the reverse was established as the rule. *Rowe v Williams*, Holt 366.

See cases in preceding note. *Ambrose v Hopwood*, 2 Taunt. 61.

¹ 1 and 2 Geo. iv. c. 78. By this Act, 1. 'If (after 1st August 1821) any person shall accept a bill of exchange payable at the house of a banker, or other place, without further expression in his acceptance, such acceptance shall be deemed and taken to be, to all intents and purposes, a general acceptance of such bill.' But, 2. 'If the acceptor shall in his acceptance express that he accepts the bill, payable at a banker's house or other place only, and not elsewhere, such acceptance shall be deemed and taken to be, to all intents and purposes, a qualified acceptance; and the acceptor shall not be liable to pay the said bill except in default of payment when such payment shall have been first duly demanded at such banker's house or other place.'

This statute seems to be applicable to Scotland as well as to England. [See 2 and 3 Will. iv. c. 98.]

² [*Robertson v Burdequin*, 1843, 6 D. 17.]

³ *Rhodes v Gent*, 1821, 5 Barn. and Ald. p. 244. [Sm. Merc. Law, 7th ed. 245.]

⁴ *Collins v Butler*, 2 Strange 1087; *Bateman v Joseph*, 12 East 433; *Beveridge v Burgess*, 3 Camp. 262; *Browning v Kinnear*, 1 Gow 81. [Sm. 240.]

⁵ Molloy, b. 2, c. 10, sec. 34. Pothier, Tr. du Cont. de Change, No. 146, tom. ii. p. 154.

⁶ Chitty 213.

⁷ *Easdale v Sowerby*, 11 East 114. The general rule laid down by Lord Ellenborough: 'It is too late now to contend that the insolvency of the drawee or acceptor dispenses with the necessity of a demand for payment, or of notice of the dishonour;' and this has been referred to by Lord Chancellor Eldon as the settled rule. 11 Ves. 412, and 18 Ves. 21.

Howe v Bowes, 1813, 5 Taunt. 30, where the Workington Bank having been shut, and having refused to pay their notes, this was held no excuse for not presenting.

In Scotland, although the decisions have sometimes been a little unsteady, the doctrine is settled so. *Langley v Hog*, 1748, M. 1574; *Ferguson & Co. v Belch*, 1803, M. App. Bill of Ex. No. 13; *Calder v Lyall*, 22 Dec. 1808, 15 Fac. Coll. 66.

⁸ Dupuy de la Serra, p. 109; Pothier, No. 155. [Add. Cont. 6th ed. 803. See *Elder v Young*, 1854, 17 D. 56.]

⁹ [See *Lyon v Butter*, 1841, 4 D. 178.]

¹⁰ It is laid down by foreign jurists, that even an action brought against the acceptor, and a decree against him, would not supply the want of protest. Pothier, *Contrat de Change*, No. 136, p. 148, tom. ii.

[By the Mercantile Law (Scotland) Act, 19 and 20 Vict. c. 60, sec. 13, it is enacted, that 'where any inland bill of exchange shall be presented for acceptance or payment, and the same shall be dishonoured by not being accepted or paid, or where any promissory note shall be presented for payment, and dishonoured by not being paid, it shall not be necessary that a notarial protest shall be taken on such bill of exchange or promissory note in order to preserve recourse against the drawer or indorser of such bill or promissory note respectively;

necessary part of the proof to be produced, along with a claim in bankruptcy, against drawer or endorsers.

In England, a distinction seems to exist between foreign and inland bills at common law. The former was regulated by the custom of merchants, according to which a protest is the only way in which the drawer could be charged on default of the person drawn on. But inland bills, not being properly bills of exchange according to the law of merchants, but introduced in imitation of them, simple notice was held sufficient, without the solemnity of a protest, to charge the drawer on dishonour of his draft, or failure of the acceptor. But this greater facility, as at first sight it appears, proved a disadvantage, since without protest only the principal sum could be recovered. This was remedied by statute, permitting protests on inland bills and promissory notes to the effect of recovering principal, interest, and charges.¹ But in Scotland no such distinction ever has existed. Inland as well as foreign bills have always been considered as in the same situation in this respect; a protest being with us an ordinary remedy for preserving rights entire.²

It is not necessary to specify in the protest that the bill was presented at the place of payment, provided it be said that the bill was duly protested.³

In the instrument of protest, the bill and endorsements, in full or in blank, must be transcribed verbatim as a preliminary to the instrument. The names of the witnesses must be mentioned, as ought also their designations. But the designations are not indispensable; nor do the witnesses sign the instrument.⁴ The notary himself must, according to our practice, make the presentment, or be present; though in some places a different custom prevails. This was said in one Scottish case not to be required in London; and a presentment by the notary's clerk, with an instrument extended by the notary, was thought sufficient.⁵ But it does not appear to be law in England more than here, that the presentment can be made by any one except the notary himself, who is trusted as holding the character of a public officer.⁶

It is no justification of the want of a protest, that the bill was lost: the protest is in that case to be taken on a copy, or on a general statement of the bill as lost.⁷ Where by contrary winds the bill has not arrived in due time, or has been sent to a person whose death, absence, or sickness has prevented the bill from being presented, it would appear that recourse will not be lost, provided a demand for payment be made, and notice sent as soon as possible.⁸ Death, absence, or impossibility of finding the acceptor, drawee, or maker, will not justify the want of protest: it must be made against his heirs, or at his dwelling-house, or at the house where he last had his domicile. Bankruptcy is no justification of want of protest; at least not of want of notice. See below, p. 445.

[415] As acceptance should be pure, the payee is not obliged to take a conditional acceptance, or an acceptance for a part only, or an acceptance at a protracted term; and in that case he must protest to preserve his recourse.⁹ If a partial acceptance be taken,

but it shall be sufficient to prove such presentment and dishonour to the effect of preserving recourse as aforesaid by other competent evidence, either written or parole: Provided always, that nothing herein contained shall be taken to affect the necessity for a notarial protest in order to entitle the holder of any bill or note to proceed with summary diligence thereon.']

¹ 9 and 10 Will. III. c. 17; 3 and 4 Anne, c. 9.

² *Ferguson & Co. v Belch*, 1803, M. App. Bill of Ex. No. 13. It was observed on the bench, 'that with us no distinction has ever been made relative to protesting between foreign and inland bills. In both the same rules hold, making it in all cases essential to protest upon the last day of grace in case of non-payment.'

³ *Commercial Bank v Hannah*, 24 Feb. 1818, 19 Fac. Coll. 484. [*Telfer v Barron*, 1844, 7 D. 170.]

⁴ *Inglis v M'Kie*, 1697; Forbes on Bills, 118. These form an exception to the common rule, as being instruments *juris gentium*.

⁵ *Stevenson v Stewart & Lean*, 1764, M. 1518.

⁶ See *Leftley v Mills*, 4 Term. Rep. 175, Chitty 217. [The question whether the notary must present in person seems to be still undecided. Sm. Merc. Law, 7th ed. p. 254.]

⁷ Pothier, Cont. de Change, No. 145; *Dehers v Herriot*, 1 Shower 164. Here a first bill of exchange drawn on Dublin had been sent and lost, and the second was not sent lest it should also be lost, but an exact copy was sent. On a demand the drawee refused on account of an attachment made in his hands. The protest was made on the copy, and held good.

⁸ Pothier, No. 154. Molloy, b. 2, c. 10, sec. 27.

⁹ Stair i. 11. 7.

there cannot, without a protest for non-acceptance as to the residue, be any recourse to that extent.¹ If the holder take the acceptance, though conditional, it becomes absolute to all intents as soon as the condition is performed; and a neglect to give notice of the condition will not in that case liberate the drawer and endorsers.² If the acceptance be partial, a neglect to give notice is available to discharge the responsibility only as to the residue unaccepted.³

The reason for refusal should be stated in the protest.

Protests for *non-acceptance* may validly be made by any one having the custody of the bill. Protest for *not-payment* is a disgrace where the bill has been accepted; and it can be taken only by the bill-holder, or one having authority from him.

Under the Stamp Laws, no more than one bill can be included under an instrument of protest.⁴

III. OF INTIMATION OR NOTICE OF DISHONOUR.⁵—Notice is the third indispensable requisite for recourse against the prior endorsers and the drawer. The omission of it imports a legal discharge of all but the person drawn on, or the acceptor of a bill, or maker of a note. This rule may now be held as absolute; although at one time the consideration of the purpose of the notice—namely, that the parties may take measures to secure themselves—so far prevailed as to occasion a great fluctuation of opinion.⁶

FORM OF NOTICE.—No particular form is prescribed for notice. On the Continent it is much more strictly a ‘denonciation de protêt.’⁷ But notice must at least import, 1. That the bill (which should be minutely described and identified) was not accepted or not paid; 2. That it was thereupon protested; and, 3. That the bill-holder claims in recourse against the person to whom the notice is given, the sum in the bill, interest, costs, and re-exchange. The notice must be such as to enable the party not merely to conjecture, or from circumstances to collect, what the bill dishonoured was; but so minute and clear as to make it safe to proceed against the drawer or prior endorser for relief or security.⁸

The notice *ought* to be accompanied by a copy of the protest; but this seems not to be *necessary*, at least where the drawer is not abroad.⁹ It must, however, be sent when demanded.

¹ Molloy, b. 2, c. 10, sec. 21.

² Bayley 206.

³ *Ibid.* 206.

⁴ *Napier v Carson*, 1824, 2 S. 622, N. E. 530. This was only the passing of a bill of suspension, but the Court was clear on the point.

⁵ [Add. Cont. 6th ed. 804.]

⁶ *Littlejohn v Allen*, 1746, M. 1569. See also *Langley v Hog*, *supra*, p. 437; and *Henderson v Duthie*, 1799, M. App. Bill of Ex. No. 7. In England the course of the law has been similar. *Chitty* 197–8.

[An exception has been admitted to the requirement of notice, where the drawer has no funds in the hands of the acceptor. In the case of *Bickerdike v Bollman*, 1 T. R. 405, it was laid down that notice was required to be given to the drawer, because it is presumed that the bill is drawn on account of the drawee having effects of the drawer in his hands, and in order that, if the bill is not accepted, or not paid, he may be able to withdraw them without delay. But, it was said, if the drawer has no effects in the other's hands, he cannot be injured for want of notice, and therefore he is liable to pay although notice has not been given. This exception, however, is only admitted with considerable reserve; and it has been observed in subsequent cases, that it will not be extended to cases differing in their circumstances from that of *Bickerdike*. It appears that the drawer will be entitled to

notice if he had effects on their way to the drawee to meet the bill when presented. *Rucker v Hiller*, 3 Camp. 217. And where the drawer and drawee have carried on a system of mutual accommodation, and the balance of accommodation is in favour of the drawer, he is entitled to plead want of notice. *Ex parte Heath*, 2 Ves. and Bea. 240. As to bills drawn for the accommodation of the payee, there are decisions in the same sense. *Cory v Scott*, 3 B. and A. 619; *Norton v Pickering*, 8 B. and C. 610. Since the case of *Orr v Magennis*, 7 East 359, where the drawer had effects at the time when the bill was drawn, but not when it became due, it has generally been considered that, if at any time after the bill was issued the drawer could reasonably have expected that it would be paid, he has a right to notice. See 2 Smith, L. Ca. 6th ed. 54, citing *Hammond v Dufrene*, 3 Camp. 145; and *Lafitte v Slatter*, 6 Bing. 623.]

⁷ Pothier, No. 148.

⁸ *Johnston v Hog*, 1747, M. 1570. [In *King v Bickley*, 2 Q. B. 421, the Court of Queen's Bench, after a conference with the other judges, stated the rule to be, ‘that it is not necessary in express terms to inform the party whom it is intended to charge that he will be looked to for payment, and that the sending notice of dishonour is in itself sufficient for that purpose.’ See the cases there cited, and particularly *Solarte v Palmer*, 7 Bing. 530.]

⁹ *Cromwell v Hynson*, 2 Espinasse Cases 511; *Robins v*

[416] It is not indispensable that the notice should be in writing, though that be the most common form of it. It is sufficient to give verbal notice, provided the evidence of such notice be clear.¹ In such verbal notice, the exhibiting of a written intimation sent to the giver of the notice, or of the bill noted, or of the instrument of protest, strengthens the evidence without altering the principle.² In England it is ruled, that if in sending verbal notice to a merchant's counting-house, there be no clerk to answer or take the intimation, it is not necessary to leave or send a written one; the abandoning or shutting of the shop being substantially a refusal to pay.³ Neither is it necessary to seek out the dwelling-house.⁴

It is the usual practice to give notice in writing to the drawer and endorsers, residing in the same place with the holder of the bill, as well as to those at a distance. This appeared in the above case of Sir G. Colebrooke to be the usual practice in Scotland.⁵ But the improvement of the post office establishment affords now the best of all means of communication, and it is universally adopted. The rule has been sustained in England, that if notice is proved to have been put into the general or twopenny post, properly addressed, and in due time, it is sufficient, although said not to have been received.⁶ So also it has been held in Scotland as to the general post;⁷ and in Edinburgh it would seem that the penny post will, in the same way with the twopenny post in London, be available as a proper medium of intimation. It is generally used as such.

Where there is no post, the ordinary mode of conveyance is sufficient, it not being requisite that a special messenger should be sent with the notice, unless there happens to be no regular means of intercourse. Nor is it necessary, when there is a post, or carrier, or [417] packet, to take the opportunity of an irregular conveyance, which, though indirect, may bring the notice sooner.⁸

Gibson, 1813, 1 Maule and Selwyn 288. There was a regular protest; and the drawer having arrived in England before the bill became due, a letter was sent to his house, stating that the bill was dishonoured, but not sending the protest or a copy of it. The Court of King's Bench held that the drawer, having come to England from Buenos Ayres, where the bill was drawn, notice of dishonour, though not of the protest, was sufficient. Lord Ellenborough said the defendant had due notice of the dishonour of the bill; and as the circumstances of parties alter, the rule respecting notice also changes according to the circumstances of the case. If the party is abroad, he cannot know of the fact of the bill having been protested, except by having notice of the protest itself; but if he be at home, it is easy for him, by making inquiry, to ascertain the fact. [Sm. Merc. Law, 7th ed. 253.]

¹ *Goldsmith v Bland*, 1800, Bayley 224. Below, note 3. *Syme v Ferguson*, 25 June 1813, 17 Fac. Coll. 406. See also *Douglas, Heron, & Co. v Alexander*, 1781, M. 1606; *Stirling Bank v Duncanson's Reps.*, 1794, Bell's Oct. Ca. p. 111.

² *Sir G. Colebrooke & Co. v Douglas*, 1780, M. 1605, affirmed in House of Lords 15th May 1781. [Mr. Paton notes that no trace of an appeal is to be found. 3 Pat. 682.] A bill drawn from Glasgow on London was not accepted. Notice by letter was sent to Douglas, Heron, & Co., the endorsers. Their cashier sent the letter to Brown, who had endorsed the bill to Douglas, Heron, & Co.; and Brown read the letter, or showed it to the drawer, which fact he had noted on the cashier's letter. The question was, whether this was good notice to the drawer? The Court of Session, after inquiring into the practice of merchants, held that the notice, as evidenced by Brown's jotting on the letter, confirmed by his testimony, established a sufficient notice.

³ *Goldsmith v Bland*, cor. Lord Eldon at Guildhall, 1800; Bayley 127. Here a clerk of the endorsee went to the endorser's counting-house, found it shut, and no one there; saw a servant girl, who said nobody was in the way; and he then went away without leaving a message. The notice was held sufficient.

Howe v Bowes, 1812, 16 East 113; *Crosse v Smith*, 1813, 1 Maule and Selwyn 545, where a clerk took a bill between ten and eleven in the morning to the counting-house of the endorsers to give notice; knocked, and found nobody there; on his return met their attorney, and told him what he had done. Next day went in the same way without effect. Lord Ellenborough delivered the opinion of the Court. It was held, that from ten to eleven is a time during which a banking-house should be open, and some person there; that law does not require notice in writing to be left at the counting-house or put into the post office; that there was no one with whom to leave it in this case; and that a letter by post is only one mode of giving notice, and in the same place not the best; and that shutting up shop is substantially a refusal. [Sm. Merc. Law, 7th ed. 256.]

⁴ *Crosse v Smith*, 1 Maule and Sel. 545.

⁵ See in this case (above, note 2) the report of Sir William Forbes & Co., and of Mansfield, Ramsay, & Co.

⁶ This held as to the *general* post. *Kufh v Weston*, 3 Esp. Cases 54, cor. Lord Kenyon, 1799.

Also held as to *twopenny* post. *Scott v Lifford*, 1808, 1 Camp. No. 246, and 9 East 347.

⁷ *Stewart v Wright & Scott*, 1821, 1 S. 213, N. E. 203. [*Stock v Aitken*, 1846, 9 D. 75.]

⁸ Although in honour one may be bound to seize all opportunities, it may be otherwise in law; and so, to send notice

PROOF OF NOTICE is regulated by the ordinary rules of evidence according to the law of Scotland, except in one respect,—namely, that the objection of interest will not exclude the proof by the marking or testimony of the cashier, or other proper officer of a bank, although he should happen to be a partner of the establishment.¹

TIME FOR NOTICE.—The time for notice is, by the law of Scotland, different in the case of foreign and of inland bills.²

1. In the case of FOREIGN bills, it is expressly declared by statute, 'that notification of dishonour is to be made within such time as is required by the usage and custom of merchants.'³ In England, so far as any rule of law appears to be fixed, it would seem, 1. That to such of the parties as reside in the same place, the notice must be given at furthest by the expiration of the day following, but not necessarily on the day on which the dishonour is known; and if that be Sunday, it is the same as if the arrival were on Monday.⁴ 2. That in successive notices, in the same circumstances, each should have a day to give notice;⁵ and that a bill-holder, placing his bill with his banker to recover payment, in effect augments the number of persons from whom notice must pass by one; and in a question with the drawer and endorsers, time will accordingly be allowed.⁶ 3. That to those who reside elsewhere, notice should be given by the next post, unless that should be so early

by the first regular ship bound for the place to which it was to be sent, was held sufficient. *Muilman v D'Eguino*, 2 Hy. Blackst. 565.

¹ *Colebrooke & Co. v Douglas*, 18 July 1780, M. 1605, 3 Pat. 682; *Douglas, Heron, & Co. v Alexander*, 1781, M. 1606; *Padon v Bank of Scotland*, 1824, 3 S. 250, N. E. 176; *Stewart v Wright*, *supra*, p. 440, note 7.

² [An important change in this branch of the law is effected by 19 and 20 Vict. c. 60, secs. 12 and 14. By sec. 12, 'every bill of exchange drawn in any part of the United Kingdom of Great Britain and Ireland, the Islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them, being part of the dominions of Her Majesty, and made payable in or drawn upon any person resident in any part of the said United Kingdom or islands, shall be deemed to be an inland bill; but nothing herein contained shall alter or affect the stamp duty, if any, which, but for this enactment, would be payable in respect of any such bill.'

By sec. 14 it is enacted, that 'where any inland bill of exchange shall be presented for acceptance or payment, and such acceptance or payment shall be refused, or where any promissory note shall be presented for payment, and payment shall be refused, notice of the dishonour of such bill or promissory note by such refusal to accept or pay shall, in order to entitle the holder to have recourse to any other party, be given in the same manner and within the same time as is required in the case of foreign bills by the law of Scotland.'

With respect to bills drawn in the United Kingdom, and payable in a foreign country, notice of dishonour is well given if given according to the formalities and within the time prescribed by the law of the place of payment. *Hirschfeld v Smith*, 1 L. R. C. P. 340, *accord*. *Rothschild v Currie*, 1 Q. B. 43.]

³ 12 Geo. III. c. 72, sec. 41.

⁴ Bayley 219. *Smith v Mullet*, 2 Camp. N. P. 208. [If a bill (whether inland or foreign) be protested on a Saturday, notice of dishonour to a party living where the bill is payable is duly given on the Monday following. *Mackenzie v Dott*, 1861, 23 D. 1310.]

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⁵ See much valuable matter in *Darbishire v Parker*, 6 East 12. The rule laid down since. *Scott v Lifford*, 9 East 347; *Langdale v Trimmer*, 15 East 291.

In *Bray v Hadwen*, 5 Maule and Sel. 68, a bill payable at a banker's in London on 14th July was presented that day about twelve o'clock, and dishonoured. It was returned with notice by post on 15th to Launceston. The letter reached Launceston on Sunday morning, 17th. On Monday, 18th, notice was sent by the bankers there to Bray, by whom the bill had been deposited with them, and Bray forwarded the notice to another endorser, who gave notice to Hadwen. Between the arrival and departure of the post at Launceston there are four hours. The banker there did not put in his letter till after the four hours were expired, by which it did not leave Launceston till next post, and was a day later of reaching Bray. The verdict was for the plaintiff. And on a motion for a new trial, Lord Ellenborough, delivering the opinion of the Court, said: 'It has been laid down, I believe since the case of *Darbishire v Parker*, as a rule of practice, that each party into whose hands a dishonoured bill may pass, should be allowed one entire day for the purpose of giving notice (see *Scott v Lifford*, 9 East 347; and *Langdale v Trimmer*, 15 East 291). A different rule would subject every party to the inconvenience of giving an account of all his other engagements, in order to prove that he could not reasonably be expected to send notice by the same day's post which brought it. This rule is, I believe, in conformity with what Marius states upon the subject of notice, and it has been uniformly acted upon at Guildhall by this Court for some time. It has, moreover, this advantage, that it excludes all discussion as to the particular occupations of the party on the day.'

Wright v Shawcross, 2 Barn. and Ald. 501. Notice received on Sunday of dishonour of a bill; might have been communicated on Monday, but no notice was transmitted till Tuesday's post in the evening. Held not bound to open the letter till Monday, nor to send notice till Tuesday. [Sm. Merc. Law, 7th ed. 249 et seq.]

⁶ A banker is now a distinct holder, though he has the bill merely to receive for his customers. *Robson v Burnet*, 2 Taunt. 388; *Langdale v Trimmer*, 15 East 291.

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after the dishonour as to make this impossible, or inconvenient, as a general rule in trade.¹ 4. That if the proper day of notice be a day of public rest,² or of similar sanctity, according [418] to the religion of the person bound to give notice, it will be sufficient on the following day.³

Probably these rules would be followed in Scotland, as grounded in sound discretion and mercantile usage. The same general rule is to be held as established,—namely, that every delay of notice which can fairly be ascribed to neglect or omission, and which is not justified by the circumstances of the case, will be fatal to the claim of the bill-holder.⁴ Mr. Erskine has laid down a rule, ‘that the dishonour must be notified to the drawer or endorser within three posts at furthest.’⁵ But this is not law,⁶ and the Court has sanctioned the general doctrine already alluded to. In applying the doctrine, the Court has sustained the claim of recourse where a post-letter had miscarried.⁷

2. INLAND bills and notes, both in England and in Scotland, are under the regulation of particular statutes. In Scotland, by 12 Geo. III. c. 72, sec. 41 (made perpetual), the rule is, that ‘it shall be sufficient to preserve recourse, if notice is given of the dishonour within fourteen days after the protest is taken.’ In England, also, in the case of inland bills and notes, fourteen days is the term within which protests for non-acceptance or non-payment are to be sent, or notice given of them.⁸ But there is a most remarkable difference in the construction which has been put on those statutes in the two countries, grounded on the difference respecting protests, already explained, p. 438.

In England, prior to the statute of William and of Anne, the remedy on an inland bill or note was not by protest, but simply by noting and reasonable notice; but this gave a demand for the *sum in the bill or note only*, not for the *interest or costs*. The Act of William first made it competent to protest inland bills, to the effect of giving a claim for damage, in which is included interest. This claim was given under the condition, *first*, of a protest; and, *secondly*, of notice of such protest within the fourteen days.⁹ The remedy on the bill or note itself, for the sum contained in it, still remains on the original footing of reasonable notice;¹⁰ the penalty for neglecting a protest being, that the person ‘failing or neglecting is and shall be liable to *all costs, damages, and interest which do or shall accrue thereby*.’

In the Scottish Act there is very properly no distinction made between notice for the bill and for the interest and costs. But in borrowing, as we appear to have done, from the [419] English statute, no attention seems to have been paid to the peculiarity of that Act as qualified by the rule of common law; and fourteen days were taken as the term of notice

¹ *Darbishire v Parker*, 6 East 10, 11; Lawrence, J.

² *Smith v Mullet*, *supra*, p. 441, note 4; *Tassel v Lewis*, 2 Lord Raymond 743, where evidence given of custom of merchants.

³ *Lindo v Unsworth*, 2 Camp. 602, where a Jew was excused from giving notice on the day of the great Jewish festival, when Jews are prohibited from attending to any secular affairs. [See 7 and 8 Geo. IV. c. 15, as to bills due on Good Friday and Christmas-day.]

⁴ In the case of *Hodgson & Donaldson v Bushby*, decided in the Court of Session 18th July 1782, 9 Fac. Coll. 88, and affirmed in House of Lords 12th May 1783, the endorser having left London and gone to reside in Scotland, in which country the bill-holder was not acquainted, no notice was given for twenty-one days. It was held a sufficient justification that on leaving London (the endorser's place of residence when he endorsed the bill) he left no notice where he might be found, and that the bill-holder made every inquiry after him.

⁵ Ersk. iii. 2. 35. He quotes *Johnston*, 21 July 1747, as reported in Tinwald's MS. The case as reported by Kilkerran, 79, and by Falconer, vol. i. 270 (M. 1570), contains no such

point, but merely that for which I have already quoted it, *supra*, p. 439, note 8.

⁶ The rule has since been held as ill laid down by Erskine, and not law. *Carriek v Harper*, 1790, M. 1614.

⁷ *Henderson v Duthie*, 1799, M. App. Bill of Ex. No. 7. This was a very narrow case, there being something in the address not quite precise. But one principle seems to have influenced the decision which ought not to have been admitted, viz. that the neglect is not a discharge of the claim of recourse, but the ground of a claim of damages; and here there was no damage, the makers of the note being bankrupt before the note fell due.

⁸ 9 and 10 Will. III. c. 17; 3 and 4 Anne, c. 9, sec. 4. How the period of fourteen days came to be fixed on, instead of taking the rule as it stood in bills of exchange, is not anywhere explained. But it is probable that this term in the Scottish statute was borrowed from the English.

⁹ *Harris v Benson*, 2 Strange 910; *Lumley v Palmer*, Bayley 121.

¹⁰ See Bayley, edit. Barnes, 123; *Darbishire v Parker*, 6 East 3, and numerous other cases.

to rule the whole claim of recourse, without observing that in England that long term of notice was confined to the remedy for costs, damages, and interest. It is enacted, 1. That all inland bills and notes shall be protested, etc., otherwise there shall be *no recourse* against the drawers or endorsers; 2. That it shall be *sufficient to preserve the said recourse*, if notice is given of the dishonour within fourteen days. These words are too strong to be overcome but by the Legislature. And it is heartily to be wished that a remedy were so applied; for while in practice the rule is generally understood to be the same as in England, and similar to that which regulates the notice on foreign bills, so that a drawer or endorser concludes the bill to be paid if he has no notice within the same short time as in foreign bills, it has been decided under this statute that notice on inland bills and promissory notes at the distance of *twelve* days is sufficient.¹ It is so far happy, that in this question an English bill drawn on Scotland, or a bill from Scotland drawn on England, is held not to be inland;² so that the effect of the peculiar structure of the Act of 12 Geo. III. is strictly confined to Scotland.

Whether, according to the true construction of the words, 'if notice is given of the dishonour within fourteen days,' it is necessary that the notice shall have been actually *received*, or sufficient that it shall have been *despatched*, has not yet been determined. The safe course undoubtedly is, to take care that the notice shall actually reach the party within the term; and there will naturally be a disposition judicially to enforce this as the true construction, considering how far the rule of the Act stretches beyond the utmost licence of mercantile usage, and how reprehensible it must ever be to delay for a day that notice on which the safety of the party may depend. But, on the other hand, the words are precise enough, and may be thought rather to be pointed to the act of him from whom the notice is to proceed. There is a case now depending on this point, in which probably the rule of construction may be settled.

BY WHOM NOTICE IS TO BE GIVEN.—The notice of dishonour is to be given by the bill-holder; or by one who is empowered to act as his agent in that matter; or by one who has himself been called upon to answer for the bill, and who on doing so will have a claim of recourse. Information from a third party, not thus interested or entitled to give notice, or to act for the holder, is unavailing to preserve recourse to the proper party.³ But if [420]

¹ *Baird v Belch*, 9 July 1803, Mr. Baron Hume's papers. A bill was drawn by M'Gregor & Co. of Glasgow on John Hill of the same city for £178, and was after acceptance endorsed to James Baird, also of Glasgow, and again by him endorsed to D. & T. Bryce of Glasgow, by whom it was discounted with Andrew Belch, a banker, and by him made over to J. Belch. The bill was due 21st October 1802. Verbal notice was given of the dishonour to D. & T. Bryce, but none whatever to the other endorsers or to the drawer till 3d November, when a written notice put into the post office by Belch on the 2d reached Baird. Summary diligence was then raised against Baird; and in a suspension he pleaded the palpable if not fraudulent neglect to give notice for twelve days. The answer was grounded on the statute. Lord Cullen held Baird liable, and gave costs; and to this judgment the Court adhered.

See also *Andrew v Adam*, 2 June 1812, 16 Fac. Coll. 660.

² *Ferguson & Co. v Belch*, 1803, M. App. Bill of Ex. No. 13, where a bill was drawn from England on Scotland. *Reynolds v Syme*, 1774, M. 1598, where the bill was drawn from Scotland upon England.

³ In *Tindal v Brown*, 1 Term. Rep. 167, where the question turned chiefly on what was reasonable notice, there is a good deal of doctrine on the above-mentioned point also. Thus

Buller, J., says: 'The purpose of giving notice is to let the party know that *he is looked to for payment*, that he may have his remedy over by an early application;' 'and a notice from another person cannot be sufficient: it must be from the holder.' Ashhurst, J.: 'Notice means something more than knowledge, because it is competent to the holder to give credit to the maker (or drawer):' 'the party ought to know whether the holder intends to give credit to the drawer, or to resort to him.'

In *Barclay ex parte*, 7 Vesey 597, Kemp drew two bills on Dearlow, which were afterwards endorsed by Clay to Barclay. They were dishonoured, and of this Clay gave notice to Kemp. A commission having been issued against Kemp, Barclay petitioned to be admitted to prove under it: the question was, whether the notice from Clay, and not from Barclay, was sufficient? Lord Eldon, Chancellor, held that the notice ought to have come from the holder, and dismissed the petition.

Stewart v Kennet, 1809, 2 Camp. 177. The notice must be by the holder himself, or some one authorized by him, and not by a stranger.

Baker v Birch, 3 Camp. 107. Here the acceptor went to the drawer a few days before the bill became due, and told him he could not pay it, and gave him five guineas, being all

notice has been given to one endorser, he may, even before paying the bill, give notice to the drawer or another endorser, that shall be available to the holder.¹

TO WHOM NOTICE IS TO BE GIVEN.—The rule is, that notice must be given to every one against whom the holder means to claim his recourse. In his selection of persons to be responsible to him, the holder is not restrained by any rule. He is not bound to give notice to the drawer, though it seems once to have been thought that if he did not, he discharged the endorsers.² He may select the last endorser, who will of course be entitled to his remedy against the others; or he may restrict his demand to an intermediate endorser, by which of course he will discharge the subsequent endorsers,³ and also the prior, including the drawer, if that intermediate endorser do not give notice.

It is an important question, how this rule is to be applied as to inland bills and notes in Scotland. If it is sufficient to give notice of the protest within fourteen days, the holder may on the fourteenth day make his demand on any endorser. How is that endorser to secure his relief against the other endorsers, including the drawer? The natural rule should be that of reasonable notice to those against whom the endorser might choose to take recourse,⁴ the statute ruling only the notice by the bill-holder; and yet it is much to be wished that the words of the Act were held strong enough to require within the fourteen days, notice to all against whom recourse is to be preserved; and it would in that case seem to follow that even against the last endorser recourse would be lost by such a delay as should discharge *his* recourse against the rest.

It is held in England, that notice to one of several partners, or joint drawers or endorsers, is notice to them all.⁵ This will also be held sufficient in Scotland.

It is sufficient to give notice to a clerk in the counting-house of the drawer or endorser. But it would not seem to be sufficient to give notice to a clerk met in the street, or in any other place not appropriate to his master's business.

[421] IV. EQUIVALENTS OF PROTEST AND NOTICE, AND WAIVING OF NEGOTIATION.—1. The death, imprisonment, known insolvency, or bankruptcy of the acceptor, are not equivalent to notice of dishonour given to the drawer or endorser. This is settled in England by many cases.⁶

he could command, for that purpose. The drawer received the five guineas, and promised to take up the bill. The bill was not presented for payment till some days after it was due. There were two questions: Whether the want of notice discharged the drawer? and whether he held the five guineas for the bill-holder? Lord Ellenborough was of opinion 'that the defendant was discharged upon the bill for want of due notice, but that the plaintiff was entitled to recover the five guineas as money had and received to his use.'

This contradicts *Shaw v Croft*, cor. Lord Kenyon, 1798.

But the matter seems to be thrown into doubt by an opinion of Lord Ellenborough in the case of *Rosher v Kieran*, 1814, 4 Camp. 87, where Kieran drew a bill for £1000 on Rowcroft, which was accepted and endorsed to Rosher, but not paid when due. On the same day the acceptor wrote to the drawer that he had not paid the bill, and that it was in the hands of Rosher. 'Lord Ellenborough held this notice from the acceptor sufficient, and the plaintiff had a verdict.' [See *Sim. Merc. Law*, 7th ed. 250.]

¹ *Jameson v Swinton*, 1810, 2 Taunt. 224. Here notice was given to Elsham, the last endorser, by the bill-holder; and Elsham gave notice to Swinton, from whom he had it. Mr. Justice Lawrence was of opinion that Elsham gave the notice soon enough to enable him to recover against Swinton; and that if Elsham might recover against Swinton, Jameson, to whom Elsham gave the bill, might also recover against Swinton.

² In *Bromley v Frazier*, 1 Strange 441, this negatived in the case of a foreign bill. And in *Heylin v Adamson*, 2 Burrows 669, it was negatived in the case of an inland bill.

These two reports deserve very attentive perusal, as laying down the law in the most satisfactory way, in all the three cases of bills of exchange, inland bills, and promissory notes.

³ *Henderson v Duthie*, 1799, M. App. Bill of Ex. No. 7.

⁴ *Carrick v Harper*, 1796, M. 1614; *Batchin v Orr*, 1792, M. 1619.

⁵ *Porthouse v Parker*, 1807, 1 Camp. 82; *Jones v Radford*, 1806, *ibid.* 83, note.

⁶ *Russell v Langstaffe*, Doug. 497, where this doctrine is in his presence stated to have been frequently ruled by Lord Mansfield, as many means may remain of obtaining payment by the assistance of friends or otherwise.

Esdale v Sowerby, 11 East 114, where the endorser knew that the acceptor had no funds, and that the drawer as well as acceptor were insolvent. The Court were clear that the insolvency of the drawer and acceptor, and the knowledge of it, did not dispense with the necessity of giving notice of the dishonour of the bill.

Nicholson v Gouthit, 2 H. Blackst. 609. This was a very strong case of knowledge of the acceptor's insolvency; and the Court were satisfied that the justice of the case was with the bill-holder. But instead of trying to reach the justice of the case, perhaps it is better, said the Chief Justice, to adhere to a rule, however strict, than relax it. It sounds harsh that

In Scotland, some doubts seem once to have prevailed;¹ but a clear series of cases has established the necessity of notice.²

The bankruptcy or insolvency of the drawer is no excuse for not giving notice to him, or to the trustee, etc., on his estate.³ In England it once was otherwise held (by Lord Thurlow), but it has been since settled that notice must be given.⁴

Whatever infers knowledge at once of the dishonour and of the resolution to claim recourse, so as to entitle the endorser or drawer to take measures of precaution against the acceptor or others, would seem to be equivalent to notice; as a meeting of the parties for arranging their responsibility.⁵

2. The parties may by anticipation WAIVE the rules of negotiation, or may dis- [422] charge the objection afterwards; and this will be a good answer to the objection of want of protest or notice. Thus:—

(1.) If the drawer say to the holder before the bill falls due, that he has no regular residence, and that he will call and see whether the bill has been paid by the acceptor, it is a waiving of notice.⁶ (2.) Payment of a part, after neglect known to the endorser,⁷ or a promise to pay the whole, in full knowledge of the default,⁸ will bar the exception of want of notice. But such payment or promise will not be sufficient if made in ignorance,⁹ or on the supposition of liability when truly not liable.¹⁰ It would seem that the waiver must

a known bankruptcy should not be equivalent to a demand or notice; but the rule is too strong to be dispensed with.

Ex parte Wilson, 11 Ves. 412.

Boulton v Stubbs, 18 Ves. 21. In these cases the Lord Chancellor held the rule to be settled. [See *Sm. Merc. Law*, 249.]

¹ *Irvine*, 1791, Bell Oct. Ca. 120. Here there was not merely private knowledge, but that sort of intercourse among the parties which left it to be inferred that the endorser was aware not merely of the dishonour, but of the holder looking to him for payment: particularly there was a meeting of the parties, at which the acceptor made a partial payment. This case was not very fit for bringing out the question, and was not very carefully prepared.

² The first is a very clear case. *Langley v Hog*, 1748, M. 1574. This was a bill on London at forty-five days, endorsed by Hog; not protested till two days after the days of grace were out. The acceptor was bankrupt, and in the *Gazette* some days before the bill fell due; and this was known to Hog, the endorser, so that he wrote to his correspondent to pay on protest for his honour. 'Found that no recourse lay, the bill not having been protested in due time.'

Ferguson & Co. v Belch, 1803, M. App. Bill of Ex. No. 13. This was a bill on London accepted; but before it was due, Risk the acceptor was a bankrupt. It was due on 3d June, not protested till 29th. Held that, the bill not being duly negotiated, there was no recourse.

Thomson, Still, & Co. v M'Ruer, 20 Jan. 1808, 15 Fac. Coll. 68, note. This was an inland bill drawn by M'Ruer and accepted by Fleming, and endorsed to Thomson, Still, & Co. It was due 24th April, but no notice to drawer till 17th June. The acceptor had previously been imprisoned, and cited the drawer as one of his creditors in a cessio. This was offered to be proved by the drawer's oath, and the point was the relevancy of this fact if proved. Lord Robertson held the private knowledge insufficient to supply the want of notice. The Court unanimously approved of this determination, and of the principle on which it proceeded.

Calder v Lyal, 22 Dec. 1808, 15 Fac. Coll. 66. The bills

here were drawn by Calder, accepted by Paterson, and endorsed to Petrie, and then to Lyal. Paterson was sequestered 6th August, the bills due in September. On Paterson's bankruptcy Lyal lodged money with his agent to retire the bills. They were dishonoured and protested, and notice given to Lyal, but none to Calder the drawer for seventeen days. Lyal demanded recourse against Calder. But the Court approved of the decision in *Thomson, Still, & Co.'s* case, and held the rule to be without any exception but that of the case of accommodation bills.

³ The above cases may be taken generally to prove this point.

⁴ *Cook*, B. L. pp. 167, 168; *Whitmarsh*, pp. 181, 182; *Cullen*, B. L. p. 160.

⁵ *Coulter v Martin*, 1775, M. 1601, where the drawer of a bill having pleaded want of due notice of the acceptor's failure, the Court held it a sufficient answer that in a conveyance to trustees for his creditors he had acknowledged the holder as a creditor for £518, which was admitted to comprehend the bill, and it was not regarded that by a clause of the deed it was stipulated that this enumeration of the debts did not discharge objections. This decision may be doubted.

Something like this took place in *Irvine's* case, *supra*, note 1.

⁶ *Phipson v Kneller*, before Lord Ellenborough, 1815, 4 Camp. 285, 1 Starkie 116.

⁷ *Vaughan v Fuller*, 2 Strange 1246, where a part having been paid, Lee, C. J., held it sufficient to supersede all proof of a demand.

So in *Horford v Wilson*, 1 Taunt. 12. [*Sm. Merc. Law*, 7th ed. 257.]

⁸ *Haddock v Bury*, 7 East 236, note; *Whitaker v Morris*, 1 Esp. Cases 58; *Lundie v Robertson*, 7 East 231; *Wood v Brown*, 1 Starkie 217; *Rogers v Stephens*, 2 Term. Rep. 713; *Anson v Bailey*, Buller's N. P. 276; *Gibbon v Coggan*, 2 Camp. 188. See also *Bayley* 234; *Chitty* 301.

⁹ *Bayley* 272; *Chitty* 307; *Stevens v Lynch*, 12 East 38; *Hopley v Dufresney*, 15 East 276.

¹⁰ *Borrodale v Lowe*, 1811, 4 Taunt. 93, where the endorser

be express in the case of an endorser, although a drawer may impliedly waive his defence.¹

Ignorance of the neglect to give notice, though it may entitle an endorser to recover from the bill-holder the money wrongfully paid, will not entitle him to demand recourse from the drawer or other prior endorser acquainted with the neglect.² But there may be a neglect which would be fatal to a claim of recourse by the person guilty of it, which yet will not affect an onerous endorsee. Thus, the holder of a bill drawn at a day certain is not required to present it for acceptance (p. 433); but if he do present it, he must give notice (p. 434). If such bill, however, have been after such presentment, and without notice, endorsed to a stranger for value, he will not be liable to the objection of want of notice.³ But where, from the bill itself, or the attendant circumstances, knowledge of the objection is necessarily to be inferred, it would be otherwise; as if there were a *noting* on the bill, or if the bill were past due.⁴

[423] What has now been laid down as to Presentment, Protest, and Notice, applies to the case of Bills for Value. Accommodation Bills will be considered afterwards.

Before leaving this subject, there are two observations to which it may be useful to attend.

1. The holder of a bill may, at the time of its dishonour, be in possession of funds belonging to the acceptor; and the drawer and endorsers have a clear interest to insist that he shall apply those funds in extinction of the bill, before claiming recourse against them. The same interest arises to the creditors of the drawer and endorsers on their bankruptcy. Taking the simplest case of a sum of money in the hands of the holder of the bill on the day of payment, without any other debt between those parties on which the bill-holder can claim right to apply the fund in security of other engagements; and supposing that no competing creditor has interfered with diligence to attach the fund, it would appear that the bill-holder would be bound to apply the moneys in his hands in extinction of the bill.⁵ But

of a bill wrote that he would not remit till he received the bill, and desired that it might be returned to a certain banker, who was an endorser subsequent to him; but afterwards discovering that in law he was discharged, refused to pay. The Court of Common Pleas held that this was no express promise, but a letter written under supposition that he was liable.

¹ A drawer never has any one to look to but the acceptor, and on him he may come at any distance of time; an endorser loses his recourse against the rest by delay.

[A subsequent promise to pay made by an endorser of a bill who has had no notice of dishonour, is a waiver of the right to notice. *Woods v Dean*, 3 B. and S. 101. It would seem that such a promise may be treated by a court of law as evidence or admission of due negotiation in all respects, and that a drawer or endorser will not be allowed to set up a defence of ignorance after making such a promise. See *Campbell v Webster*, 2 C. B. 258, where this doctrine was established, with reference to a plea founded on the absence of a protest in the case of a foreign bill, upon an elaborate review of the authorities. The doctrine was applied to exclude a defence of non-presentment in *Mitchell v Allhusen*, 13 April 1870, 8 Macpherson. The rule is obviously an equitable one. An endorser is allowed to evade liability under his subscription, if the bill was either not presented for payment, or not duly intimated, and no inquiry is allowed as to whether his remedy against the drawer or prior endorsers was thereby lost. But if he promise to pay without inquiry, he must be held to have satisfied himself, either that the bill was duly

negotiated, or that he is morally bound to pay notwithstanding the informality.]

² *Roscoe v Hardy*, 12 East 434. [Sm. M. L. 259.]

³ *O'Keeffe v Dunn*, 1815, 6 Taunton 305. The bill here was drawn by Dunn on Rickets at one month after date. Sinclair, the payee, presented it for acceptance; but it was refused, of which no notice was given. Sinclair then endorsed the bill to O'Keeffe, who presented it for acceptance; and it was again refused, when he took recourse in the regular way against the drawer. The defence was discharge by laches of the payee. Lord Chief Justice Gibbs, with Dallas, J., and Heath, J., were clearly of opinion that a holder not being bound to present a bill for acceptance, and there being nothing on the face of an unaccepted bill to awaken a suspicion that it has been presented for acceptance and refused, the endorsee was entitled to recover. Mr. Justice Chambre dissented from this opinion. He founded on *Roscoe v Hardy*, which the Chief Justice explained.

⁴ Lord Chief Justice Gibbs said, in O'Keeffe's case: 'He who takes a bill after it has arrived at maturity, takes it subject to all the defences which could have been made by any previous holder; for the bill being unpaid, its date is notice to him sufficient to put him on inquiry. But if he takes the bill before it is due, he takes it not subject to the same infirmity of title, because he then takes it without notice of any suspicious circumstances that may break in upon his remedy against any former holder.' This is the general law.

⁵ In *Calder & Co. v Leith Bank*, 30 May 1816, Calder & Co. had discounted with the Leith Bank a bill for £330, of which

if the holder have other transactions with the acceptor, and is creditor on them, he seems to be entitled by compensation to secure himself, and to resist the demand of the drawer and endorsers to apply it for their relief.¹ And if, instead of a sum of money, the holder of the bill be only in possession of a security given on another account, but out of which he might himself derive relief, it does not appear that a drawer or endorser will be held entitled to an assignment of such security on paying the bill.²

[424] 2. If the holder of the bill happen to be indebted to any of the parties to the bill on another account, it may be of importance for him, on the supposition of the person to whom he is so indebted becoming a bankrupt, not to discount the bill: for if he be a debtor of that person on the bill at the time of his bankruptcy, he will by compensation or set-off be secure; whereas he may be deprived of this security if the bill be not in his possession at the time.³

DEMAND BY ONE ACCEPTING, OR PAYING ON PROTEST.—A friend or agent of any of the parties to a bill may *accept* it *supra* protest for their honour, and then he will be liable to all the parties in the bill, except to him for whose honour he has accepted; and on paying under such protest, will have a good claim against the person for whom he has accepted, and against all who in the bill are responsible to him.⁴ Or an accepted bill may in the same way be *paid supra* protest; and then the person paying will have his remedy against that person for whom he has so interposed, and against all who on the bill are responsible to that person.

The proofs of a claim by him who thus accepts and pays, or who after due acceptance pays *supra* protest, are the protest and act of honour, with the retired bill, and evidence of notice. The bill should be first protested before it is accepted or paid for honour of any of the parties: for, on the one hand, that is the sole check against officious, or fraudulent, or malicious interference for a sinister purpose; and, on the other, without protest, there can be no recourse against those responsible to him for whose honour the interference is.⁵

John Sibbald & Co. were the acceptors. A month before the bill was due, John Sibbald & Co. failed. At this time it was understood that John Sibbald & Co. had funds in the Leith Bank, who were their bankers; and Calder & Co., in a letter to the bank, desired that if such funds were in their hands, they should be applied in extinction of the bill. The bank did not acknowledge the existence of such funds, but alleged that the account was unsettled, and the result doubtful. Calder & Co. suspended a charge on the bill. The Court, 'in respect that it is not established that there are any funds in the hands of the chargers,' refused the bill of suspension. Even in these circumstances, where the balance, though not ascertained, might exist, the judges were equally divided, and Lord Craigie was called on as Lord Ordinary to give his opinion. Had the balance been clear, and the fund unquestionable and free, the plea of Calder & Co. would have been sustained. Session papers.

In *Cowan & Sons v Hurry*, 19 Dec. 1816, 19 Fac. Coll. 241, a similar plea was urged by the *acceptor* of a bill, which was said to be for the drawer's accommodation. He insisted that the bank, who held a general security for the balance that might arise on the drawer's bank account, were not entitled to payment from him or the acceptor without assigning their mortgage, reserving their own interest in it. The late Lord Reston passed the bill of suspension; but the Court altered the judgment, on the ground 'that the suspending of a charge on an accepted bill by an onerous endorsee, upon a claim by the party paying it for an assignation of a security for a general balance held by the endorsee against another

debtor in the bill, even a prior debtor, was without authority and precedent, and would destroy the currency of bills; and that this held more particularly in the present case, where the party demanding the assignation was *ex facie* of the bill the primary debtor, and proposed to establish by extrinsic evidence that another party to the bill was truly the primary debtor; that a charge on a bill by an onerous endorsee could not be suspended on an allegation that it was accepted without value; that in a question of payment of a bill, nothing can be believed except what appears *ex facie* of it; and that any claims which the different obligants may have against each other must be settled by a separate action afterwards.'

In the English case of *Crosse v Smith*, 1 Maule and Sel. 545, the same plea made one point in the case, but seems to have been rejected on two grounds: 1. That the banker had a right to set off the money in striking the balance on his own transactions; and, 2. That at the bankruptcy of Tuke the bill did not constitute an item in his banker's account.

¹ See *Crosse v Smith*, in the above note.

² See the case of *Cowan & Sons*, *supra*. Mr. Thomson has contended for an opposite result in these supposed cases, on the analogy of indefinite payment. But his argument is not so correctly deduced on this occasion as his reasoning generally is. Tr. on Bills of Exchange, 420-423.

³ Chitty, p. 182.

⁴ See above, p. 426.

⁵ Beawes, No. 53; Chitty 312, 409; *Carstairs v Paton*, 1703, M. 1528.

1. The drawee may refuse to accept simply where he has no funds, and yet after protest accept for honour of the drawer, or of any one of the endorsers; or a stranger to the bill may after protest accept for the honour of the drawer or any of the endorsers. In accepting for the drawer's honour, he will have his remedy only against the drawer, and will be responsible to all the other parties, as if the bill were regularly accepted. The use of acceptance *supra* protest, is to prevent the bill from going back with charges against the parties in the bill. Naturally, the acceptance is in honour of the drawer's order; but it may be made for any of the other parties, to the effect of the acceptor being liable to all to whom that party is responsible, and of preserving the remedy against that party, and those who are responsible to him, provided the acceptance is made specially for him, and notice given.¹

2. In paying for honour, the bill should in the same way be protested first. The person so paying will have his remedy against him for whom he interposes, and against all on whom, had that person paid it, he would have had recourse.² But to give such claim there must not only be protest of dishonour, but notice given.³ 3. The person on whom a bill is drawn may have accepted on the faith of provision being made for the bill; and if it be not made, he may suffer the bill to be protested on the day of payment, and then pay *supra* protest, to the effect of securing his recourse against the drawer.⁴

There is an exception to the rules of protest and notice in the case of a bill drawn on a person who has not effects of the drawer in his hands with which to answer the draft. [425] But this case it may be better to consider in the next Section, along with the case of accommodation bills. See below, p. 450.

There is no exemption from those rules, although the bill is held only in security, or as a deposit.⁵

The bill-holder may enter his claim against all the parties who are liable on the bill; and from each he may claim the whole sum, taking care, 1. That he deduct, in making such claim, whatever he has already received from the estates of other obligants,⁶ and whatever he is entitled to receive from dividends already declared;⁷ and, 2. That he do not, on the whole, draw more than his full debt, but leave the excess for the relief of the other parties..

One who acquires a bill or note (whether originally a real or only an accommodation bill) for a smaller sum than that for which it is drawn (as in pledge of a debt due to him to a less amount), may enter a claim to the full amount of the bill or note against each of the other parties, although he cannot *draw* on the whole more than the amount of the

¹ Beawes, No. 89; Chitty 310 et seq. [It has been laid down by all the text writers, including Smith, Chitty, and Byles, on the authority of the case *ex parte Lambert*, 13 Ves. 179, that a person who takes up a bill for honour, succeeds strictly to the title of the person for whose honour he accepts in this sense, that he is subject to latent equities affecting the right of that person. But in a recent case, upon a review of all the authorities, it was found that the principle of the case of *Lambert* had been repeatedly overruled; and the true doctrine, as now laid down by Vice-Chancellor Malins, is, that the holder for honour succeeds to the title of the person FROM whom he received it, and has all the title of such person to sue upon the bill, *except* that he discharges all the parties subsequent to the one for whose honour he takes it up, and that he cannot himself endorse it over. *In re Overend, Gurney, & Co.*, *ex parte Swan*, 6 L. R. Eq. 344.]

² *Ex parte Wackerbath*, 5 Ves. 574. [Sm. Merc. L. 7th ed. 237.]

³ Chitty 409.

⁴ Beawes, sec. 52. Pothier, Tr. du Change, No. 114.

⁵ See *J. Murray v Grosset*, 1762, M. 1592, as determined in the House of Lords, 17 March 1763, 2 Pat. 81.

Reid & Co. v Coats, 1794, M. 1620.

⁶ Cook, B. L. 151; Whitmarsh 179. See above.

⁷ *Ex parte Tod* in Watson's bankruptcy, 1815, 2 Rose 202. See as above.

This doctrine, however, may be open to question. If a remedy lie against all the co-obligants, can it justly be said that when I receive payment of a dividend from one of them, I take that dividend as a sum to be deducted from my claim on the co-obligants? May it not fairly be argued, that by bankruptcy the obligation is extinguished, and in its room comes an *assignation* to the bankrupt estates *pro tanto*? That one assignation is not extinguished in consequence of payment in part by arrears of another, the whole benefit derivable from each being necessary to extinguish the debt? Or, at least, it may be contended that no payment, except from the estate of the principal or proper debtor, can operate as an extinction of the creditor's right.

debt for which it was pledged;¹ but, on the estate of him who gave him the bill or note in security, he can enter his claim for nothing but the actual debt² for which the bill was pledged.

REMEDY TO THE BILL-HOLDER BEYOND THE BILL.—The question has been already considered, how far the endorsee of a bill which has been guaranteed by a separate letter is entitled to the use of that guarantee, freed from any latent exceptions pleadable by the granter of the guarantee against him who originally held it.³ But there is a prevailing notion among bankers, still more questionable perhaps,—namely, that on discounting a bill a banker is entitled to all the remedies extraneous to that instrument, which the drawer might have exercised as creditor under the contract out of which the bill originated. If a bill, for example, has been accepted by one who has ordered goods which ostensibly are for himself, but which turn out to be for the use of a joint adventure in which others are concerned, bankers hold that, by acquiring that bill, they acquire also by implied contract a right of demand against all the joint adventurers. But this seems to be extremely questionable, and to involve considerations which deserve to be well weighed. The banker, in buying a bill, seems to be the purchaser merely of the remedies competent on that instrument; and although the drawer may have a remedy beyond this, and may assign it with the bill, or may even in equity be bound to communicate the benefit of it, the [426] bill-holder should have no ground of action without assignment, in respect of the original contract of sale, any more than he would be liable to any latent exceptions on account of the quality of goods, which might enable the acceptor effectually to resist a demand by the drawer himself.

SECTION II.—DEMANDS ON ACCOMMODATION BILLS AND NOTES.⁴

Besides the proper mercantile use of bills and notes in transmitting money from one country to another, and in bringing into a discountable form the prices of goods sold on credit, so that the debt may be used as money, there is another purpose to which this form of obligation has been applied,—namely, to supply traders, on occasion of sudden difficulties, or as the means of speculation, with money and commodities by the loan of credit. Bills and notes so used have been called **ACCOMMODATION** or **WIND BILLS**. In this species of transaction, the person requiring the accommodation prevails with his friend to accept a note or bill for the sum to be raised, at such a date as a banker will discount; it being understood, that he for whose use the bill is intended is to provide the means of paying it, or is himself to retire it. This bill is discounted, and produces money; and if he who receives the money provides for the due payment of the bill, the transaction is closed. This is done sometimes as a single transaction on the footing of mere friendship: it is sometimes done in consideration of a commission: and not unfrequently credit is thus supplied by means of a course of bills drawn and redrawn, the expense of which in interest and commission is enormous.⁵

¹ Cooke, B. L. 156, 157.

² Lord Chancellor Eldon, in *Bloxam ex parte*, said: 'I look upon it as settled that you cannot hold the paper of the bankrupt, and prove beyond your actual debt upon it; but that you may have the paper of third persons, those persons being indebted to your debtor in more; and you may prove to the whole amount, not exceeding 20s. in the pound upon your original debt.' 6 Ves. 449. [Sm. Merc. Law, 7th ed. 266.]

³ See above, p. 393.

⁴ [Observe that onerosity in bills of exchange is presumed, and the defence of no value can only be established by writ or oath, subject to the exception introduced by sec. 15 of the

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Mercantile Law Amendment Act (*supra*, p. 426). The admission that value was only given to a less amount than the sum in the bill, does not deprive the holder of the benefit of the presumption to the extent admitted. *Brock v Newlands*, 1863, 2 Macph. 71; *Mercer v Livingstone*, 1864, 3 Macph. 300.]

⁵ [See Add. Cont. 6th ed. 794.] This ruinous expedient was one chief cause of the fall of the Douglas Bank in Scotland in the year 1772. The expense of drawing and redrawing on London, and of the securities necessary to maintain this circulation, was so great as to exhaust the resources of the bank, and mainly to produce the failure.

But persons under the necessity of adopting this expedient, generally agree with some house which requires the same sort of accommodation, that they shall mutually draw on each other, or exchange acceptances, or even exchange the more dangerous instruments called skeleton bills. Sometimes it is necessary to have two or three houses engaged in the traffic; and the creation of fictitious firms, the use of feigned names, the careful avoidance of the same train of discounts, are the dangerous and discreditable expedients into which this ruinous practice leads the parties. This is not the place in which to discuss the question of policy, whether this trade in fictitious bills ought to be suppressed? and if so, how far courts of law can exercise a wholesome control over it? The purpose of this work is merely to state the law on the several points which may arise. But it is a subject of sincere regret with every one who considers this subject, that parties have ever been permitted to depart, in these accommodation transactions, from the character which they bear on the face of the bill, or to pretend to rights not strictly belonging to the place which, on the document, they profess to hold.

The obligations and the rights of parties to bills are different in the case of accommodation bills and in that of bills in real transactions.

1. In real bills the acceptor is the primary debtor, as holder of the drawer's funds, or indebted to him for money which by his acceptance he acknowledges. Each endorser also is debtor to the endorsee, by having received value from him for the endorsement of the original engagement of the acceptor, and is bound to guarantee that engagement for the endorser's indemnification; and the bill-holder is entitled to go back on the whole of the previous parties, who are jointly and severally responsible to him on the dishonour of the bill.

2. Accommodation bills are either entirely so or partially. So far as no money or other consideration passes, they are accommodation bills: they become bills in real transactions [427] from the moment that money is advanced upon them. As a bill is a mandate to pay money for the drawer, the effect of acceptance where there are no funds is, on payment by the acceptor, to raise a debt against the drawer. And so in regard to endorsation, each endorsation, where no money is given for it, is the creation of a debt against him for whose use it is intended, on the endorser paying the bill. The person for whose use a bill of this kind is made is the primary debtor, the others are sureties. Where they engage by concert, or in the knowledge of each other's accommodation to the same person, they are co-cautioners in so far as concerns their reciprocal responsibility *intra se*. To the bill-holder, where he is not one of the accommodators, they are all responsible, jointly and severally, as if the bill had originated in a real transaction.

This difference in the nature of these two kinds of bills deserves attention in several respects.

I. RULES AS TO PROTEST AND NOTICE.—Accommodation bills are not regulated by the same rules in this respect as onerous bills. The bill-holder, if an onerous *bona fide* holder, has not only all the advantages held by the endorsee of a real bill, but he may have the benefit also of not being bound to the same strictness of notice. Thus:

1. Where one has drawn a bill on a person not in possession of funds to answer it, and passed it as a real bill, he cannot defend himself on the plea of neglect of protest or of notice, against the bill-holder's claim of recourse, in consequence of the refusal of the person drawn upon to accept. It will be an answer to that plea, that he necessarily was apprised of the dishonour, and required no notice, since he was by the instrument truly bound to pay it himself as primary debtor. This is settled law in England,¹ and rules the case of the

¹ *Bickerdike v Bollman*, 1 Term. Rep. 405. The question here on a case reserved was whether, a bill having been drawn by a bankrupt in favour of the petitioning creditor, on a man who then, and from that time till the bill became due,

was a creditor of the bankrupt, so much of the petitioning creditor's debt had, in consequence of his having failed to give notice of the dishonour, been discharged? Mr. Justice Ashhurst says: 'It has never been disputed that the want of

dishonour both of an unaccepted draft and even of an accepted bill, the only difference between these cases being, that the acceptance is *prima facie* evidence of effects, which the holder must redargue; whereas the *onus probandi* to show effects seems to lie with the drawer where acceptance has been refused.¹ This rule proceeds not on the ground that in such a case the drawer does not suffer by want of notice. For it has been held, that where truly there were no effects, evidence cannot be offered to show that by want of notice damage has occurred collaterally.² The doctrine has been placed on a different [428] footing; namely, that the drawer of the bill, in drawing with previous knowledge that he has no effects in the hands of the person drawn on, and that the bill will be dishonoured, if not guilty of a fraud, at least takes an accommodation, which it requires no notice to inform him he must provide for.

2. But the bill-holder must run his risk of the defence, grounded on want of notice, being available or otherwise; and so, wherever a drawer has good ground for drawing, he is held entitled to notice of dishonour, as otherwise he is exposed to a sudden and unexpected demand to pay a bill which he thought was provided for. Accordingly, where there were effects at the time of drawing, that has been held sufficient to entitle the drawer to notice, although the balance has afterwards shifted;³ and it does not seem to be sufficient to

notice to the drawer after the dishonour of the bill is tantamount to payment to him. But that rule is not without exceptions; and particularly, notice is not necessary to be given where the drawer has no effects in the hands of the drawee. Mr. Justice Buller says: 'The law requires notice to be given for this reason, because it is presumed that the bill is drawn on account of the drawee's having effects of the drawer's in his hands; and if the latter has notice that the bill is not accepted or not paid, he may withdraw them immediately. But if he has no effects in the other's hands, then he cannot be injured for want of notice.' And he proceeds to state a case, where at Guildhall he had directed a full special jury in that way, who found accordingly. Besides laying down the doctrine thus, Mr. Justice Buller puts it in another view, more in the way of special pleading: 'It has been truly argued that the question is not whether an action could be maintained on the bill itself, but whether the want of notice extinguishes the debt; as to which the case is this: A not having any effects in C's hand, draws a bill of exchange for £100 on him in favour of B for value received. Now, if C does not accept, and B does not give notice to A, there is an end of the bill. Then how does the case stand? A has £100 of B's in his hand without any consideration, which therefore B may undoubtedly recover in an action for money had and received.' The case was decided in favour of the bill-holder, the Court being of opinion that there was no sufficient neglect to discharge the petitioning creditor's debt, because here the drawer had no effects in the hands of the drawee, and could not therefore be injured, and is not entitled to any notice.

This followed as a precedent in *Goodall v Dolley*, 1 Term. Rep. 712, and in *Legge v Thorpe*, 12 East 171; *Rogers v Stevens*, 2 Term. Rep. 713. See below, note 2. [Sm. Merc. L. 258; and see editor's note, *supra*, p. 439.]

¹ See Mr. Justice Buller's note of the case of *Tindal v Brown*, 1 Term. Rep. 409. See below, page 452, note 6.

² *Rogers v Stevens*, 2 Term. Rep. 713, where a bill was drawn by Stevens from Newfoundland on Birbeck & Blake in favour of Rogers, for value given to Calvert. Acceptance was refused, and the bill was protested; but no notice sent to

Stevens, and he on this grounded his defence. Lord Kenyon, at Guildhall, directed a verdict for Rogers, on the ground that the drawers had no effects. On a motion for new trial, and on the rule to show cause, Stevens further stated that by want of notice he had suffered damage: for Calvert and he had dealings from which he had right to draw on Calvert, and Calvert desired him to draw on Birbeck & Blake, his agents, instead of drawing on himself; and that believing, from having no notice, that this draft was honoured, he settled accounts with Calvert, gave him credit for the payment, and delivered up goods and effects of greater value than the amount of the bill. The new trial was refused. Mr. Justice Ashurst said: 'The case being now fully established, that notice of non-acceptance of a bill of exchange to the drawer is not necessary where the drawee has no effects belonging to the drawer in his hands, every person must be supposed to know the law. And when the plaintiff found that the drawees of this bill had none of the defendant's effects in their hands, he knew that he was not bound by law to give notice of the non-acceptance. He was not bound to take cognizance of any private transactions between the drawer and a third person, which did not appear on the face of the bill.'

³ *Orr v Maginnis*, 1806, 7 East 359, where a bill was drawn by Maginnis, the captain of an African ship, on Mullier & Co., for stores furnished at Demerara. He had then effects in the hands of the drawee (to what amount did not appear); but before they had notice of the bill they paid him the balance which at settling stood on his account, and about two months afterwards the bill was presented, when they refused to accept. Afterwards it was presented for payment; but having yet no effects, the drawees refused it. The bill was noted, but not protested for non-acceptance. It was protested for non-payment. No notice of non-acceptance. Lord Ellenborough had at the trial directed a nonsuit for want of a protest for non-acceptance, and for want of notice of non-acceptance. He now, on a motion for a new trial, said 'that the case of *Bickerdike*' (see p. 450, note) 'went on the ground that the drawer had no effects in the hands of the drawee at the time of the bill drawn, and the other cases fol-

discharge the necessity of giving notice, that the drawer *might* have known of the shifting of the balance. Where he does actually know, however, that there is no balance,—as where, by an account rendered, he sees the balance against him; or where the balance, being in his favour, is paid over to him,—it would appear that notice will not be necessary.¹ And where the drawer has effects in the hands of the person drawn on, although it turns out on the balance of accounts that the debt is against him, it has been held that he is entitled to notice, as he might in these circumstances expect that his bill would be accepted.² [429] The doctrine appears to extend to all cases in which there was at the time good ground to look for acceptance.³ Where the drawer, at any time between the time of drawing and the time of the bill falling due, has effects in the drawee's hands, he is entitled to notice.⁴

3. In Scotland, recourse is not lost by the omission of protest and notice, if the person drawn on had no effects of the drawer in his hands.⁵ No case has occurred to bring out the question, which has been decided in England, as already stated above,—namely, whether the exemption from the necessity of giving notice is to be extended to the case of effects in the drawee's hands at the date of drawing, where those effects have been withdrawn before the bill is presented? But the true case for the application of the rule, that no notice is necessary where there are no effects, is that of a proper accommodation bill. Accordingly, where the bill is drawn for the accommodation of the drawer, and he is to provide for it, no notice to the drawer is requisite.⁶ Where, however, the accommodation is not for the

lowed on the same ground; but no case has gone the length of extending the exemption further to cases where the drawee had effects of the drawer in his hands at the time of the bill drawn, though the balance might vary afterwards, and be turned into the opposite scale. And I know it has been a subject of regret with the very learned person who was counsel for the plaintiffs in that case' (Lord Chancellor Eldon), 'that the old rule requiring notice to be given in all cases to the drawer of the non-acceptance of his bill was so far broken in upon. But I shall anxiously resist the further extension of the exemption. The case is different where there are no effects of the drawer in the hands of the drawee at the time, because the drawer must know that he is drawing on accommodation; but if he have effects at the time, it would be very dangerous and inconvenient, merely on account of the shifting of a balance, to hold notice not to be necessary: it would be introducing a number of collateral issues, in every case upon a bill of exchange to examine how the account stood between the drawer and drawee from the time the bill was drawn down to the time it was dishonoured.' [Sm. Merc. L. 7th ed. 258.]

¹ See Lord Ellenborough's doctrine in *Blackhan v Doren*, next note.

² *Blackhan v Doren*, 1810, 2 Camp. 503. Doren drew a bill in Jamaica on Hunter & Co. of London for £250. Acceptance was refused; and it was proved that, when the bill was presented, Hunter & Co. had produce in their hands to the amount of £1500, but that he owed them £10,000, and that they had appropriated the effects towards satisfaction of this debt. In these circumstances action was brought against Doren, as drawer, without notice or protest. Lord Ellenborough said: 'If a man draws upon a house with whom he has no account, he knows that the bill will not be accepted: he can suffer no injury from the want of notice of dishonour, and therefore he is not entitled to such notice. But the case is quite otherwise where the drawer has a fluctuating balance in the hands of the drawee. Here notice is peculiarly requisite.

Without this, how can the drawer know that credit has been refused to him, and that his bill has been dishonoured? It is said here, that the effects in the hands of the drawees were all appropriated to discharge their own debt; but that appropriation should appear by writing, and the defendant should be a party to it. I wish that notice had never been dispensed with, and then we should not have been troubled with investigating accounts between drawer and drawee. I certainly will not relax the rule still further, which I should do if I were to hold that notice was unnecessary in the present instance. Plaintiff nonsuited.

³ See *Legge v Thorpe*, 12 East 171; particularly Lord Ellenborough, 176.

In *Rucker v Hiller*, 3 Camp. 217, bills were drawn on consignments; but one cargo, against which the bill in question was drawn, was detained in Russia, and spoiled. Lord Ellenborough held notice necessary.

In *Robins v Gibson*, *ib.* 334, the bill was drawn on a cargo, the proceeds of which were expected to be with the drawer. Lord Ellenborough held notice necessary.

⁴ *Hammond v Dufresne*, 3 Camp. 145; *Thackray v Blacket*, *ib.* 164.

⁵ *M'Kenzie v Urquhart*, 1731, M. 1561; *Littlejohn v Allan*, 1746, M. 1569. See *Langley v Hog*, 1748, M. 1574. A case was decided the other way: *Hart v Glassford*, 1755, M. 1580. But it is not held to be law. See next note.

⁶ *M'Adam v M'William*, 1787, M. 1613, where M'William drew bills for his own accommodation, which were accepted, but not paid by the acceptor. No notice of the dishonour was given to the drawer, who pleaded neglect. I see from a note of Mr. Ross, Dean of Faculty, that the Court was unanimous in holding that a wind bill intended to be retired by the drawer does not require strict negotiation and notice of dishonour in order to give recourse against the drawer, and that when the drawee has no effects of the drawer in his hands, recourse lies against the drawer without notice.

This confirmed, *M'Alpine & Co.'s Crs. v Carsons*, 1792, M.

drawer's behoof, but for the use of some of the other parties on the bill (as the acceptor), the drawer has been held entitled to notice.¹

4. In accommodation bills, concerted by the parties for the purpose of aiding or [430] raising money for one of their number, the understanding is, that he for whose use the money is to be raised shall provide for the bill; and as each person engaged, with the exception of him for whose behoof they interpose, has an action or remedy in case he be made to pay the bill, he is entitled to notice.² In Scotland, as already stated, this has been extended to the drawer, who has been held entitled to notice where the accommodation was for behoof of another.³

5. But it does not appear that in Scotland this has ever been carried so far as to entitle the *acceptor* to notice, and freedom on the neglect of it. This doctrine was held in England by Lord Ellenborough, a great authority in mercantile law, who, following the principle already explained, that a draft on one who has no funds is a mandate, which, when answered, raises a debt directly against the drawer, ruled that where a bill is within the knowledge of all the parties an accommodation bill, the acceptor can only be considered as a surety for the drawer; that the case is the same as if the bill, being for a real debt, had been drawn by the acceptor, and accepted by the drawer; in which case time given to the acceptor would have discharged the drawer.⁴ But this doctrine has not been approved

1617; and *Hill v Menzies & Anderson's Crs.*, 1805, M. App. Bill of Ex. No. 13.

See the English case, *Collet v Haigh*, 3 Camp. 281.

It may be observed, however, that in the case of *M'Adam*, Lord Braxfield appears to have laid down the proposition too broadly, in holding the burden of proof to be on the drawer, for in that case the bill had already been accepted; and in these circumstances Mr. Justice Buller's doctrine seems to be correct. See above, p. 451 and note 1.

¹ *Goldsmidt & Moxon v M'Neil, Stewart, & Co.*, 26 May 1814, 17 Fac. Coll. 623. *M'Neil, Stewart, & Co.* of Glasgow drew a bill for £1037 on Hendry & Co. of London, at three months after date. It was endorsed by the drawers, and being intended for the accommodation of Hendry & Co., they discounted it; and it came by endorsement to Goldsmidt & Co., who, having neglected to give notice of dishonour, claimed against the drawers. They pleaded neglect. 'The Court laid down this principle, that, in general, every holder of a bill is bound to notify the dishonour of that bill to the drawer, and is only relieved from this necessity by proving that the bill was for the accommodation of the *drawer*. But in the present case it was clear that the bill was for behoof of the *acceptors*, who got the money for it, in which case the holders were not relieved from the necessity of due negotiation.'

² In England, the Court of King's Bench held this doctrine in *Smith v Becket*, 13 East 187, where Canning made a note for £200 in favour of Becket, who endorsed it. The note endorsed was given to Canning, who thereupon raised money with his banker. It was a note payable on demand. Canning became bankrupt, and then a demand was made on him for payment, and afterwards the banker demanded payment from the payee, who pleaded want of notice. Lord Ellenborough held notice necessary, and under his direction the plaintiff was nonsuited. A new trial was refused on two grounds:—1. That notice was necessary in this case, since the payee might have taken means of security against Canning. 2. That the banker had renewed his advance to Canning without communicating this to the payee.

This was confirmed in *Brown v Maffey*, 15 East 216, where

Whitmarsh drew a bill for £500, which was accepted by Neaves; he then endorsed it to Fiander, who endorsed it to Maffey; and so on to Woods, who discounted the bill with Brown & Co., bankers. It was a bill drawn for the accommodation of Woods. Maffey was not proved to have known the bill to be drawn without value in the hand of the person drawn on. The Court held, that as Maffey, if he had received notice, would have had his remedy against Woods, the right of action was lost for want of notice. [Sm. Merc. Law, 7th ed. 259.]

³ See above, *Goldsmidt v M'Neil, Stewart, & Co.*, note 1.

⁴ *Laxton v Peat*, 1809, 2 Campbell 185. Here Hunt drew a bill, which Peat for Hunt's accommodation accepted. Laxton having notice of the circumstances, gave money for the bill. When it fell due he got part payment from Hunt, and gave him time for the remainder, without the knowledge of Peat, the acceptor. Peat pleaded that he was discharged. Lord Ellenborough at Guildhall said: 'This being an accommodation bill within the knowledge of all the parties, the acceptor can be considered only as a surety for the drawer; and in the case of simple contracts the surety is discharged by time given without his concurrence to the principal. The case is exactly the same,' he added, 'as if the bill had been drawn by Peat, and accepted by Hunt, in consideration of a debt due.' According to many authorities, the defendant Peat, on that supposition, would have been discharged by the time given to Hunt; and the principle of these authorities applies with equal strength to the facts actually given in evidence. Plaintiff nonsuited.

Collet v Haigh, 3 Camp. 281. Dufton accepted a bill drawn by Haigh for Haigh's accommodation. It was endorsed to Collet, who, on its falling due, gave time to Dufton on his lodging some security, which turned out bad. The action was against Haigh, the drawer. Lord Ellenborough held the drawer here not to be discharged. The drawer of an accommodation bill must be considered as principal debtor, and the acceptor only in the light of a surety. The reason why notice of the dishonour of a bill must in general be given to the drawer of a bill is, that he may relieve himself by withdraw-

[431] of by other judges, as by Sir James Mansfield, Chief Justice, and Sir Vicary Gibbs in the Court of Common Pleas. They held, and the Court concurred, that the bill-holder who gives indulgence to the drawer does not thereby discharge the acceptor.¹ And on the authority of this determination, and several others, the law has been laid down, that although the holder of an accommodation bill receive a part from the drawer, and take a promise from him for payment of the rest at an enlarged time, this will not discharge the acceptor.²

II. CLAIMS ON COUNTER-ACCOMMODATIONS, OR CROSS-PAPER.—The most difficult questions which arise out of accommodation bills, are those in which, on the bankruptcy of persons who have dealt together in this traffic, there appear mutual acceptances, or cross-paper, as it is called. But this forms a part of the doctrine of ranking on insolvent estates, and will be considered afterwards in explaining the principles of ranking.

CHAPTER III.

OF MUTUAL CONTRACTS.

IN reviewing the general principles of Obligation and Contract, the constitution and great divisions of contracts have been explained. It is now necessary to consider the essence and effect of the several contracts, properly called Mutual Contracts.

But before proceeding to this, it may be proper to observe some points of doctrine applicable generally to all such contracts.

I. GENERAL EFFECT OF THE RECIPROCAL OBLIGATIONS OF THE PARTIES.—A mutual contract is the reciprocal undertaking or engagement of two or more persons, whereby something is to be given, or done, or abstained from on one side, for a valuable consideration or counter-engagement to give, or do, or abstain from something on the other; the engagement on either side being so certain and precise, that each party may be able to enforce performance.

These opposite engagements or counter-obligations are in some contracts strictly [432] reciprocal; in others they differ in point of time. Taking the contract of sale as an

ing his effects from the hands of the acceptor; and he is discharged by time being given to the acceptor without his consent, because his remedy over against the acceptor may thus be materially affected. But where the bill is accepted merely for the accommodation of the drawer, he has no effects to withdraw, and no remedy to pursue when compelled to pay. He therefore suffers no injury, either by want of notice or by time being given to the acceptor; and in an action on the bill he cannot defend himself on either of those grounds.

See also *English v Darley*, 2 Bos. and Pul. 61.

On these authorities this is laid down as law by Mr. Barnes, in his edition of Mr. Justice Bayley's Summary, pp. 92, 152. See also 1 Selwyn, N. P. 329.

¹ The doubt first appears in the case of *Kerrison v Cooke*, where Lord Chief Justice Gibbs says Lord Ellenborough's doctrine has been much doubted.

Fentum v Pocock, 1813, 5 Taunt. 192, where Lord Chief Justice Mansfield directed a verdict on the principle that giving time to the drawer is no discharge of the acceptor.

The Court confirmed this doctrine. There was a distinction between this case and those before Lord Ellenborough; namely, that in the latter the bill was from the first known to be an accommodation bill for the use of the drawer: in this case that circumstance was unknown till the bill became due. But this was disregarded, and the case decided on the general doctrine. The engagement of an acceptor was held to be such as nothing but payment or release can discharge.

See 6 Dow 237, for a remark of Lord Chancellor Eldon on this case.

² Chitty 381, 382; *Ellis v Gallindo*, Doug. 250; *Kerrison v Cooke*, *supra*; *Anderson v Cleveland*, 13 East 430, note; and cases in the above note.

Mr. Justice Bayley does not state the law so absolutely. He says Lord Ellenborough's 'doctrine has been doubted, especially if the holder when he took the bill did not know that it was an accommodation acceptance, or if it were duly presented when due to the acceptor, and he promised payment.' Bayley 167, 168.

example, the commodity and the price, reciprocally engaged for, may be exchanged with each other at completing the contract; in which case the counter-engagements are contemporaneous, and payment of the price or delivery of the subject are conditions precedent of each other. The one party cannot demand performance, or the other payment, without tendering the counterpart.¹

But instead of this, it may be settled by agreement between the parties, that for a commodity to be delivered now, a price shall be paid hereafter. Under such agreement, the delivery may be insisted for without any right on the part of the seller to hold the payment of the price as a precedent condition: equity, however, being admitted to alter this rule, where there is a change of circumstances by the intervening insolvency of the buyer; in which case the seller may insist for security before delivery.

These effects, proceeding from the reciprocal engagements of the parties, give rise to the doctrines of retention, and of stopping *in transitu*; the former of which shall be commented on hereafter, the latter having been already considered at some length.²

II. GENERAL RULES OF CONSTRUCTION OF MUTUAL CONTRACTS.—The construction or interpretation of a contract is the inference, by the act of reason, or the collecting from proper indications, of the true meaning of the parties. And the great object which the law in all cases has in contemplation, as furnishing the leading principle of the rules to be

¹ [In contracts consisting of a series of promises on the one side, given in consideration of promises on the other, it is not always the case that performance of any given stipulation on the one side is a condition precedent to the performance of a relative stipulation on the other. Sometimes two promises stand in that relation one to the other, and non-performance then disentitles the party failing from demanding performance of the counter-stipulation; but sometimes the promises stand to each other in such a relation that non-performance by the one party will not disentitle him from demanding performance of the stipulations agreed to be performed on the other side, but will only expose him to an action of damages. It is often matter of great nicety to determine whether or not the obligation of one promise is conditional on the due performance of the other, or whether they operate as mutually conditioning each other, or do not either of them operate as a condition precedent to the other—whether, as it is called, the two promises are dependent, or concurrent, or independent. The dependence, concurrence, or independence of covenants, is to be collected from the evident sense and meaning of the parties; and however transposed they may be in the deed, their precedence must depend on the order of time in which the intent and purport of the transaction requires their performance. (Per Lord Mansfield in *Jones v Barkley*, 2 Dougl. 684–90.) Where, from a consideration of the whole instrument, it is clear that the one party relied on his remedy and not upon the performance of the condition by the other, such performance is not a condition precedent. On the other hand, where it is clear that the intention was to rely on the performance of the condition, and not on the remedy, the performance is a condition precedent. (Per Jervis, C. J., in *Roberts v Brett*, 25 L. J. C. P. 280, 286.) With regard to the intent of the parties as to the relation in which one promise is meant to stand to another in this respect, the times appointed for the respective performance of the promises are generally matter of great significance. On the rules of construction, derived from consideration of the times for performing mutual promises, see *Pordage v Cole*, 1 Wms. Saunders 320, *b*, and the authorities there. *Stavers v Curling*, 3 Bingh. N. C. 355, 368; *Smith*, L. C. vol. ii.,

notes to *Cutter v Powell*. A further rule of construction as to the dependency, concurrence, or independency of mutual covenants or promises, is derived from the connection of their matter, as being *wholly*, or only *in part*, the one the consideration for the other. See *Pordage v Cole*, *supra*; *Smith*, *ubi supra*; Lord Mansfield in *Boone v Eyre*, 1 H. Bl. 273, note, cited 6 T. R. 573. See further, in illustration of both sets of *indicia* as to the parties' intention, Leake on Contracts, 344–52, and the cases there; M'Lachlan, Shipping, pp. 320–325, and cases there; *Pust v Dowie*, 34 L. J. (Ex. Ch.) Q. B. 127, 32 L. J. Q. B. 180; *Behn v Burness*, 32 L. J. (Ex. Ch.) Q. B. 204; *Tidey v Mollet*, 33 L. J. C. P. 235; *Parsons on Contr.* ii. pp. 525–29, and 676–7. It is entirely a question of intention whether performance of any given promise is to be held to be dependent on, concurrent with, or independent of the performance of another on the other side. No precise words are requisite to express such intention: perhaps it may almost be said that no words, however formal, will constitute one promise a condition precedent of another, if it be obvious from the whole reason and sense of the subject-matter that this was not the intention of the parties. Certainly the parties may intend that the one side shall literally and completely fulfil some part of the contract before the other side shall be bound to do anything; and if they make that clear and indubitable, it must have effect, although the consequence may be that the party who has failed in the literal performance of his part may have incurred much expense and conferred much benefit on the other side by a partial performance without receiving any recompense. But where the whole agreement is such as to show that the non-performance of a part may still leave the other side benefited by the performance of the rest, parties must express their intention very clearly indeed, if they mean partial default by the one party, not merely to give the other party an action for special damage therefrom, but to absolve him from his own engagements, and so to operate as a forfeiture by the partial defaulter of the right to recompense for the benefit conferred by his performance of the rest of his obligations. (See *Blackburn, Sale*, pp. 311–5.)]

² See above, p. 223.

observed, is, that justice is to be done between the parties, by enforcing the performance of their agreement, according to the sense in which it was mutually understood and relied upon at the time of making it. Where the contract is in writing, the difficulty lies only in the construction of the words; where it is to be made out by parole testimony, that difficulty is augmented by the possible mistakes of the witnesses as to the words used by the parties.¹

1. Where words are of precise and unambiguous meaning, leading to no absurdity, that meaning is to be taken as conveying the true intention of the parties. But should there be manifest absurdity in the application of such meaning to the particular occasion, this will let in construction for discovering the true intention. And so, 1. If the words are manifestly inconsistent with the declared purpose and object of the contract, they will be rejected;² as if, in a contract of sale, the price of the thing sold should be acknowledged as received, while the obligation was *not* to deliver the commodity.³ So where one is made in the deed to bind 'his heirs,' instead of binding himself and his heirs, the meaning of the words, though intelligible enough, being inconsistent with the nature of the agreement, it is rejected as imperfect, and the obvious meaning of the parties adopted.⁴ 2. If words be omitted so as to defeat the effect of the contract, they will be supplied by the obvious sense and inference from the context.⁵ 3. If the words, taken in one sense, go to defeat the contract, while they are susceptible of another construction which will give effect to the design of the parties, and not destroy it, the latter will be preferred.⁶

[433] 2. The plain, ordinary, and popular sense of the words is to be preferred to the more unusual, etymological, and recondite meaning; or even to the literal and strictly grammatical construction of the words, where these last would lead to any inefficacy or inconsistency.

3. Where a peculiar meaning has been stamped upon words by the usage of that particular trade or place in which the contract occurs, such technical or peculiar meaning will prevail.⁷ It is as if the parties, in framing their contract, had made use of a foreign language, which the Court is not bound to understand, but which, on evidence of its import, must be applied.⁸ But the expression so made technical and appropriate, and the usage by

¹ On the rules for the Interpretation of Contracts, see. Parsons on Contracts, pp. 491-566, and the ample illustrations in the notes there.

² In conventionibus, contrahentium voluntatem potius quam verba spectari placuit. Dig. Lib. 50, tit. 16; De Verb. Sign. l. 219.

³ *Tenison v Vaughan*, before Lord Hardwicke, 2 Atk. Rep. 32.

⁴ *Lord Justice-Clerk v Hamilton*, 1708, M. 4981.

⁵ Verba debent intelligi cum effectu ut res magis valeat quam pereat.

Cochran v Bryson, 1713, M. 11627. Here an action for £238 was grounded on a bond in which the obligation was for '238 Scots, with 50 pounds of penalty and annualrent.' According to the tenor of the bond it was good for nothing. But the context and the penalty indicated clearly that the word 'pounds' was omitted, and the bond was held good to sustain action for £238.

⁶ On this principle there is an admirable judgment of Lord Mansfield's in the case of *Pugh v D. of Leeds*, Cowper 714, where the question of construction arose upon a lease in exercise of a power which permitted a lease in *possession*, but not in *reversion*; and the difficulty turned on the expression in the lease, to hold '*from* the day of the date of the indenture.' Whether this was *inclusive* of the day, which would make a valid lease in *possession*; or *exclusive*, which would

destroy it as a lease in *reversion*? The conclusion of Lord Mansfield's argument is this: 'The ground of the opinion and judgment which I now deliver is, that "*from*" may, in the vulgar use, and even in strict propriety of language, mean either inclusive or exclusive; that the parties necessarily understood and used it in that sense which made their deed effectual; that courts of justice are to construe the words of parties so as to effectuate their deeds, and not to destroy them, more especially where the words themselves may admit of either meaning.'

⁷ In policies of insurance a peculiar meaning has been fixed by usage on certain expressions; and Lord Ellenborough laid down the rule thus: 'The same rule of construction which applies to all other instruments applies equally to this,—viz. that it is to be construed according to its sense and meaning, as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary, and popular sense, unless they have generally, in respect to the subject-matter, as by the known usage of trade or the like, acquired a peculiar sense distinct from the popular sense of the same words, or unless the context evidently points out that they must, in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense.'

Robertson v French, 1803, 4 East 135 et seq.

⁸ As where the practice is to compress bales of cotton by

which it has become so, must be so clear that the Court cannot entertain a doubt upon the subject.¹ Technical words are to be taken according to their approved and known use in the trade in which the contract is entered into, or to which it relates, unless they have manifestly been understood by the parties in another sense.

4. In construing a contract, the place in which it was made, or in which it is stipulated to be performed, is a most material consideration.² So lawful interest, in a foreign deed, is construed to be the interest of the country where the obligation is contracted, or where it is to be enforced, if that be different.³

5. Previous or contemporaneous conversations or communings, and all that passes in the course of correspondence or negotiation leading to the contract, are entirely superseded by a written agreement. The parties having agreed to reduce the terms of their contract to writing, the document is constituted as the only true and final exposition of their admissions and intentions. It is the only instrument of evidence which law will recognise as the interpreter of their intentions; and nothing which does not appear in the written agreement will be considered as a part of the contract.⁴ This is a rule so well established [434] in Scotland, that, although daily admitted and stated from the bench, there is not any distinct authority to which reference can be made.⁵ But this rule admits of this exception, that where there has been anything stated in the way of inducement or representation in the previous communings or correspondence, and by fraud or collusion the correct truth has been concealed, evidence of this may be admitted.⁶

6. All contracts made in general terms, in the ordinary course of trade, are presumed to incorporate the usage and custom of the trade to which they relate. The presumption is, that the parties know such usages, and do not intend to exclude them. But where there is a special stipulation in opposition to or inconsistent with the custom, that will prevail.⁷

7. Where there is an ambiguity which impedes the execution of the contract, it is first,

machinery to improve their stowage, a contract to load a full and complete cargo of cotton implies that it shall not be stowed in uncompressed bags. *Benson v Schneider*, 7 Taunt. 272.

So, a purchase of scarlet cuttings for the Chinese market means without serge, etc. *Bridge v Wain*, 1816, 1 Starkie 504.

¹ Lord Eldon's observations on the limits to which the admission of a technical and peculiar meaning should be restrained are extremely important, as delivered in *Anderson v Pitcher*, 1800, 2 Bos. and Pul. 164; also 3 Starkie on Evidence, p. 1036.

See the case of *Cutter v Powell*, 6 Term. Rep. 320, with respect to an admission of evidence of usage to explain and authorize mercantile contracts.

² See *D. of Fitzjames'* case, 1 Bos. and Pul. 141.

³ *Wilkinson v Monies*, 1821, 1 S. 89, N. E. 91.

⁴ This rule is held in England on the broad ground so well stated by Lord Coke: 'It would be inconvenient that matters in writing, made by advice and on consideration, and which finally import the certain truth of the agreement of the parties, should be controlled by an averment of the parties, to be proved by the uncertain testimony of slippery memory; and it would be dangerous to purchasers, and all others in such cases, if such wide averments against matter in writing should be admitted.' 5 Coke's Rep. 26. In a modern case the rule is thus laid down by Lord Chief Justice Abbot: 'Where the whole matter passes in parole, all that passes may sometimes be taken together as forming parcel of the contract, though not always, because matter talked of at the commencement

of a bargain may be excluded by the language used at its termination. But if the contract be in the end reduced to writing, nothing which is not found in the writing can be considered as a part of the contract.' 2 Barn. and Cress. 634. See also *Pickering v Dowson*, 4 Taunt. 779.

⁵ See *Gordon v Hughes*, 1815, Fac. Coll. See also *Millers v Miller*, 1 Sh. App. Ca. 317. See next note.

⁶ So in the case above cited (note 4), the Chief Justice proceeds to say: 'A matter antecedent to and *dehors* the writing, may in some cases be received in evidence, as showing the inducement to the contract; such as a representation of some particular quality or incident to the thing sold. But the buyer is not at liberty to show such a representation, unless he can also show that the seller by some fraud prevented him from discovering a fault which he, the seller, knew to exist.'

See *White v Ballantyne*, H. L., 1 Sh. App. Ca. 472.

⁷ *Yeats v Pim*, 1815, Holt 95, 2 Marsh 141; *Horne v Redpath*, 1824, 2 Shaw and Dunlop 791, N. E. 654, where local usage of the north, in selling fish, to use Dutch weight was admitted to rule the contract.

See *Gordon v Robertson*, 1 Wils. and S. 115, 135.

[Evidence of custom or usage is only admissible to annex incidents or give a peculiar construction to a contract where the parties are to be taken as cognizant of the custom, and not otherwise. *Kirchner v Venus*, 12 Moore, P. C. 361-399. On the whole subject of usage, see Leake, Contr. pp. 110-119; Duer on Insurance, i. 250-80; Parsons' Contr. ii. 535-47; Dickson, Ev. vol. i. 171-7.]

if possible, to be resolved, on a review of the whole contract or instrument, aided by the admitted views of the parties; and if indispensable, parole evidence may be let in to clear it, consistently with the words.

8. If the words cannot be reconciled with any practicable or consistent interpretation, they are held as not made use of *perinde sunt ac si scripta non essent*.

SECTION I.

OF THE CONTRACT OF SALE.¹

SALE is distinguishable from BARTER or EXCHANGE, as being a contract for transferring property in consideration of a price in money, while the other is a contract for the exchange of two subjects or commodities. In the vulgar use of the word, Sale is understood to imply the transference of the commodity, and with this the legal meaning in England accords. But in the law of Scotland, sale is only a contract for transferring, not in itself a transference. [435] It is the *titulus transferendi domini*: the *modus*, by which the transfer is accomplished, is tradition.

The completion of the transfer by tradition, in so far as a question may arise relative to the property of the thing sold, has already been considered.² In this place, sale is to be viewed merely as a contract on which claims may arise to the parties as personal creditors of each other.

SUBSECTION I.—GENERAL PRINCIPLES RELATIVE TO SALE.

Under this head may be considered, 1. The constitution of the contract of sale; 2. The completion of the contract; 3. The conditions implied in it; and, 4. The effect of insolvency.

I. CONSTITUTION OF THE CONTRACT OF SALE.—Sale is a consensual contract, completed by consent alone.³ And this consent may be proved by writing; or by parole evidence, where the parties have not previously settled that the contract shall be in writing,⁴ or where the law has not required, as in the case of land or of ships,⁵ that there shall be a written contract to transfer.

The contract may be concluded between the principals, or by a broker or brokers acting for them.

1. The parties themselves complete their contract on the principles already pointed out.⁶ It may further be observed, however, relative to the constitution of sale by offer and acceptance, that although it is an implied condition of a mercantile offer that it shall be accepted at the time specified, and especially where an answer is required in course, yet if any delay has been occasioned by the offerer,⁷ he will not be freed by mere expiration of the time, taken as in reference to his original offer.⁸

¹ Since the former edition of this book, a very elaborate Treatise on the Contract of Sale has been published by M. P. Brown, Esq., advocate. In that work will be found all the learning on the subject which can be usefully applied in questions on this contract, with a discussion, at all times acute, though occasionally too minute and detailed, on the doctrines of sale in the Roman law and law of England, as well as in the Scottish law; and there are throughout the work many valuable disquisitions and distinctions relative to the analogies of English law, as fit to be applied or rejected in Scottish practice.

² [To that subject belongs the consideration of the changes made on the law of sale by the first four sections of the Act 19 and 20 Vict. c. 60.]

³ Stair i. 14. 1; Ersk. iii. 3. 2.

⁴ Ersk. iii. 2. 4.

⁵ Above, p. 155.

⁶ See above, p. 313 et seq.; and p. 343, as to offer and acceptance.

⁷ [Or by casualties at the post office delaying the arrival of the letter of acceptance. *Dunlop v Higgins*, 1 H. L. Ca. 381, 6 Bell 195; *Duncan v Topham*, 8 C. B. 225. The principle, as laid down in *Thomson v James*, 1855, 18 D. 1, is that, where the offer is made by post, the acceptance is invited by the same medium; and the posting of the acceptance completes the contract, because that was what the offeree was expected to do, and all he could do, through that medium. That is, however, if the acceptance ultimately comes to hand. If it never do, after being posted—as if the mail were lost—there would, it seems, be no contract.]

⁸ *Adams v Lindsell*, 1818, 1 Barn. and Ald. 681, where the

2. In the great emporiums of trade, the negotiation of sales is chiefly carried on by **BROKERS**. They have no concern with the custody of the goods, but merely settle the terms of the sale between the parties.¹

Where a broker is authorized by one man to sell, and by another to buy, an entry made in his book of a sale of the goods so authorized to be bought and sold is a contract binding between the parties, when communicated to them by the broker giving to each a note of the bargain, called a **BOUGHT AND SOLD NOTE**. In one case it was questioned whether the broker had any more than authority to propose the terms, leaving to the parties a power of dissent, provided it was immediately exercised. It was ruled by Lord Ellenborough, that after the broker has entered the contract in his book, neither party can recede from it; that he is the agent for both parties; and that they are equally bound by his entry of the bargain, as if they had themselves signed the entry in the broker's book.² But this doctrine has since been so far qualified, that the bought and sold notes sent to the parties have been held to be the constitution of the bargain; so that if there be any incongruity between the notes sent, there is no bargain.³

It is⁴ an understood condition in such transactions, that if the name of the [436] purchaser has not been communicated, the seller shall have a negative on the sale, where the price is not in ready money, but on credit; provided he intimate his rejection as soon as he has time to inquire into the buyer's solvency.⁵ But this rule does not extend to the case of a factor, whose power is held to be absolute to sell on credit.⁶

If the broker, in communicating the names of the parties to each other, or in any other respect, has made an innocent mistake, which can involve no important consequences to the parties, it will not furnish a ground for departing from the contract. Although, therefore, a broker should send to the seller a sale-note of a bargain on credit with A and Co., when truly the contract was made with A, B, and Co., the seller might object; yet it would not appear that he could so object if the bargain were for cash. The buyer seems entitled, as well as the seller, to object on account of the person with whom the contract is formed, where the sale is on credit, as a man may have insuperable objections to become the debtor of a particular person. The more correct way, perhaps, would be to make an exception

offer was wrong addressed, and so delayed in reaching its destination. Acceptance in course from the time of arrival was held to bind the offerer, although on the day he had expected the answer he had sold the goods to another.

¹ See afterwards, the distinction between brokers and factors.

² *Heyman v Neale*, 2 Camp. 337.

³ *Cumming v Roebuck*. Cumming having bought at the East India sales 140 bags of coffee, resold by his broker 120 bags to Roebuck. It appeared that the bought and sold notes differed, on which an objection was taken by Roebuck's counsel against Cumming's action, and Lord Chief Justice Gibbs directed a nonsuit. 'If the broker,' said he, 'delivered a different note of the contract to each party contracting, there is no valid contract. There is, I believe, a case,' he continued, 'which states the entry in the broker's book to be the original contract, but it has since been contradicted. Each is bound by the note which the broker delivers; and if different notes are given to the parties, neither can understand the other.' *Holt's Cases*, 170.

⁴ [In London, at least by usage of trade, not by force of common law. Probably proof of usage to this effect would be required even in London. *Benjamin on Sale*, 210.]

⁵ *Hodgson v Davies*, 2 Camp. 530. In this case Davies sold to Hodgson by a broker 40 hhds. of tobacco, 20 by bill at two

months, and 20 by bill at four months. The broker, having the usual authority, wrote out the bought and sold notes, and sent a copy to each. Five days afterwards Davies disapproved of the sufficiency of Hodgson, and pleaded that he had not ratified the contract. A proof of usage was offered. Lord Ellenborough was at first inclined to hold the contract as concluded by the broker, and absolute, unless his authority was limited by writing, of which the buyer had notice. But the gentlemen of the special jury said, that unless the name of the purchaser was previously communicated to the seller, if the payment is to be by bill, the seller is always understood to reserve to himself the power of disapproving of the sufficiency of the purchaser, and annulling the contract. Lord Ellenborough allowed that this usage was reasonable and valid. But he clearly thought that the rejection must be intimated as soon as the seller had had time to inquire into the solvency of the purchaser. Five days seemed to him a longer period than the exigencies of commerce would permit. However, he left it to the jury to say whether it was according to the usual commercial practice to reject a contract so long after it had been entered into. The jury, without any hesitation, found for the plaintiff.

⁶ So laid down by Mr. Justice Chambre in *Houghton v Matthews*, 3 Bos. and Pull. 489.

in granting powers to the broker. But though this be not done, the power of objection will remain.¹

II. COMPLETION OF THE CONTRACT.—This, in many questions, is a very important point. The general rule is, that final and conclusive consent completes the con-

¹ In *Mitchell v Lapage*, Holt's N. P. Cases 254, this doctrine was sanctioned by Lord Chief Justice Gibbs, though the example of inconvenience stated seems rather questionable. The sale-note sent to the buyer bore Tod, Mitchell, & Co. as the sellers; but the firm had been dissolved, and new persons were in the company. It was at the trial objected that the bought and sold notes were in the name of the old firm, and that the defendant had a right to settle with whom he was to deal. This was assented to by the Chief Justice, to the extent that the buyer 'cannot be prejudiced by the substitution. If the defendant could show any inconvenience which he has sustained by the inaccuracy of the broker, it might be an answer to the present action. Metcalf, the broker, has misdescribed the names of his principals; and if by this mistake the defendant was induced to think that he had entered into a contract with one set of men and not with another, and if, owing to the broker, he has been prejudiced or excluded from a set-off, it would be a good defence.'

[The reader will keep in view that the English cases as to the completion of the contract of sale through brokers turn mainly on the 17th section of the Statute of Frauds, which provides that 'no contract for the sale of any goods, wares, or merchandises, for the price of £10 or upwards, shall be allowed to be good except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.' The London brokers have been from the earliest times subject to the control of the corporation, whose regulations bind them under the Acts 6 Anne, c. 16, 10 Anne, c. 19, and 56 Geo. III. c. 60; and they are required to take an oath and give a bond. See Russell on Factors and Brokers. Elsewhere brokers are absolutely free. The decisions as to the effect of brokers' bought and sold notes, entries in brokers' books, and so forth, seem frequently to turn on the local customs of London. See the cases fully commented on in Blackburn, Sale, pp. 81–119; and Benjamin on Sale, pp. 191–212; and correct, by the authorities in the latter, the statements in the text that the bought and sold notes, where there is a signed entry in the book, constitute the contract so as to leave it no bargain if they vary. If there is no signed entry, and they agree, they are good evidence within the Statute of Frauds; but if there is a signed entry, that is binding on both, and constitutes the contract, however the notes vary. To us, who are not bound by the Statute of Frauds, these decisions are not of direct importance. Where, with us, the broker has no absolute power to buy or sell without reference to his principals, or one of them; where, in short, he is a mere *internuntius* proposing terms and conducting the negotiation, but with a power of dissent in the parties, the sending of a bought note to the one, and a sold note in the same terms to the other, not *debito tempore* rejected by either, will complete the contract as being evidence of *consensus ad idem* on the part of both principals. But this is not the function of the broker in

England. The contract is completed, not by the assent of the principals communicated through the broker, but by the definitive will and resolution of the broker as agent for the buyer and the seller respectively, that the goods shall be sold by the one and bought by the other; and the proper written evidence of this is his book, signed by him, in accordance with the Statute of Frauds, as the authorized agent of the buyer to buy, and of the seller to sell. Supposing that with us a broker had an absolute commission to buy for one man, and an absolute commission to sell for another, either at discretion or at a given price, there seems no doubt that in strict principle a contract would be completed between them by his *enixa voluntas* alone, without any writing on his part, and before any communication to his principals of the bargain he meant to cause pass between them, so that neither party could recede. But it is plain there would be an inconvenience in leaving the proof of this *enixa voluntas*, and of the exact time at which it was exerted, if any question should afterwards arise (and an hour or two may, in case of a loss by fire or fall of markets, make all the difference to the parties), to the mere testimony of the broker as agent for each, unsupported by any overt act on his part evidencing the definitive act passing within his own mind, which in theory completes the contract. There may be custom also by which the completion of the contract shall be held suspended until the performance by the broker of some overt act of this kind which shall give external form and expression to, and ascertain the exact time of, his internal resolution to complete the contract; and the peculiarity of the case would almost of itself suggest a condition precedent of this kind as suspensive of the contract. But, apart from custom, it is rather a question as to what shall be sufficient evidence of the time and terms of the definitive act of the broker's will, than as to what is necessary to constitute the contract; and all that can be said is, that we are not tied up by law, apart from custom, to writing by the broker as the exclusive evidence of this act. Where bought and sold notes are sent, an important difference may arise according to the form the broker uses. There are three forms: one where the broker expresses the names of the buyer and seller as 'Bought for A B from C D,' 'Sold for C D to A B;' another, where the notes, while showing that the broker acts as such, do not disclose to either who the other principal is,—the note to the vendor being, 'Sold for C D,' and that to the vendee, 'Bought for A B;' and a third form, where the broker, on the face of the note, states himself as principal, though he is really only an agent, as where the note to the buyer, instead of 'Bought for you, A B,' bears 'Sold to you, A B, by me, E F.' By this form of note the broker assumes the obligation of a principal, and cannot escape responsibility by parole proof that he was only acting as broker for another, although the party to whom he gives such a note may show there was an unnamed principal, and make this principal responsible. (Benj. pp. 193, 164–5; Blackburn, p. 92; *Higgins v Senior*, 8 M. and W. 444.) As to the other consequences of the broker's assuming the apparent position of a principal, see Sec. 3 (Of Mercantile Agents, etc.).]

tract.¹ But it may be observed, 1. That the conclusive consent is indicated in different cases by very different proofs. So, where it is *pars contractus*, or required by law, that writing shall pass between the parties to bind them, the writing alone indicates the final consent. 2. That the completion of the contract may take place to one effect, though not to another. So, the final engagement to sell 500 quarters of wheat will bind the seller, though not to the effect of altering the risk, the commodity not being specific and identified. 3. That the contract may be of the nature called executory in England, binding from the first, but the effect of the contract depending on a future act or event. While the contract is completed by consent alone, it is necessarily implied in the very nature of sale, that the parties shall be at one in respect to the price and to the subject.

PRICE.—The price, not elusory,² must be certain, or ascertainable by reference to some criterion by which it may be fixed. The maxim in the latter case is, *Certum est quod certum reddi potest*. A reference to the fair prices of grain is enough,³ or to the market prices on a particular day;⁴ a reference to the award of a third person, and even a reference to one of the parties themselves, is effectual.⁵

SUBJECT.—1. If the subject is specific and certain in all respects, and the price fixed, the contract is complete the moment that the parties have expressed their full consent to the sale.⁶

¹ The language used by Mr. Brown is not strictly correct as applied to the law of Scotland, although perhaps it is more so in English law. He says, that 'although the general rule be that sale is perfected by sole consent, yet this proposition is subject to certain exceptions and qualifications.' He then proceeds to state, as exceptions, the sale of commodities by weight, number, or measure; the sale of immoveable property, or ships; and sales of which it is *pars contractus* that the agreement shall be reduced to writing. Brown on Sale, p. 32. These are not exceptions to the rule as to the completion of the contract, though in English law they are correctly exceptions to the transmutation of property. The sale of commodities by weight, etc., is complete by consent alone, though the risk is not altered, nor a particular commodity transferred; and the suspension of the contract in the other cases is only till consent shall be indicated by those conclusive proofs to identify the commodity which law or convention has made necessary.

² Ersk. iii. 3. 4.

³ *Treasurer of Aberdeen v Gordon*, 1760, M. 4415.

⁴ In commodities of which the price is accurately fixed by the market, perhaps a reference to that price is to be implied where the price is not otherwise fixed. So it was held in *Leslie v Miller*, 1714, M. 14197. [*Acebal v Levy*, 10 Bing. 382; *Hoadley v M'Lane*, 10 Bing. 482. See *Malloch v Hodgton*, 1849, 12 D. 215, as to the effect of a remission of duty where goods are sold under reference to the market price. Where the parties differ as to the price in consequence of a misunderstanding as to the agreement, and the goods cannot be restored, the rule is that the purchaser must pay the market price. *Wilson v M. of Breadalbane*, 1859, 21 D. 957. As to discount, see *Cumming v Hendrie*, 1861, 23 D. 1365.]

⁵ *E. of Montrose v Scott*, 1639, M. 14155, where the price of land referred to the buyer was fixed by him and held binding.

But such award is subject to question if unfairly made. *Stair* i. 14. 1; Ersk. iii. 3. 4. See 2 Noodt 388. *Graham v Graham*, H. L., 1 Sh. App. Ca. 365.

⁶ Dig. lib. 18, tit. 6; De Peric. et Comm. Rei venditæ, l. 8.

[Our law is not quite settled as to several points of the doctrine of *periculum rei venditæ*; nor does the usual question whether the contract is 'complete' suggest any fruitful principle for settling them, as it really just means in this connection, *Has the risk passed?* It is, e.g., probably not certain that it is not too absolute a proposition to affirm that in no case can the risk pass unless the subject be precisely identified as that to which the contract attaches, and of which the risk passes. If one buy ten sheep out of a flock, and before the ten are separated and identified ten of the flock die, it is impossible to hold that the risk of those ten was the buyer's. That, however, cannot be because the contract of sale is not complete, for no engagement at all can arise from an incomplete contract; and, as the author correctly lays it down, the seller is bound effectually before the identification takes place to separate and deliver, and the buyer to pay. See also Poth. Vente, sec. 309, who says that before the measuring, the weighing, the counting, and from the instant of the contract, the engagements which arise from it are in existence. The meaning of holding that the risk of the ten sheep that died had not passed to the buyer is just this, that while by the completion of the contract the seller's obligation to deliver ten sheep is perfect, there is no ground on which he can be allowed to plead that, owing to the *damnum fatale*, he cannot fulfil it; because even though the selection would, before the event, have lain with him, it would be impossible to permit him after the event to make a selection of those ten as the very sheep he had in his mind destined for delivery to the buyer. But this reason does not apply if, even before identification of the ten sold, not only ten out of the flock, but the whole flock, perish by accident. There it is certain, on the one hand, that the buyer meant to deliver ten sheep out of that flock; and although it never was ascertained which ten he meant to deliver, it is certain, on the other hand, that whichever possible ten he had chosen or might have chosen, the *damnum fatale* which has befallen him must have prevented him from implementing his obligation from no fault of his, and his obligation is without doubt extinguished, though the buyer's obligation to pay is not: the result being, in other words,

2. If the subject be not specific, but consist in quantity or number, the sale, to certain effects, may be complete before the identification takes place. The seller may be constrained to fulfil his obligation of separating and delivering the quantity; the buyer may be forced to pay on the quantity being ascertained. But although the contract of sale be completed, it will not change the risk, if the subject to which the risk and the obligations of the parties

that the *periculum* had passed to the buyer, though the particular ten had not been identified. The correctness of this analysis of the *periculum rei venditæ* into the ultimate principle, that the vendor is liberated from his obligation wherever it is certain that the subject of it has perished by *damnum fatale*, is confirmed by Pothier (Vente, No. 307). And if this be the true principle, it is also clear that the obligation to deliver perishes by the extinction of the *corpus*, not only where it is a debt of a thing certain and determinate, or individualized, but also where the obligation is not absolutely indeterminate, but is a debt of a thing not indeed actually individualized, but which forms part of a definite collection of *corpora*, all of which perish. 'For example,' says Pothier (Oblig. No. 623), 'if any one owes me a tun of the wine which he has in such a house, and there be a hundred of them in that house, so long as there remains any of them, his obligation will subsist; but if there remains of them not one, as if an inundation has carried the whole away, the obligation will be extinct.' The same thing holds in the case of an alternative obligation. If one only of two things, one or other of which is to be delivered at the option of the vendor, perishes, his obligation becomes determined to the one that remains; but if both perish, even while there was as yet no election to appropriate the one or the other to the vendor's obligation, the obligation perishes, because, whichever might have been selected, the obligation to deliver it has become imprestable. (Pothier, Oblig. Nos. 248-253, 621-623; Vente, No. 312.) It would appear, then, that it is perhaps not strictly correct to say that in no case will the risk be held to have passed to the vendee unless the precise *corpus* to which the contract applies has been individualized or identified as the very subject of the contract: it appears to be sufficient, in order to lay the loss arising by a fortuitous peril on the vendee, if the vendor can show that, whatever uncertainty there may have been about the individual subject of the obligation, it was at least *so far determined, with reference to the peril that has happened*, that his obligation to deliver it has indubitably perished by that peril. While an obligation to deliver ten sheep out of a flock which is determined still remains *in dubio* with respect to the particular sheep to which the vendor or vendee—whoever may have the selection—shall ultimately appropriate the obligation, it is really very much like an alternative obligation to deliver one or other of all the possible combinations of ten that can be made up out of that flock; and the general rules as to risk, or, in other words, as to the extinction of the debtor's obligation applicable to alternative sales, apply to it while things are in this state. Looking, again, at the question of the vendee's risk from the point of view that it is just another mode of expressing the extinction *damno fatali* of the seller's obligation to deliver, while the buyer's obligation to pay the price remains,—the true ground is disclosed upon which—where a whole quantity, say of wheat, which has been sold out, which lies separate in a particular place, but of which the precise extent is not known, perishes by *damnum fatale*—

we are justified in drawing the distinction as to risk drawn by the Roman law and by Mr. Bell, as to whether it has been 'all sold for a fixed price for the whole'—a slump price for the lot—or whether 'the price depends on the weight or measurement, and the exact quantity and price has not been ascertained.' If the things perish before measurement, the vendor's obligation is indeed alike extinguished in either case, and no distinction as to risk can arise from the vendor's obligation in these cases; but the difference lies in the fact, that in the latter case, but not in the former, the amount of the vendee's obligation for the price has not been, and never can be liquidated, or at least not by the method contemplated by the contract; and therefore the vendee cannot in the latter case be subjected to payment, *i.e.* he escapes the loss. Dig. Lib. 18, tit. 1 (De Contr. Empt.), l. 35, secs. 5, 6. But, on the contrary, it would seem that where the vendor's obligation to deliver can, on the one hand, be shown to have perished *damno fatali*, either by the destruction of a particular *corpus* to which it was appropriated, or by the total destruction of a whole number of *corpora*, to one or other of which alternatively it applied; and, on the other hand, the amount of the vendee's obligation to pay (which is not destroyed by the mere extinction of the vendor's to deliver) is ascertained, or is still ascertainable, in the mode prescribed by the contract,—there the *periculum* will be held to have passed, quite irrespective of anything remaining at the time of the accident to be done to the goods by either party, for whatever purpose it may have been required, provided that its not having been done does not leave either of the two points just mentioned in doubt. Of course it is assumed throughout these observations that there has been no *mora*, or any of the other specialties which sometimes interfere with the ordinary rule as to risk; as to which, see Brown, Sale, No. 511 et seq. If the not doing of the thing remaining to be done has amounted to *mora* on the vendor's part, retarding delivery, that will prevent the operation of the principle that his obligation to deliver perishes by the destruction *damno fatali* of the subject to be delivered. (Pothier, Oblig. secs. 624-635.) But if there is no *mora*, the fact of any such operation remaining to be done to put the thing into deliverable condition (on which, as a criterion quite independent of any *mora* involved in it, many of the English cases turn) is of no consequence, because it neither prevents the extinction of the vendor's obligation, nor the ascertainment of the amount due under the subsisting obligation of the vendee. See *Hansen v Craig & Rose*, 1859, 21 D. 432. In reference to the observations made regarding the risk being with the vendee where the subject sold forms an unseparated portion of a number, to one or other of which the seller's obligation applies, see a case of *Wellard v Perkins*, given in Parsons on Contr. i. 533, note (z), where, the contract being executory, there was no room for the ordinary principle of English law, that the risk passes with the general property to the vendee, and yet the vendee was held liable, on principles apparently similar to those of our law, for the loss of an unidentified

are to attach be not identified; as where the price depends on the weight or measurement, and the exact quantity and price has not been ascertained.¹ The risk may be changed even of a fungible, where it is either specifically separated and distinguished; or where it lies in a particular place, and (although the precise extent is not known) is all sold at a fixed price for the whole.

3. Where the commodity is sold with reference to the taste, or any other criterion, [438] the sale is not complete till the goods have undergone that test.²

4. Where the sale is executory, referring to some future act or event, its efficacy depends on that event; and it is either a conditional sale, or a combination of the contract of sale with that of *locatio operarum*. Of the former, the sale of goods to be imported is an example;³ of the latter, the sale of goods to be manufactured, as a ship or chariot to be built.⁴

III. CONDITIONS IMPLIED OR EXPRESS.—The constitution or the annulling of a sale may depend on a compliance with certain conditions in the nature and state of the commodity, or in the time and manner of the delivery, or in the mode of payment. These conditions may be implied or express.

IMPLIED CONDITIONS.—Of these conditions it is important to mark the rules with the exceptions. 1. As it is an essential condition in every sale, that the subject of it shall be sound and fit for the implied or avowed use intended, the buyer will be quit of the bargain (where he has not previously inspected or had an opportunity of inspecting the commodity) if this condition be not fulfilled; and this however innocent the seller may be, or however ignorant of the defect.⁵ So, if goods be commissioned to be sent abroad, and they are found not to correspond with the description in the order, or (where no special description is given) with that of merchantable goods, they may be returned, or damages recovered.⁶ And, 2. The commodity must be fit for the particular purpose specified by the buyer; and if it be found on examination not to be so, it may be rejected and damages claimed, or, if used before the defect is discovered, an abatement may be demanded in the price.⁷ Thus, ale bought for a warm climate must be prepared so as to endure the heat of that climate;⁸ and

portion of a determinate lot of rosin, the whole of which was destroyed by fire. Lastly, it may be suggested that though, where the contract is not complete (in the sense of there being no final engagement between the parties), there can be no passing of risk, the 'completion' of the contract had better not be mixed up with the passing of the risk, as in one sense, i.e. where it merely denotes final engagement, it is not a criterion of risk; and in the other sense, it is just equivalent to saying that the contract is complete so as to pass the risk, and contains no principle—is just, in fact, *idem per idem*.]

¹ Dig. lib. 18, tit. 1, De Contra. Empt. l. 35, sec. 5.

In *Zagury v Furnell*, 2 Camp. 240, a purchase was made of 289 bales of goatskins from Mogadore, containing five dozen in each bale, at 57s. 6d. per dozen. It appeared that, by the usage of trade, the seller of goatskins thus by bales counts them over, that it may be seen whether each bale contains the number specified. But before they were so counted, a fire at the wharf destroyed them all. Lord Ellenborough held, that as an act remained to be done when the fire happened, there was no complete transfer, and the skins were at the seller's risk. The number of skins actually contained in the 289 bales being uncertain, the plaintiff had failed to show that he was authorized by the terms of the contract to draw the bills which the buyer had refused to accept. The same case was contrived to be tried in Common Pleas also, when Mansfield, Ch. J., held the same doctrine. 2 Camp. 242, note.

[If the counting over or measurement be merely to satisfy the

buyer that the quantity is correct, the rule stated in the text will not apply, even according to the law of England. *Swanwick v Sothorn*, 9 Ad. and El. 900; Add. on Cont. 6th ed. 178.]

² [Pothier, Vente, No. 310.]

³ See below, p. 466.

⁴ See above, p. 193.

⁵ *Stair* i. 9. 10, 11; *Ersk.* iii. 3. 10. *Balston v Robb*, 1808, M. App. Sale, No. 6. [As to proper warrantice, or warranty of title, in sales of goods, see *Swan v Martin*, 1865, 3 Macph. 851.]

⁶ *Gardiner v Gray*, 4 Camp. 144. Assumpsit on a sale of waste silk to be landed from the Continent, found on arrival to be unsaleable. Held by Lord Ellenborough, and verdict accordingly, that the purchaser was entitled to a saleable article as an implied warranty in the sale.

Laing v Fidgeon, 1815, 6 Taunt. 108. There was an order for saddles for exportation. On arrival abroad they were found unsaleable without being restuffed and relined. Buyer had a verdict under Lord Chief Justice Gibbs' direction (4 Camp. 169); and this confirmed, though it was objected that the price was so low that a well-conditioned article could not be expected. [*Whealer v Methven*, 1843, 5 D. 402; *Van Oppen v Arbuckle*, 1855, 18 D. 113.]

⁷ [Correct this by *M'Cormick v Rittmeyer*, 1869, 7 Macph. 854. As to the specialty arising in the case of a sale of machinery, which is discovered to be imperfect after it has been used, see *Pearce Bro. v Irons*, 1869, 7 Macph. 571.]

⁸ *Baird v Pagan*, 1765, M. 14240, where ale for the West

if seed be bought for sowing, and if, after being sown, it turns out unfit for that purpose, damages may be claimed.¹

These are the rules of the law of Scotland, not only where there has been no opportunity of examining the commodity, but where the defect or vice is latent; whether known [439] to the seller or unknown.² In this respect the law of Scotland differs from that of England.³

But the exceptions to the seller's responsibility for the quality are important. And, 1. If the sale take place between the parties themselves, or their authorized agents, if the defect be open to observation, and if a full opportunity is given of examining the condition of the commodity, the rule is *caveat emptor*: in vulgar phrase, the buyer's eye is his merchant; and he will not be allowed to avoid the contract, unless the seller is guilty of fraud, or the buyer have required a special warranty.⁴ 2. If the fault be latent, or if the buyer have no opportunity of examining the quality or inspecting the commodity before it is sent to him, or to its destination abroad, he must make his challenge instantly on discovering the defect, or at least without any unreasonable delay.⁵ But even where the delay has been

India market was unfitted prepared, and great part of it spoiled and lost. In an action for payment of the price, the buyer's defence was held good.

In England, in a similar case of beer intended for Gibraltar, the defect would have been held sufficient had the delay not barred the plea. *Fisher v Samuda*, 1808, 1 Camp. 193. See below, note 5.

¹ *Adamson v Smith*, 1799, M. 14244. Adamson purchased 50 bolls of rye-grass seed, expressing his intention to purchase only *perennial* seed. The seed sold was *annual*, though the seller *bona fide* believed it to be perennial. The seed was sown and gave only one crop, and the buyer was found entitled to damages by Lord Meadowbank, whose judgment was affirmed by the Court.

Dickson & Co. v Kincaid, 15 Dec. 1808, 15 Fac. Coll. 57. This was a curious case of the same sort. A person had unconsciously sold as good Swedish turnip seed, what, although the true produce of Swedish turnip, had by the floral influence or impregnation from other plants growing in the neighbourhood, degenerated into hybrids, a mixed and bastard species. This seed was sold to a dealer, who having sold it again was made liable in damages, and sought relief by an action of damages against the original seller. The Court of Session found him entitled to full indemnification.

[See, under the Mercantile Law Amendment Act, *Stewart v Jamieson*, 1863, 1 Macph. 525. As to the warranty implied upon the sale of goods bearing a trade-mark or description concerning the number, quality, measure, or weight thereof, see 25 and 26 Vict. c. 88, secs. 19, 20.]

² *Stair* i. 10. 15, and i. 14. 1; *Ersk.* iii. 3. 10.

³ In England the original rule was, that a full price implies a warranty of a sound commodity. But it is now held to be settled that a warranty of quality is not implied on the sale or exchange thereof. *Stewart v Wilkins*, Doug. 18; *Parkinson v Lee*, 2 East 321; *La Neuville v Nourse*, 3 Camp. 351.

Bluett v Osborne, 1 Starkie 384. Here one sold a bowsprit, which at the time of sale the buyer had an opportunity of inspecting, and which appeared perfectly sound; but on the vessel's arrival at Madeira, the bowsprit, on being cut up, was found to be rotten. The seller brought his action for the price. The defendant pleaded that he was liable only for the

real worth on the seller's implied warranty that the article should be sufficient. Lord Ellenborough said: 'A person who sells, impliedly warrants that the thing sold shall answer the purpose for which it is bought. In this case the bowsprit was apparently good, and the defendant had an opportunity of inspecting it. No fraud is complained of, but the bowsprit turned out to be defective upon cutting it up. I think the plaintiff is not liable on account of the subsequent failure. What he deserves here is the apparent value of the article at the time of delivery. Supposing the price to have been paid on delivery, could it have been recovered back? Verdict for the plaintiff, £60. The Court refused a rule Nisi for a new trial.

See the Scottish case of *Reid v Steele*, 1824, 3 S. 201, where the fact was doubtful whether the breaking of the mast arose from inherent defect or from bad management. The loss was divided.

⁴ [By 19 and 20 Vict. c. 60, sec. 5, 'where goods shall, after the passing of this Act, be sold, the seller, if at the time of the sale he was without knowledge that the same were defective or of bad quality, shall not be held to have warranted their quality or sufficiency; but the goods with all faults shall be at the risk of the purchaser, unless the seller shall have given an express warranty of the quality or sufficiency of such goods, or unless the goods have been expressly sold for a specified and particular purpose, in which case the seller shall be considered, without such warranty, to warrant that the same are fit for such purpose. See *Edinburgh and Leith Brewing Co. v Reid*, 1861, 24 D. 26. To bring the seller within the protection of this provision, he must supply goods answering to the description in the order. *Jaffé v Ritchie*, 1860, 23 D. 242. The statute applies to horses. *Young v Giffen*, 1858, 21 D. 87. As to seed, see *Hardie v Austin & M'Aslan*, and *Hardie v Smith & Simons*, 25 May 1870.]

⁵ *Stair* i. 10. 15; *Ersk.* iii. 3. 10. *Brisbane v Merchants in Glasgow*, 1684, M. 12328; *Mitchell v Bisset*, 1694, M. 14236; *Stevenson v Dalrymple*, 1808, M. App. Sale, No. 5, where a delay of nearly a month in challenging kelp, and the having used a part, were held fatal to the objection.

See the English case of *Fisher v Samuda*, 1808, 1 Camp. 193, before Lord Ellenborough, where beer for Gibraltar was known in July to be bad, and no notice of objection till

such as to bar the purchaser from succeeding in his entire rejection of the goods, he may be allowed relief by abatement on making out a strong case of defect.¹ In the question of delay, the time is to be reckoned from the discovery of the fault: from the time of delivery, where it is palpable; where latent, from the time of its becoming apparent.² And although it will not deprive the buyer of his remedy, that the article has been put to use, or partly or irretrievably disposed of, this must have been done in *bona fide*, and in ignorance of the defect. If the buyer has been even doubtful of its quality, he will forfeit his remedy [440] by disposing of it.³ The buyer may reject the goods, but he is not entitled to convert the contract into one of another description, nor to dispose of the goods on any other than the original footing, without the assent of the seller.⁴ Where goods are so rejected at a distance from the seller's residence, and where he has no agent, the buyer must act fairly for the seller's interest, on the principles of *negotiorum gestio*; but in general it may be laid down, that he is not safe to proceed without the control of a magistrate. 3. Where the commodity may be applicable to several uses, the buyer is not entitled, without special stipulation, to reject it, because it is not fit for one particular use.⁵

The usage of trade in general, or even local usage, may establish an implied condition essential to the subsistence of a sale, non-compliance with which may entitle the party to avoid the contract or have relief. All contracts made in the ordinary course of trade, and without special provision, are presumed to incorporate the usage and custom of the trade to which they relate. The trade as exercised, and its usual practice known to the parties, are naturally understood to be within their intention in forming their bargain, and to be relied on in the execution of it. And so a sale-note, in simple terms, and which, taken by itself, would seem to import a ready money bargain, has the implied condition of the usual credit fixed in such sales by the usage of trade.⁶ This doctrine, however, even in its terms, implies two exceptions: 1. That where an express stipulation or warranty has been introduced, it

December. Lord Ellenborough directed the jury to presume that the buyer had assented to the quality.

In *Hopkins v Appleby*, 1 Starkie 477, the consumption of the article without objection held to bar a defence against payment of the price.

See also *Groning v Mendham*, 1816, 1 Starkie 257, where Lord Ellenborough called on the defendant's counsel, before going into evidence of bad quality, to show that he had offered to return the seed on the discovery of its inferiority; and on sufficient proof of this being shown, the plaintiff had a verdict.

Bruce v M'Kenzie & Balfour, 1821, 1 S. 77, N. E. 78. Linseed for sowing arrived in December, a bill for the price in February: the seed turned out unfit for sowing. But this defence was held to be too late.

Bennoch v M'Kail, 27 Jan. 1820, Fac. Coll. 89. Delay of thirty-seven days in the rejection of a horse fatal.

Cossar v Sir J. Marjoribanks, 1826, 4 S. 685, N. E. 692. [*Ransan v Mitchell*, 1845, 7 D. 813; *Ramsay v M'Lellan & Son*, 1845, 8 D. 142; *Smart v Begg*, 1852, 14 D. 912. The chief difficulties in applying the rule as to latent insufficiency occur in sales of machinery. Compare *Morson & Co. v Burns*, 1866, 5 Macph. 99, with *Pearce Bro. v Irons*, 1869, 7 Macph. 571. The latter case establishes the right of the purchaser to recover from the seller the cost of restoring the defective parts of the machine and putting it into working order. See also *Hardie v Austin & M'Aslan*, 25 May 1870.]

¹ In *Rowe v Osburn*, 1 Starkie 140, before Lord Ellenborough, the jury, with permission of the Court, asked the witnesses how much the value of bacon, which was the subject of the

sale, fell short of what had been contracted for, and gave a verdict, making abatement accordingly.

² [Sometimes the invoice or specification makes it a condition of the sale that objections shall be stated within a certain time. See *Laing v Westren*, 1858, 20 D. 519.]

³ *Baird v Aitken*, 1788, M. 14243.

Parker v Palmer, 1821, 4 Barn. and Ald. 387. Sale of rice per sample. The rice did not correspond, but the buyer had allowed it to be put up for sale again after he knew of the discrepancy, and was held, by taking his chance of profit at that sale, to have precluded himself from claiming redress.

⁴ *Ross v Taylor & Co.*, 1823, 2 Shaw and Dunlop 173, N. E. 154. Here oranges were rejected as under the contract of sale, but agreed to be taken for sale to the vendor's behoof. The defender held to account as agent.

Jaffray v Boag, 1824, 3 S. 375, N. E. 266. Here goods were sent; not approved of; an offer made to take them on certain terms; and, too rapidly proceeding on the inference of assent, the buyer broke bulk. Goods held to be accepted on the original condition. [*Padgett & Co. v M'Nair*, 1852, 15 D. 76; *Melville v Critchley*, 1856, 18 D. 643.]

⁵ *Seaton v Carmichael*, 1680, M. 14234.

⁶ [The general rule would seem to be, that in the absence of special agreement a ready money bargain is implied. *Arnott v Watt*, 1825, 4 S. 4.; *Athya v Rowell & Co.*, 1856, 18 D. 1299. As to the admissibility of evidence of usage of trade, see the latter case, and *Stewart v Gordon*, 1831, 9 S. 466.]

suspends the usage.¹ 2. That where the usage is local, and unknown to one of the parties, it cannot affect the contract.

EXPRESS CONDITION.—Where the bargain expressly contains any essential condition, the non-performance of that condition voids the contract.²

¹ *Yeats v Pim*, 1815, Holt's Cases 95. This was a sale of 60 bales of bacon, warranted prime singed bacon. Part of the bacon (3 bales) was landed and opened, and no exceptions taken. A bill was drawn for the price, accepted, and paid. About two months after the sale, a final examination took place, when the buyers rejected it as tainted. The buyers then brought their action for breach of contract. The defence was on an alleged custom in the trade upon the sale of bacon, to examine it a few days after landing, if not imported at the time of sale; and at the time of inspection to reject or accept it, or claim an allowance for damage or difference of quality, otherwise to accept the bacon. Evidence of this custom was objected to where there was an express warranty. Mr. Justice Heath directed a verdict for the plaintiffs. He held it competent to give evidence of acquiescence, that the buyers were guilty of gross negligence in not examining and rejecting the bacon in time, but he refused to admit the evidence of custom to alter the contract. By requiring a warranty, the buyer is to be understood as excepting against all terms but such as are stipulated in the bargain. Confirmed by the Court of Common Pleas, 6 Taunt. 446, 2 Marsh. 141.

² [On this subject two distinctions must be attended to—that between warranty and representation, and that between sales of goods *in genere* and sales of goods *in specie*.—(1.) *As to the ground of action*: 'Every affirmation at the time of sale of personal chattels is a warranty, provided it appears to have been so intended;' 1 Smith L. C. 6th ed. 166, citing *Power v Barham*, 4 Ad. and E. 473; *Shepherd v Kain*, 5 B. and A. 240; *Freeman v Baker*, 2 Nev. and Man. 446; and see *Hopkins v Hitchcock*, 32 L. J. C. P. 154. The rule was originally laid down by Lord Holt. (Buller, J., in *Pasley v Freeman*, 3 T. R. 51.) Antecedent representations made by the vendor as an inducement to the buyer, but not forming part of the contract when concluded, are not warranties. A warranty must form part of the contract. *Foster v Smith*, 18 C. B. 156; *Moridel v Steel*, 8 M. and W. 858; *Street v Blay*, 2 B. and Ad. 456; *Chanter v Hopkins*, 4 M. and W. 399; Benj. Sale, p. 452. It need not be made simultaneously with the conclusion of the bargain, but only during the course of dealing leading to it, and must then enter into the bargain as part of it. *Hopkins v Tanqueray*, 23 L. J. C. P. 162; *Stuckley v Bailey*, per Martin, B., 32 L. J. Ex. 483. No special form of words is necessary to create a warranty. *Cross v Gardiner*—per Holt, C. J.—3 Mod. 261; *Medina v Stoughton*, 1 Ld. Raymond 593; per Buller, J., in *Pasley v Freeman*, 2 Sm. L. C. 71. Whether an affirmation at the time of a sale is or is not intended to be a warranty, is a question of fact for the jury, to be inferred from the nature of the sale, and the circumstances of the particular case. *Stuckley v Bailey*, *supra*; Benj. Sale, p. 454; *Parsons' Contr.* i. 581, note (n). The criterion is the understanding and intention of parties. A bare affirmation of the soundness of a horse, then exposed to the purchaser's inspection, is not *per se* a warranty. It is of itself only a representation. To give it the effect of a warranty, it must be shown to the satisfaction of the jury that the parties intended

it to have that effect. *Parsons*, *ut supra*, and cases there. It will be material to distinguish whether the language used was meant as a mere expression of opinion, belief, or inference on the part of the seller, or as the assertion of a fact: for the former will not amount to a warranty; the latter, if so intended, will. Per Buller, J., in *Pasley v Freeman*, 3 T. R. 51; *Powell v Barham*, *supra*; *Jendwine v Slade*, 2 Esp. 572; per Bramwell, B., in *Stuckley v Bailey*, *supra*. See *Hardie v Smith & Simons*, 25 May 1870, for an instance of the distinction between representation of fact and of seller's opinion or inference from certain facts stated by him to buyer. In *Wood v Smith*, 5 M. and Ry. 124, 4 C. and P. 45, the buyer of a mare said to the seller, 'She is sound, of course?' The latter said, 'Yes, to the best of my knowledge.' On being asked if he would warrant her, he replied: 'I never warrant. I would not even warrant myself.' Lord Tenterden at trial, and the Court in Banco, held on these facts that there was a *qualified warranty* that the mare was sound to the best of defendant's knowledge, and that the action was properly laid on the promise to warrant, although it was insisted that, as there was an express refusal to warrant, it should have been laid on tort, as for a false and fraudulent misrepresentation. Where the contract is in writing, but contains no warranty, or expresses a particular warranty as given, parole is inadmissible to prove its existence in the former case, or to extend it by inference or implication in the latter. (*Kain v Old*, 2 B. and C. 627.) But a mere receipt for the price, whether it does or does not contain anything about warranty, will not exclude parole evidence of the terms of the contract, such receipt not being a reduction of the contract to writing with the purpose of ascertaining its terms. (*Allen v Pink*, 4 M. and W. 140.) Though a representation anterior to the sale, and not forming part of the contract when made, is no warranty, yet if it is material, and also false and fraudulent, it will be a ground for rescinding the contract as having been effected through fraud, or, if rescission be barred, will found an action of damages for the injury done. *Prima facie*, the remedy by rescission or avoidance of the contract *ab initio* as obtained by fraud, and the remedy by a special action upon the case to recover the amount of damages occasioned by the fraud, treating the fraud as the substantive ground of action, are at the option of the party injured. (*Clarke v Dickson*, 27 L. J. Q. B. 223, El. Bl. and El. 148; per Blackburn, J., *R. v Saddlers' Co.*, 32 L. J. Q. B. 337, 343; *Feret v Hill*, 23 L. J. C. P. 185; *Leake on Contracts*, p. 195; *Story, Contr.* i. p. 603; Lord St. Leonards' V. and P. pp. 211, 208–9; *Kerr on Fraud*, p. 264, citing American cases, and *Bédarride sur Dol*, vol. i. p. 248; *Stair* i. 9. 14; *Bankt.* i. 10. 6. 65, vol. i. p. 259.) But as rescission implies *restitutio in integrum*, that remedy is barred by the impossibility of returning things to their original position. (*Clarke v Dickson*, *supra*; *Western Bank of Scotland v Addie*, L. R., 1 Sc. App. Ca. 167; *Deposit, etc. Assurance Co. v Ayscough*, 26 L. J. Q. B. 29; *Hunt v Silk*, 5 East 449; *Blackburn v Smith*, 2 Ex. 783.) It is also barred by the party defrauded, after discovery of the fraud, treating the agreement as binding. (*Campbell v Fleming*, 1 A. and E. 40;

ex parte Briggs, 35 L. J. Ch. 320; *Selway v Fogg*, 5 M. and W. 86; *Macbryde v Weekes*, 22 Beav. 533; *Vigers v Pike*, 8 Cl. and F. 562.) Nor will his right to rescind, if so lost, be revived by the discovery of another incident in the same fraud. (*Ibid.*) A contract, though induced by fraud, cannot be avoided if the rights of an innocent vendee, or other third party giving value and without notice, have in the meantime intervened,—the transaction not being *ipso jure* null and void, but only voidable; and third parties without notice being therefore in a position to acquire rights and interests in the matter, which must stand good and be enforceable. (*White v Garden*, 10 C. B. 919; *Kingsford v Merry*, 11 Ex. 579; *Schofield v Templar*, 4 D. and J. 429; *Oakes v Turquand*, L. R., 2 App. Ca. 375; *Henderson v Royal British Bank*, 7 E. and B. 356; *Addie v Western Bank*, *supra*, and cases there.) But the party defrauded may, instead of rescinding, stand to the contract, even after he has discovered the fraud, and may recover damages for the fraud, or he may recoup in damages if sued by the vendor for the price. The affirmance of a contract by the vendee after discovery of the fraud, merely extinguishes his right to rescind. His other remedies remain unimpaired. (Leake, Story, and Kerr, *ut supra*, and cases there; Dig. iv. 3. 18, pr. and 1, and *id. tit. l. 18. 4*, and *l. 24*; Voet iv. 3. 11.) In order to sustain an action of damages for false and fraudulent misrepresentation, the representation must generally assume to be as to some matter of fact not known to the other party, and not as to the belief or opinion of the person making it. This is on account of the difficulty of ascertaining whether the belief or opinion represented was really entertained, and on account of the latitude to be allowed for error and weakness of judgment, or want of skill, and the varying value of different people's opinions, or of the same man's opinion under different circumstances, so that as a rule one is not entitled to rely absolutely on a statement of opinion, as he is on a statement purporting to be of some external fact. There are cases where the profession of an opinion not really entertained, if made with the fraudulent intent of operating as an inducement to the other, will found an action for fraud. If the party expressing the opinion be an expert, and had, or profess to have had, adequate means of forming a reliable opinion, and the subject of the opinion be a matter about which, in the circumstances, he might easily, and without doubt or much uncertainty, have formed such an opinion; and if he express it not in a vague and general way, but hold it out as a matter to be relied on with safety, he may, especially where the other party places himself in his hands, and so establishes a kind of confidential relation between them, render himself liable to an action for fraud. Where, from the nature of the promises, the pretended opinion might, if really formed, have justly been trusted to almost as confidently as fact, and it is held out as such for the purpose of being so relied on, the misrepresentation is the misrepresentation of a fact—viz. the existence of the opinion—which the other party was entitled to regard as a material fact, in considering whether he would enter into the contract; nor is it easy to see how the party making it can in such a case be permitted to deny that it was so. (Story, Contr. i. 624, and cases there; Parsons on Contracts, ii. pp. 778–9.) Of course, in such a case, the evidence that the opinion professed was not really held must be very clear. (*Wall v Stubbs*, 1 Madd. 80; *Ingram v Thorpe*, 7 Ha. 74; *Dimmack v Hallett*, L. R., 2 Ch.

App. 26; *Henderson v Lacon*, L. R., 5 Eq. 257.) In an action founded on fraudulent misrepresentation, fraud will be held established if the representation was false in point of fact, and either (1) known by the defendant to be false in fact, or (2) not honestly believed to be true, or (3) if he had no knowledge whether it was true or false. (*Evans v Edmonds*, 13 C. B. 777, 786; *Taylor v Ashton*, 11 M. and W. 415; *Pickard v Sears*, 6 A. and E. 469; *Western Bank v Addie*, L. R., 1 Sc. App. Ca. 162, 39 Sc. Jur. 437; *Smout v Ilbery*, 10 M. and W. 10; *Thom v Bigland*, 8 Exch. 725; *Smith v Reese River Co.*, L. R., 2 Eq. 264; *Foster v Charles*, 7 Bingh. 107; *Murray v Mann*, 2 Exch. 541—per Lord Wensleydale; *Rex v Mawbey*, 6 T. R. 637—per Lawrence, J.; and see especially the charge of Lord J.-C. Inglis in *Dobbie v Johnston*, 1861, Irvine Smith's Report, p. 314 et seq., and p. 331.) A statement false in fact, though believed to be true, will, if the maker at some former time knew the truth of the matter, and ought to have remembered it, but forgot it at the time of making the statement, be held equivalent to fraud, and will vitiate an agreement. (*Burroughs v Lock*, 10 Ves. 470; *Pulsford v Richards*, 17 Beavan 87, 94; *Slim v Croucher*, 29 L. J. Ch. 273.) And if a statement made in the belief that it is true is afterwards discovered to be false, and the party after the discovery suffers the other to continue in error, and act in the belief of the statement so as to conclude the contract, this, from the time of the discovery, becomes a fraudulent misrepresentation, though not so originally; and the same thing holds where a statement originally true becomes falsified by a change of circumstances known to the party who made it, and not to the other, if the change is not disclosed. (*Reynell v Sprye*, 1 De G. M. and G. 660, 709; *Traill v Baring*, 33 L. J. Ch. 521.) Where a party declares that he knows the facts of his own knowledge, and his statements are proved to be false in point of fact, that is evidence, in the absence of any explanation of how he came to be innocently wrong, that his statements were false to his own knowledge. His own assertion, that he knew the facts, will be taken to be true, though his representations as to them are false unless he show the existence of a mistake, and what induced it. (*Wright v Selfe*—per Cockburn, C. J.—1 Fost. and Finl. 704.) When a party charged with fraudulent misrepresentation pleads that he believed the statement, though he did not know it, the Court will consider the kind or degree of belief entertained, so far as it has materials, with reference to the purpose for which the statement was made. Belief varies from something only a hairsbreadth beyond incredulity to the certainty and assuredness of faith; and a belief of the former kind, while sufficient to excuse a statement unguardedly made, where no one was intended to act on it, will not therefore excuse a party who holds out a statement in which he has only so small an amount of belief himself, as the ground on which another is to act. See Lord J.-C. Inglis' charge in *Dobbie v Johnston*, *supra*. The statement said to be false and fraudulent must be material, and its materiality consists in its being such that the person entering into the contract relied on it as a reason for doing so, and would not, it is reasonable to suppose, have entered into the contract in its absence. (*Pulsford v Richards*, 17 Beav. 86–7; and per Lord Cranworth in *National Exchange Co. v Drew*, 2 Macq. 103, 120; *Attwood v Small*—per Lord Brougham—6 Cl. and F. 232, 444, 395.) A misrepresentation must be the proximate and immediate cause of the trans-

action—the very ground of it—and not merely a remote or indirect cause. (*Barry v Crosskey*, 2 J. and H. 1; *New Brunswick, etc. Railway Co. v Conybeare*, 9 H. L. 711; *Barrett's case*, 3 D. J. and S. 30; *Burnes v Pennel*, 2 H. L. 497–531.) But it is no defence that the false representation was not the sole inducement to contract: it is enough if the plaintiff was substantially and mainly, or at least materially, induced to do so thereby, though there were other inducements concurring, or other influences at work, which contributed to the success of the false representation. (*Clarke v Dickson*, 6 C. B. 453; *Wade v Tatton*, 25 L. J. C. P. (Ex. Ch.) 240; *Nicol's case*, 3 De Gex and Jones 387; *Western Bank v Addie*—per Lord Chancellor—L. R. 1 Sc. Ap. 158.) Where a party has practised deception with a view to a particular end, which has been attained by that deception, he cannot be allowed merely to deny the materiality of the deceptive statements, or to suggest what the other party would have done if there had been no misrepresentation: the onus is with him to prove to demonstration that the misrepresented fact was not relied on at all. In the absence of such proof from him, it is enough that the false statement *may* have been relied on; for it is impossible to say, even though there are concurring inducements, that the untrue statement was not the very one which turned the scale in the other party's mind. (*Smith v Kay*, 7 H. L. 750; *Reynell v Sprye*, *supra*; *Rawlins v Wickham*, 3 De G. and J. 304; *Nicol's case*, *supra*; *Kisch v Venezuela Railway Co.*, 3 De G. J. and S. 122; *Traill v Baring*, 33 L. J. Ch. 521, 527; *Jennings v Broughton*, 5 D. M. and G. 126.) Nor can he be heard to say that the party to whom he made the misrepresentation might have known the truth by proper inquiry, or that he had the means of knowing: he must show, upon incontestable evidence, and beyond the possibility of a doubt, that the other party in point of fact knew, and was well aware and cognizant of, the real fact which he himself misrepresented. (*Dyer v Hargrave*, 10 Ves. 505; *Harris v Kemble*, 5 Bligh 730; *Vigers v Pike*, *supra*; *Wilson v Short*, 6 Ha. 366, 375; *Martin v Cotter*, 3 J. and L. 496, 506; *Reynell v Sprye*, *supra*; *Price v Macaulay*, 2 D. M. and Q. 339; *Kisch v Venezuela Railway*, *et e contra*, 3 De J. and S. and L. R., 2 App. Ca. 114; *Lawrence's case*, L. R., 2 Ch. App. 422.) It is no answer to say he was incautious, or simple, or foolish: a man who has made false representations to induce another to contract, cannot turn round and say the other had himself to blame. A man to whom a particular and distinct representation has been made is entitled to rely on it, and need make no further inquiry, even though there are circumstances in the case from which an inference inconsistent with the representation might be drawn, and which, independently of the representation, should have put him on inquiry. No man can complain that another has relied too implicitly on the good faith and honesty of what he himself stated. (*Lysney v Selby*, 2 Lord Raym. 1118; *Dobell v Stevens*, 3 B. and C. 623; *Rawlins v Wickham*, 3 De G. and J. 319; *New Brunswick Railway Co. v Muggeridge*, 1 Dr. and Sm. 382; *Smith v Reese River Co.*, L. R., 2 Eq. 264; *Kisch v Venezuela Railway*, *supra*; *Rawlins v Wickham*, *supra*; *Grant v Munt*, Coop. 173; *Van v Corpe*, 3 M. and K. 269; *Pope v Garland*, 4 Y. and C. 394; *Cox v Middleton*, 2 Drew 209; *Grosvenor v Green*, 5 Jur. N. S. 117.) Even a distinct refusal to warrant the fact represented will not, if it is still represented as a fact known to the party, liberate him, or deprive the other party

of remedy if the representation be false and fraudulent. (See *Wood v Smith*, 4 C. and P. 45, *supra*; *Pothier, Louage*, No. 114.) Nor will a sale 'with all faults,' which is a proclamation that no contract warranty is to be given, absolve from liability for fraud in misleading a buyer as to the real state of the faults existing in the article sold. (*Pickering v Dowson*—per Heath, J.—4 Taunt. 779; *Baglehole v Walters*—per Ellenborough, C. J.—3 Campb. 154; *Scheider v Heath*, 3 Camp. 506—per Mansfield, J. C.; *Fletcher v Boucher*, 2 Starkie 561.) A contracting party making a statement of specific matters as known to himself, is always bound to warrant fraud to be absent from that statement—*dolum malum a se abesse pręstare*. (Dig. 18. 1. 43. 2, l. 23, De Reg. Jur.; l. 1, Dig. de Dolo Malo; Vinnius, Inst. p. 586; Dig. 16. 3. 1. 7; Dig. 2. 14. 27. 3 and 4; Dig. Commod. l. 17.) The maxim, *Jura vigilantibus non dormientibus subveniunt*—sometimes absurdly misapprehended—applies only to competition in the face of diligence between creditors: the law aids the sharpness of lawful activity; but it does not mean to deliver over the slow-witted and simple, who most need its protection, as lawful prey to the *vigilantia* of cheats and swindlers. A party may, when specific statements are made to him, waive a contract warranty, and rely on the warranty from which no contracting party can stipulate exemption, *dolum malum abesse*. See, as to the maxim, Dig. 42. 8. 24; *Stair i. 9. 15. 7*. See also l. ult. C. Depositi. On the contrary, the whole foundation of the edict *de Dolo Malo* is, that it is directed against 'varios et dolosos qui aliis offuerunt calliditate quādam; ne vel illis malitia sua sit lucrosa, vel istis simplicitas damnosa (l. 1, D. de Dolo Malo). The *vigilantia* which the law favours is *industria* as opposed to *desidia*, not *malitia* as opposed to *simplicitas*. Compare d. l. ult. C. Depos. with d. l. D. de Dol. Malo. A false and fraudulent representation may ground an action for damages, not only where made directly to the party who, believing it to be true, has acted on it and sustained damage thereby, but also at the instance of a party to whom it was indirectly made: as, where it is made to a third with the intention of its being communicated to the plaintiff; or where it is known by the maker of it, at the time of contracting, that it has been so communicated, and by the third party to whom it was made. (*Langridge v Levy*, 2 M. and W. 532, 4 *ibid.* 337; *Blakemore v Bristol and Ex. Ry. Co.*, 27 L. J. Q. B. 167; *Farrant v Barnes*, 31 L. J. C. P. 139; *Pilmore v Hood*, 5 B. N. C. 109; *Longmeid v Holliday*, 6 Ex. 766. See cases as to representations made by directors of companies to the public at large: *Scott v Dixon*, 29 L. J. Ex. 62; *Denton v Great Northern Ry. Co.*, 5 El. and Bl. 860; *Bagshaw v Seymour*, 18 C. B. 903, 4 H. and N. 548.) On the other hand, a fraudulent misrepresentation made by an agent without the principal's knowledge will render the principal who adopts the act and takes the benefit of the contract induced thereby, responsible in damages to the person injured; but if he repudiates the transaction as soon as he becomes acquainted with the fraud, and shuns all participation therein, and if he had given no sanction or authority to it, and the representation was not within the scope of the ordinary authority of an agent acting in such a matter, he will not be responsible. But a principal cannot take any benefit under a false and fraudulent representation made by his agent when acting within the scope of his authority. In respect of the liability of a principal for the acts of his agent, done in the course of his master's

1. Express warranties are conditions of this kind.¹
2. If a merchant agree to sell a commodity, or answer an order, on the buyer paying cash or sending his acceptance in course, the sale is incomplete,² though the goods be sent off, if the cash has not been paid or the acceptance has not been transmitted as [441] stipulated; but if the vendor acquiesce in an alteration of this condition, it will be different.³
3. If he shall stipulate payment by 'a bill,' or 'an approved bill,' at a certain term of payment, the condition must be fulfilled in order to complete the contract; but the seller will not be suffered arbitrarily to reject a bill which ought to be approved. If it be one to which no reasonable objection can be made, it is in England deemed a sufficient compliance.⁴ In Scotland, we are accustomed to consider discounting as the test. But this in all cases ought not to be held, and probably the rule applied in England would guide the decision.

business, no sensible distinction can be drawn between the case of fraud and any other wrong. The principal cannot take the benefit and repudiate the fraud. The statements of the agent are the statements of the principal, and the principal cannot separate the contract itself from that by which it was induced. He must adopt the whole contract, including the statements and representations which induced it, or must repudiate the contract altogether. On this principle, a partnership firm is bound by false and fraudulent representations made by one of the partners whilst acting within the scope and limits of his authority, and having reference to the proper business of the firm. (*Wright v Crookes*, 1 Sc. N. R. 685; *Wilson v Fuller*, 3 Q. B. 77; *Blair v Bromley*, 2 Ph. 350; *Coleman v Riches*, 15 C. B. 104; *Wheelton v Hardisty*, 8 E. and B. 232, 260; *Udell v Atherton*, 7 H. and N. 173; *Nicoll's case*, 3 De G. and J. 387, 437—per Turner, L. J.; *Udell v Atherton*—per Pollock, C. B., and Wilde, B.—7 H. and N. 172; *New Brunswick Ry. Co. v Conybeare*, 9 H. L. 714—per Lord Westbury 726, per Lord Cranworth 739; *Barwick v English Joint-stock Bank*, L. R., 2 Exch. 265; *Western Bank v Addie*, L. R., 1 Sc. App. Ca. 159; *Oakes v Turquand*, L. R., 2 App. Ca. 325; *Cornfoot v Fowke*, 6 M. and W. 358—per Lord Abinger, C. B.; and see, as to this case, Lord Cranworth in *National Exchange Co. v Drew*, 2 Macq. 108; and Willes, J., in *Barwick*, *supra*; and Lord St. Leonards in *National Exchange Co. v Drew*, 2 Macq. 144; and Lord Campbell in *Wheelton v Hardisty*. *Bristow v Whitmore*—per Lord Kingsdown—9 H. L. 418; *Hern v Nicholls*, 1 Str. 653, 1 Salk. 289—per Holt, C. J.; S. P., per Lord Ellenborough in *Crockford v Winter*, 1 Camp. 127; *Southern v How*, 2 Molloy Jur. Mar. 330—per Holt, C. J.; Paley on Agency, by Lloyd, pp. 301–3, 325, 256; Parsons, Contr. i. 73; Leake, Contr. 192; Lord St. Leonards' V. and P. pp. 209–10 (18th ed.); Story, Agency, secs. 134–5; Kerr on Fraud, pp. 66–9; Dig. 14. 4. 5; 14. 3. 11. 4; 4. 3. 15. 2; 4. 3. 4. 17 and 18.) As to fraud of a partner, *Rapp v Latham*, 2 B. and A. 795; *Lovell v Hicks*, 2 Y. and C. 46, 481; *Wickham v Wickham*, 2 K. and J. 478.

(2.) *As to the Remedy*.—Where the sale is of goods *in genere*, and where, therefore, the property does not pass by the bargain, the term warranty is not strictly applicable to representations respecting quality or sufficiency; but the specification or description is considered to be a condition of the order; and if the article tendered is not conformable to order, the purchaser may reject it, and may recover the price if he has granted his acceptance for it. *Allan v Lake*, 18 Q. B. 560, and cases in 1 Sm. L. Ca. p. 175. Cases of this

description do not fall within the scope of the 5th section of the Mercantile Law Amendment Act (*supra*, p. 464). *Taylor v Macfarlane*, 1868, 6 Macph. H. L. p. 1; 1 L. R. H. L. Sc. 245.

In cases of sale of specific goods, a representation of the nature of a warranty merely gives rise to a claim of damages for breach of warranty (Sm. L. Ca. *ut supra*; *Heyworth v Hutchison*, 2 L. R. Q. B. 447); but if it amounts to a fraudulent representation, the purchaser has the option of rescinding the contract, and claiming repetition of the price, provided he can restore the article sold in the same state as that in which he received it. *Clarke v Dixon*, E. B. and E. 148, and cases there cited. We have already seen that a mere expression of opinion is not in the ordinary case equivalent to a warranty, unless it be founded on a fact presumably within the seller's knowledge. *Jendwine v Slade*, 2 Esp. 572; *Power v Barham*, 4 Ad. and El. 473, and cases noted in the first paragraph of this note.]

¹ [Under a contract to supply goods *in genere* of a specified description or quality, the goods must not only answer the description, but must be saleable or merchantable under that description. *Jones v Just*, 3 L. R. Q. B. 197; *Cooper & Aves v Clydesdale Shipping Co.*, 1863, 1 Macph. 677.]

² *Brodie, Tr. for Arnot's Crs., v Tod & Co.*, 20 May 1814, 17 Fac. Coll. 609. Arnot of Leith agreed to buy clover seed from Tod & Co. of Hull, payable by an acceptance at three months. Tod & Co., in sending the invoice and bill of lading, enclosed a draft for acceptance, and added, 'which please return in course.' Arnot received this letter 24th April, but did not return the acceptance till the 26th. Tod & Co., who should have received their answer on 26th, relanded the goods. The Court of Session held, 1. That the words above quoted formed a condition, on the fulfilment of which the bargain depended; and, 2. That the course of post meant the very next post.

³ *Arnot v Watt*, 1825, 4 S. 4. In this case malt was sold for ready money. The buyer sent his bill at four months' credit for the amount. The seller kept this bill in his hand for some time, and then demanded cash, and for this he brought his action. He was held to have acquiesced in the bill.

⁴ *Hodgson v Davies*, 1810, 2 Camp. 532. This made one point in the case already quoted (*supra*, p. 459, note 5). The defendant proved a tender of his own acceptances. It was contended that by *bill* is meant an *approved bill*. Lord Ellenborough held, that even if the phrase 'approved bill' were

4. If one sell a commodity expected from abroad, 'on arrival,' the arrival of the commodity is a condition, and there is no sale if it do not arrive. The same has been held when the bargain is to sell a particular commodity expected, 'on arrival of a particular ship.' If that ship arrive without a cargo, there is no sale.¹

5. In the construction of all express conditions introduced into a bargain of sale, the fair and reasonable and customary interpretation of the condition is to be taken.²

6. If goods be sold 'as good merchantable goods,' this is a warranty or express condition, which will not be defeated by proving the goods to be equal to a sample shown.³

7. If a sale is by sample, it is a condition that the commodity shall answer to the sample (to which effect the sample must be identified); and the buyer may reject the goods, notwithstanding any usage tending to establish a rule only of abatement.⁴ The buyer is [442] entitled to examine the commodity in bulk at any proper and convenient time; and if the seller refuse to show it, after he is by the contract bound to have it in readiness, the buyer may rescind the contract.⁵ But it is of no consequence that samples have been

introduced, it could only mean a bill to which no reasonable objection could be made; and that to allow the seller in an arbitrary manner to repudiate the bill, would enable him, according to his interest or caprice, to annul a contract by which the purchaser is absolutely bound.

[Smith, Merc. Law, 7th ed. p. 507. The following specialty deserves to be noticed. In terms of a contract of sale of goods, payment was made (through a broker) by an 'approved banker's bill.' The banking-house (Barned's Bank) failed, consequently the bill was not accepted. The purchaser, not being a party to the bill, did not receive notice of dishonour. Held that his liability on the bill was not more extensive than that of an endorser, and that he was not liable *in an action for the price of the goods*. *Smith v Mercer*, 3 L. R. Ex. 51.]

¹ *Hawes v Humble*, 2 Camp. 327, note. Batley, for Humble & Holland, sold to Hawes, on arrival per the Bon Fin, 100 tons of barilla. The ship arrived without the barilla accidentally, and without any imputation of fraud. Hawes, in an action of damages for non-performance, was nonsuited. Mr. Baron Wood held that the contract was conditional, but intimated that if any negligence could be proved against the captain in not procuring the barilla, he would receive that evidence. There being no negligence, the plaintiff was nonsuited, with liberty to move the Court on the question whether the contract was absolute. The Court was unanimously of opinion that it was conditional, and that the remedy was only by action of deceit grounded on fraud.

So in *Boyd v Siffkin*, 1809, 2 Camp. 326, where 32 tons of hemp exported by the Fanny Almira were agreed to be sold on arrival of that ship, and she afterwards came without a cargo, Lord Ellenborough said: 'I think on arrival means on arrival of the hemp. The parties did not mean to enter into a wager. The hemp was expected by this ship. Had it arrived, it was sold to the plaintiff; as none arrived, the contract was at an end.' [*Jale v Thornton*, 3 Camp. 274; *Lovatt v Hamilton*, 5 M. and W. 639; *Alewyn v Prior*, 1 Ry. and M. 406; *Johnson v Macdonald*, 9 M. and W. 600; *Gorissen v Perren*, 27 L. J. C. P. 29; *Vernede v Weber*, 25 L. J. Ex. 326; *Simond v Braddon*, 26 L. J. C. P. 198; *Hale v Rawson*, 27 L. J. C. P. 189; *Parsons, Contracts*, i. 552 et seq.]

² In *Hayward v Scougal*, 2 Camp. 56, an agreement to sell all the hemp to be shipped by the seller's agent in the ship A, was held to include only what that agent ships for the seller, not what is embarked for others.

³ *Tye v Fynmore*, 1813, 3 Camp. 462. In this case sassafras wood was sold after a specimen had been exhibited to the buyer, with which the whole quantity was said to accord. But in the sale-note it was described as 'two tons of fair merchantable sassafras wood, in logs, at six guineas per cwt.' Lord Ellenborough held this not to be a sale by sample, and it is not enough to prove that the wood corresponds in quality with the specimen exhibited to the defender before the sale. The question is, Whether it was in the understanding of the trade 'fair merchantable sassafras wood?' which it is clearly proved not to have been. The vendor was nonsuited. [An express warranty of one particular quality excludes any implied warranty of other qualities. *Parkinson v Lee*, 2 East 314; *Budd v Fairmaner*, 8 Bing. 48; *Dickson v Zizania*, 20 L. J. C. P. 72. But see *Mody v Gregson*, 38 L. J. Ex. 12, 4 L. R. Ex. 49, where, however, the precise point was as to the correctness of a charge to a jury 'in the circumstances of that case;' and the case was clearly one of fraud, with adulteration both of goods and sample by the sellers, who made them both. *Josling v Kingsford*, 32 L. J. C. P. 94.]

⁴ *Hibbert v Shee*, 1 Camp. 113. Sixteen hogsheads of sugar were sold by samples drawn, and which were admitted to be those produced at trial. The sugar did not in colour correspond, and dealers proved them to be less valuable by five or six shillings a hundredweight. The seller required the buyer to take them on abatement, which the buyer refused. The seller rested on the usage, and examined brokers to prove that such disputes were settled in this way. Lord Ellenborough said: 'The question here is, Whether the contract has been substantially performed? Does the sugar accord with the sample exhibited at the sale? If I buy a commodity wholly discordant to that which is promised me, I am not bound to accept of a compensation for this dissimilarity. This is not a performance of the contract. And though there should prevail a habitual mode of arrangement between dealers in the article, I have always a right to say, "Is this what I meant to purchase?" A spirit of candour and accommodation may lead to a compromise between the parties; but the legal mode of dealing is, that if the article agreed on is not furnished, I may reject it, and keep my money in my pocket.'

⁵ *Lorymer v Smith*, 1 Barn. and Cress. 1. This was a sale of wheat by sample at Bristol. By the usage of the place, the buyer is entitled to inspect the wheat in bulk. On a

shown at entering into the bargain, unless the sale has been made distinctly in reference to them.¹ Although the samples should not be referred to, so as to make it a sale on sample, the showing of samples is a relevant circumstance in evidence of a deceitful representation.²

8. If the sale be made in reference to the taste, or any other criterion, there is no sale or concluded bargain till that test has been applied, and expressly or tacitly the bargain bound by the seller's approbation.

9. Conditions may be suspending or dissolving conditions; as to the effect of which, see *supra*, p. 256 [and p. 455, note].³

IV. EFFECT OF INSOLVENCY.—It is a rule in the law of contracts, that both parties are bound, or neither. But sometimes there is a disposition to misapply this rule to the question between the creditors of a bankrupt, and one with whom the bankrupt has made an agreement. To clear this, the distinction must be correctly observed between the *contract* of sale, and the *transference* in consequence of that contract. The contract may be completed without entitling the buyer to insist on having the commodity from the creditors, and yet so as to bind him if the creditors choose to insist that the bargain shall be implemented. So it may be effectual to bind the seller, although the buyer is bankrupt, provided the creditors choose to offer the full price; while the seller cannot have anything but his dividend, if he persist in forcing the goods on the creditors. In all these cases the contract is binding, though its effects vary. If a merchant has bought wheat from another who fails, he will not be entitled to insist for delivery, although he may have paid the price, or may be willing to pay it down; for he is under the contract only a creditor for delivery of the corn, and the creditors are not bound by their debtor's contract. But the contract is available to the solvent party, in so far as the *universitas* of the bankrupt estate is bound [443] to him as to other personal creditors; and so he may on his contract claim damages for non-execution. On the other hand, however, the obligations under the contract may be made available to the purchaser's bankrupt estate, either if the price has already been paid, or if the creditors are willing to pay the stipulated price; for the solvent party has no further interest than to demand full performance of the bankrupt's obligation.

SUBSECTION II.—CLAIMS IN RESPECT OF THE CONTRACT OF SALE.

CLAIMS ON THE PART OF THE SELLER.—The right of action, or of claiming in bankruptcy, which may arise out of the contract of sale, may be either after the goods have been delivered; or while the goods are still with him undelivered or stopped *in transitu*; or when they have accidentally perished after the risk has been changed.

1. Where the goods have been already delivered, the seller may have a personal action,

demand to see it, part was shown; but the buyer, saying he did not choose to disclose his connections, offered to send for a bushel at a time, but would not show it all. A few days afterwards he said the wheat was now in his granaries, and might be seen. The buyer refused to hold to the bargain, and was held entitled to rescind it on the general rule of law as well as the local custom. Ch. J. Abbot, and Bayley, Holroyd, and Best, Justices, present.

¹ See *Tye v Fynmore*, *supra*, p. 470, note 3.

In *Meyer v Everth*, 4 Camp. 22, there was a similar deficiency of reference to the samples. So in *Laing v Fidgeon*, 4 Camp. 169, where sample saddles were shown, but no reference to them in the sale-note; and the same in *Gardner v Gray*, *ibid.* 144. The doctrine in all these cases was, that the sample could not be allowed to be incorporated in the contract,

where the sale-note is silent as to the sample. [*Powell v Horton*, 2 Bingh. N. C. 668.]

² Thus, in *Meyer v Everth*, 4 Camp. 22, Lord Ellenborough, holding that the samples were not made a part of the bargain, said: 'You should have declared in case for a deceitful representation. It was no part of the contract that the sugar should be equal to the sample. Where goods are sold in this way, I think evidence might be admissible to show that, at the time of the sale, a sample was fraudulently exhibited to deceive the buyers, whereby the plaintiff had been induced to purchase the commodity, which turned out greatly inferior in quality and value.'

³ [Of this nature are conditions tending to restrict the purchaser's right to a security; as to which, see *Latta v Park & Co.*, 1865, 3 Macph. 508.]

or may claim as a personal creditor for the price, and take his dividend along with the other creditors.

2. Where the goods are not yet delivered, the seller may raise action for the price, proffering delivery of the goods; or he may send the goods to a warehouse at the buyer's risk; or he may, in bankruptcy, offer them to the creditors, on payment of the price; and if they are unwilling to take them on that condition, he may apply to a judge to have them sold as under lien, that he may rank for the balance of the price; or he may make his claim for the price, and retain the goods under lien. The seller is entitled to charge warehouse rent, and the expense of preserving the goods in marketable condition, during such time as the goods may have remained with him beyond the time specified in the contract.¹

3. When the goods have accidentally, and without fault on the part of the seller, perished between the completion of the sale and the time of delivery, the seller may still have his claim as a creditor for the price in certain cases.² The general rule is, that the contract of sale being once completed as to a specific subject, the risk is thenceforward with the buyer—'*Periculum rei venditæ nondum traditæ est emptoris*;' and this notwithstanding that the buyer is bound to pay the price, '*emptoris damnum est, et tenetur pretium solvere*.'³ This is a question which has occasioned much controversy among lawyers;⁴ but the true resolution seems to lie in the distinction between the *contract* of sale and the *transference* consequent upon delivery. By the completion of the contract the seller is bound to deliver, the buyer to pay the price; and these obligations are counterparts and considerations for each other. The parties reciprocally may refuse performance unless the counter-obligation is performed; but the destruction of a special subject, which the seller has undertaken to deliver, is a good defence against performance provided it has not arisen from his fault.⁵ This is the legal principle of a rule which is fully established in practice. Stair has doubted the efficacy of the rule where the subject has perished. Erskine says that at least the seller is entitled to the full price, notwithstanding any accidental deterioration. But cases have [444] again and again been determined to the full extent of the whole doctrine.⁶

¹ [The seller holds the goods not by a lien, but by an assertion of his right of property not yet divested by any delivery. Whether he could, while refusing delivery till he is paid the price—*i.e.* while retaining the goods for his own security and benefit, and not for the benefit of the vendee—make any claim for his trouble in doing so, is, at least in England, doubtful; and it is certain there that such claim, if any exists, is personal merely against the vendee, and not covered by the vendor's lien, which extends only to the price. *Somes v British Empire Shipping Co.*, 27 L. J. Q. B. 397; in *Ex. Chamb.* 28 L. J. Q. B. 220; in *House of Lords*, 30 L. J. Q. B. 229. The vendor, in Scotland, could retain against the vendee, but apparently not (under the 2d section of the *Mercantile Law Amendment Act*) against a sub-vendee. A purchaser, who rejects goods, may retain in security of repetition of the price, but not for damages; *Melville v Critchley*, 1856, 18 D. 643. His claim is not a condition of the contract of sale. But see *Pothier, Vente*, No. 290; L. 9, D. de Act. Empt.; and *Greaves v Ashlin*—per *Ellenborough, C. J.*—3 Camp. 426.]

² See above, p. 179, on *periculum* as affecting the question of transference; also notes to pp. 461, 473.

³ *Instit. De Empt. Vend.* sec. 4.

⁴ See *Stair* i. 14. 7, where he states shortly and clearly the grounds of the controversy. *Pothier, Tr. du Cont. de Vente*, No. 307 et seq., vol. i. p. 579; *Ersk.* iii. 3. 7.

⁵ This principle has been well explained in the passages referred to in the preceding note.

⁶ See the case of *M'Donald v Hutchison*, *supra*, p. 180, note 4, determined by the Court of Session in 1744, M. 10070.

In *Hinde v Whitehouse*, in England, 1806, 7 East 558, a quantity of sugars, which were in the king's warehouse, were sold by auction, and samples delivered in on 20th September. A fire on the 22d consumed the warehouse and the sugars. In an action of *assumpsit* by the seller against the purchaser, the case was tried before Mr. Justice Rook at Lancaster. There were several points on the English Statute of Frauds besides the question of *periculum*. The point was reserved, and argued in King's Bench at great length. Lord Ellenborough delivered the judgment of the Court, holding the sale to be complete, 'so as to cast the subsequent risk of loss upon the buyer.'

The case of *Phillimore v Barry*, 1808, 1 Camp. 513, is of the same description. Here thirteen puncheons of rum, lodged in a warehouse at Dover, were bought at auction, the purchaser to deposit 25 per cent., the rest of the price in thirty days, and to be chargeable with warehouse rent after the expiration of that time. About three weeks after the sale the warehouse was consumed by an accidental fire. Lord Ellenborough held the circumstances sufficient to satisfy the Statute of Frauds, and that the risk was with the buyer; so verdict went for the seller. [See also *Tarling v Baxter*, 6 B. and C. 360; *Whitehouse v Frost*, 12 East 613; *Alexander v Gardner*, 1 Bing. 671; *Hansen v Craig & Rose*, 1859, 21 D. 432.]

But while the sale is still incomplete, as where the quantity has not been separated from a common mass, or where the price is referred to weight or measurement, and the quantity has not been ascertained, or where the bargain is in reference to some test or criterion not yet applied,¹ the risk is with the seller; and if the goods have perished, he will have no claim for the price.²

¹ See above, pp. 470, 471.

² [The rule that every obligation *certi corporis* is extinguished by the extinction of the subject *damno fatali*, is a rule also of the English law. See *Taylor v Caldwell*, 1863, 32 L. J. Q. B. 165, where it is elaborately explained by Blackburn, J.; see also *Appleby v Meyers*, 35 L. J. C. P. 295, L. R., 1 C. P. 615. But it must be noted that the rule *de certo corporis* does not involve the doctrine of the buyer's risk, unless when we couple it with the further rule, which is not adopted in England (see e.g. *Rugg v Minett*, 11 East 210), and which even in the Roman law and our own is peculiar to sale,—the rule, viz., that the liberation of the *debitor certi corporis* from his obligations does not liberate the other party from his counter-obligations. In location, for example, the lessor's obligation to deliver the subject to the lessee is extinguished by the destruction of the subject; but so also is the lessee's obligation for hire, in other words, *Res perit locatori*. The exception in the case of sale originated not in any idea that the vendor and vendee's obligations were not reciprocal and conditional of each other, just as much as the lessor's and lessee's were, but from the letter of the old Roman formula expressing the vendor's obligation, which was not to deliver the thing, like the lessors, or to make the vendee *dominus rei venditæ*, but 'hactenus tenetur venditor ut rem emptori habere liceat, non etiam ut ejus faciat.' (L. 30, sec. 1, D. de Act. Empt.; Poth. Vente, No. 1.) And according to the letter of this formula, the vendor had, as it rather seemed, never failed in his obligation, or given the vendee any ground to plead liberation thereby from his counter-obligation. The vendor's obligation is not so restricted in our jurisprudence, nor in any modern jurisprudence based on the civil law, but the peculiarity remains as the legal principle of the rule *res perit emptori*. (See Ortolan, Explic. Hist. des Inst. vol. iii. p. 282; Fréméry, Droit Commercial, p. 5; Brodie, Stair, App. 857.) The fact of the vendee's risk, then, arises not from the rule *de certo corpore* alone: it consists in this, that while the seller is liberated thereby, the buyer is not. Every question between vendor and vendee as to the risk of the total destruction of the subject is soluble by the successive application of the following *criteria*: (1.) Does the rule *de certo corpore* apply so as to extinguish the seller's obligation? and if so, (2.) Is the buyer's obligation to pay still enforceable? Of course, where there has as yet been no final engagement between them so as to constitute the relation of vendor and vendee at the time of the destruction of the subject, there can be no room for the rule *de certo* on the one hand, nor can the buyer be liable in payment on the other, i.e. the risk does not pass. This is the case where 'the bargain is in reference to some test or criterion not yet applied,' as in sales upon trial *ad gustum*, and in conditional sales *pendente conditione*, for there is as yet no completed engagement. But a sale 'where the quantity has not yet been separated from a common mass,' or 'where the price is referred to weight and measurement, and the quantity has not been ascertained' (see text), is not an in-

complete sale. In the first case, if the whole mass out of which the quantity sold was contracted to be delivered perish *damno fatali*, the rule *de certo corpore* applies, whether there has been separation or not; and, on the other hand, the vendee's obligation is not discharged, but remains enforceable; i.e. the risk ought to be held, according to the principles of our law, to have passed to the vendee. The authorities on which Mr. Bell lays down that the risk does not pass, even in case of the destruction of the whole mass out of which the quantity sold is by the contract to be taken, are all English authorities, and it has been explained in a previous note that the principles of the English cases on this point have no application to our law. Where these peculiar principles of English law do not interfere, as in the case of the executory contract in *Willard v Perkins*, cited in Parsons' Contr. i. 533, note (2), the non-separation of the quantity sold from the whole mass destroyed will not free the vendee from the risk. There is no Scotch decision holding separation in such a case necessary to pass the risk. So, the application of the rule *de certo* will not, where a mass is sold and destroyed, be affected by the circumstance whether it was sold for a slump price, or for a price to be ascertained, at a certain rate per bushel or per ton; but the vendee's obligation, and the possibility of enforcing it, will. And hence arises the difference, that in the former case, as was held in *Hansen v Craig & Rose*, the risk will be held to have passed to the vendee, while in the latter, it appears to be impossible that it should. In any case where the price is to be ascertained by weight and measurement, and has not been ascertained,—whether it be a separate and specific subject, or the mass of which it formed a part, that perishes, the contract is not incomplete; that is to say, there is a final engagement from which neither can resilie. And the rule *de certo corpore* applies to the vendor's part of that engagement, and there is nothing, strictly speaking, to discharge the vendee; but his obligation cannot be enforced against him, because its amount cannot be ascertained by the standard prescribed by the contract: and, indeed, no relevant action could be stated against him. In this case the result is, that the risk does not pass to the buyer; for where the buyer cannot be compelled to pay, male diceretur, as Perezius remarks (Inst. Imp. iii. 24, p. 508), *rem perire emptori aut ejus periculo esse*. Again, the vendee may acquire a good defence against payment, even where the subject of the vendor's obligation perishes, and the obligation perishes with it. Where the vendor is *in mora* to deliver, but the destruction of the subject has been by some *damnum fatale* for which he is not directly responsible, he may still be liable to relieve the vendee of the loss which would in the ordinary case fall on him, upon the same principle upon which an agent is liable for the loss to his principal by a *damnum fatale* happening to goods deposited in an improper place, or contrary to the usual course of business or to his instructions, though these breaches of his duty were not the *causa proxima* of the loss,—or where he is held liable for the bankruptcy of a banker with whom he had the funds deposited

Where the bargain is to deliver the commodity at a particular place, the risk is with the seller till delivery at that place; so that if it perish on the voyage, it is lost to the seller, and he cannot claim for the price.¹

Where the goods are to be sent from a distance, and the seller neglects his duty in respect to the safe carriage, he will not be entitled to claim the price should the goods be lost. Thus the seller has to send the goods by sea; but they are delivered so carelessly into the vessel by which they are to be transported, that they are lost. Is he entitled to claim as a creditor for the price? The rule seems to be, that he can have no claim unless he shall have so fixed them on the wharfinger, or on the shipmaster, as to furnish a remedy to the buyer.² The same rule will hold as to a parcel sent by a coach or land-carrier. And the doctrine was in one case carried so far in England, that a person having executed an order for goods, by delivering them to the receiving-house of a vessel trading between the two places, was nevertheless held to have no claim for the price,³ as he had not paid the additional

in his own name, though there could have been no complaint against him if they had been deposited in the same bank in his principal's name. (See Story, Agency, sec. 200, note, sec. 218; *Caffrey v Darby*, 6 Vesey 496; *Davis v Garrett*, 6 Bingh. 716; *Harle v Ogilvie*, 1749, Kilk. 377, M. 10095; *Massey v Banner*, 4 Madd. 413; *Knight v Lord Plymouth*, 3 Atk. 480.) The principle is, that whatever be the immediate cause of the loss, if the party on whom the loss would otherwise fall can show that the other was under a duty to him, and that but for the breach of that duty the property destroyed would not have been in a situation exposed to the incidence of the *damnum* which has befallen it, there is a sufficient ground for an action of reparation. In this way, in the case of *mora* on the vendor's part in delivering the goods, or in the case of a misdelivery by him to some improper medium of conveyance to the vendee, if loss befall the goods in these circumstances, there will emerge to the vendee a claim of damages or for reparation, which will form a set-off against the vendor's claim for the price, or which will rather be held to exclude it, on the principle, *Frustra petis quod mox es restitutus*. In other words, in this case the risk will not be held to have passed, *res peribit venditori*. But again, following out the operation of the principle that creates the claim of damage in such a case by principal against agent, just as the agent may in answer to that claim of damages set up and show any ground which would have prevented the principal from taking benefit even though the agent had performed his duty, i.e. which must certainly have prevented him, not which might probably have done so (Story, sec. 222; *M'Lean v Grant*, 15 Nov. 1805, M. App. Reparation, No. 2); so, if the vendor can show in such a case that the subject would equally have perished in the hands of the vendee had it been delivered, he will elide the vendor's action of damages, and leave him no ground whereon to plead a set-off against his, the vendor's, own action for the price. (Poth. Vente, No. 58; Stair i. 17. 15.) In other words, where the vendee can plead a set-off against the vendor's claim for the price, *res perit venditori*; where he cannot, *res perit emptori*. And so, where the loss has happened by the direct fault of the vendor, in breach of that obligation incumbent on him to take proper care and custody of the goods till delivery, this will give the vendee a ground of set-off against the action for the price. (See Poth. Vente, No. 55; Domat. i. 2. 2. 26; Ersk. iii. 3. 7; Stair i. 14. 7.) Again, just as a depositary or an agent may assume, by special agreement, the risk of every-

thing that may happen to the property in his hands (Pothier, Mand. sec. 50, l. 39, D. de Mand.), so the vendor may. (*Spence v Ormiston*, 25 Jan. 1687, M. 3153; *Milne & Co. v Miller*, 1 Feb. 1809, 15 F. C. 127; *Vale v Bayle*, Cowp. 294; Inst. iii. 24. 3, ll. 1 and 10, D. de Per. et Comm. Rei Vend.; Ersk. iii. 3. 7.) An undertaking to deliver at some specified place, different from that where the goods are at the time of sale, has been construed to amount to a special undertaking of this kind.]

¹ *Milne & Co. v Miller*, 1 Feb. 1809, 15 Fac. Coll. 127, where grain was by letters sold, 'to be delivered at Stirling shore at the mast,' and sample given. About three weeks afterwards it arrived at Stirling; and the buyer being from home, his clerk and servants took it and lodged it in a barn, keeping it carefully apart, as it had been heated and spoilt. An inspection was ordered by the sheriff, from which the grain appeared to have been damaged before its arrival at Stirling. The Lord Ordinary found, that 'in respect the grain was by the bargain to be shipped by the seller, and delivered at Stirling shore, the risk remained on the seller till delivery; and therefore found the buyer not bound to take the grain.' The Court affirmed this judgment. See also *Spence v Ormiston*, 25 Jan. 1687, M. 3153.

² In *Buckman v Levi*, 1813, 3 Camp. 414, Lord Ellenborough directed a jury to find a verdict for the buyer, where the seller had neither taken a receipt when the goods were delivered to the wharfinger or carrier, nor taken care to have them booked, nor in any way fixed the goods on the carrier, so as to furnish the buyer with a remedy over against him; and verdict went accordingly. [*Fleet v Morrison*, 1854, 16 D. 1122.]

³ *Clarke v Hutchins*, 1811, 14 East 475. In this case Hutchins at Gosport ordered goods from Clarke at Plymouth. The goods were in value £51. Clarke entered them at the receiving-house of the carrying ship between those places, the owners of which had published cards limiting their responsibility to packages of £5 value, unless entered and paid for at a higher rate. The goods were never delivered, and Hutchins refused to pay for them. The seller brought his action of assumpsit; but under the direction of Grahame, B., he was nonsuited. The Court of King's Bench refused a rule. Lord Ellenborough said: 'The plaintiff cannot be said to have deposited the goods in the usual and ordinary way, for the purpose of forwarding them to the defendant, unless he took the usual and ordinary precaution which the notoriety of the

sum advertised as requisite to the carrier's responsibility for a package of that value. [445] But that doctrine has been since doubted.¹

The directions given by the buyer as to the carriage, must be followed with reasonable diligence and attention.²

On the same principle that the seller must secure to the buyer his remedy in case of loss, he is bound to furnish the means of insuring, otherwise to stand to the risk himself.³ The regular course is, to deliver the goods to a particular ship, and send the bill of lading; and when that is done, the shipowners are charged with the goods, the buyer enabled to insure, and he has it in his power to dispose of the goods immediately, so that he has all his remedies. Where a bill of lading is taken in the ordinary course of navigation, it seems to be an absolute duty of the shipper to transmit it; and he will be liable for any loss which may arise from the neglect. But it is neither necessary nor possible in all cases to send a bill of lading. The seller may not know the ship by which the goods are to be sent; in which case, as insurance may be done on ship or ships, it seems to be sufficient to give notice that the goods are to go by the first ship, or by the first packet, or by a ship expected to sail soon, or against a certain day, the name of the ship unknown, etc.⁴ General [446]

carriers' general undertaking required with respect to goods of this value, to ensure them a safe conveyance; that is, by making a special entry of them. He had an implied authority, and it was his duty to do whatever was necessary to secure the responsibility of the carriers for the safe delivery of the goods, and to put them into such a course of conveyance as that, in case of a loss, the defendant might have his indemnity against the carriers.' The rest of the Court assented.

¹ *Cothay v Tute*, 1811, 3 Camp. 129. While the general principle on which the above judgment went is unquestionably sound, it has subsequently been said by the eminent judge who delivered the opinion of the Court, that 'as it is in practice so unusual under these notices to enter and insure goods above the limited value, he will be inclined to hold that the vendor is not bound to do so without express instructions for the purpose. Were he to insure of his own accord with the carrier, how far would the purchaser be liable for the heavy additional expense thus incurred?' In this particular case the seller had a verdict, because this was an order for more goods; and although it was a part of the defender's case to show that the former had been entered high, he did not attempt this.

² *Sword v Milloy*, 17 Feb. 1813, 17 Fac. Coll. 209. Milloy ordered a cargo of coals to be sent by a particular ship; but that ship being engaged, he ordered the coal merchant to 'freight a gabbart yourself at 2s. 9d. per cart.' He did freight a vessel then in employment at Broomielaw; but she sank, and the cargo perished. In an action for the price the defence was, that the ship was not seaworthy, and that this was notorious and manifest from the appearance of the ship. A proof was taken, and Lord Justice-Clerk Boyle thought that, from the evidence, the pursuer had sufficiently discharged his obligation, the vessel being an ordinary trader there in employment. Lord Meadowbank held the action for the price to lie, unless it were proved that the pursuer was guilty of *culpa lata*, which was not shown here.

³ This is taken for granted as the very groundwork of all the cases on the subject.

Thus, in *Andrew v Ross, Park, and others*, 6 Dec. 1810, 16 Fac. Coll. 68, it was laid down from the bench, 'as an

essential part of the shipper's duty, to give notice immediately of the shipment, that the purchaser may have it in his power to take measures for his safety;' and as to the special case it was said: 'Here no notice of the shipment or delivery at the wharf was given; indeed, the purchasers had no reason to conclude that the goods were sent at all, in which case it was entirely out of their power to secure themselves by insurance.' See below, p. 477, note 1.

⁴ *Hogg v Kennedy*, 1754, M. 10097. Kennedy & Co. commissioned goods from Holland to be sent by the first ship for Leith, Greenock, or Borrowstounness. The goods were accordingly shipped in the Hopewell, Burton, for Leith. No bill of lading was sent, but information generally that the goods were sent by Burton for Leith, but without naming the ship. The Court of Session held this sufficient, and gave decree for the price, although the goods were lost.

Johnston & Sharp v Baillie, 2 June 1815, 16 Fac. Coll. 387. Baillie bought from Johnston & Sharp three hhds. of sugar, to be shipped for Ayr by the first opportunity. He received on 23d January an invoice, which did not mention whether the sugar was at Glasgow or Port-Glasgow, nor in what ship the sugar was to be sent. Two ships arrived at Ayr, but the sugars were not on board; on which Baillie, 16th February, wrote, expressing his surprise and his conjectures, with provisional directions about shipping them if at Port-Glasgow. To this no answer was returned. The goods had been put on board the John on 2d February, and the bill of lading was delivered to Baillie's correspondent, whom he directed to call and inquire, on the 27th. It was sent to Baillie on the 28th. On that day the ship was lost, about ten miles from Ayr, and Baillie got the intelligence at the same time that he got the bill of lading. The Court were of opinion that due notification of the shipment had not been made. They held that there was a neglect, not only of what was necessary to a correct insurance, but what was most essential to the purchase in many respects, as enabling Baillie to take measures of security during the navigation of the Clyde; and in general, that it is salutary to require, in all cases, rigidly, that the rules of accurate mercantile jurisprudence should be observed. The seller's action for the price was dismissed. Against this judgment was the opinion of two very eminent judges, Lord

information of the time of sailing is sometimes the only notice that can positively be relied on. In the carrying trade, which is prosecuted to a great extent by shipping companies, as between London and Leith, London and Dundee and Perth, Leith and Glasgow, Leith and Hamburg, etc., there are a number of ships belonging to the company, and their warehouses fill with goods against the day of sailing, and are emptied indiscriminately into whichever ship is first ready or most convenient; or the intended order of the sailing of the smacks is interrupted by accidents, and the goods intended for one ship are put on board of another. The only safe mode of insuring in such cases is to insure on ship or ships, and there can be no doubt that it will be perfectly effectual.¹ But a question remains of some importance: When goods are sent to a shipping company's wharf, the receipt in general appropriates the goods to a particular ship—the ship next in order for sailing. In this case there can be no doubt that when the seller transmits such a receipt, bearing the name of the ship, he fulfils his duty; and if the goods are afterwards put on board of another ship and lost, whatever question may be raised with the shipping company, no defence can be made against the seller's claim for the price.² But even where no such receipt has been taken, and from the wharfinger's information the seller has himself made up an invoice, expressing the name of a particular vessel, which turns out not to be the ship in which the goods were ultimately sent, the buyer is liable. The custom is held in such cases to construe both the receipt and the information of the wharfinger into an engagement, not so much to send the goods by a *particular* ship, as by the *first* ship in which they can be sent; the name of the loading ship being taken for the company's ships.³ The cases quoted below are to be taken as characterized particularly by the custom of the trade; and this effect [447] seems to be due to the custom in the opinion of the judges of England.⁴ Wherever the information is such that no effectual insurance can be made,⁵ or where the information

Robertson and Lord Pitmilley, who held that there was sufficient information given to the purchaser to enable him to insure, while the shipowners were fully charged with the goods.

¹ Marshall 172; Park, ed. 1817, p. 22.

² *Cooke v Ludlow*, 2 New Rep. C. B. 119. Ludlow, near Bristol, ordered a patent chaff-cutter from Cooke of London, who sent it to Symond's wharf, where Bristol vessels load, and received from the wharfingers a receipt: 'The Commerce, C. Farquharson, for Bristol, 17th December, received 13s. 6d. J. M.' The same day, Cooke by post informed Ludlow that the Commerce was to sail in January for Bristol, and that the agents were Pollard & Sons. It is the custom, when the vessels loading at the wharf are full, to reserve the overplus goods for the next. The chaff-cutter was thus sent by the Nancy in April, which was the next ship. When the chaff-cutter did not arrive by the Commerce, Ludlow gave himself no further trouble. In the meanwhile it went safe, and lay at Pollard's for a year; and when the price was demanded, Ludlow defended himself on the circumstances. The Court held the compliance with the order to be reasonable, and that it lay with the buyer to give notice of non-arrival.

³ In the following cases there is a degree of looseness in the printed reports, which I have endeavoured to correct:—

1. *Hesseltine v Arrol & Co.*, 1802, M. 10111. Arrol & Co. of Edinburgh ordered three chests of tea from Hesseltine of London; and the tea was sent to the Berwick Shipping Company's wharf. Hesseltine, on sending to learn what ship was to sail for Leith, was told that if his goods came next day they would go by the 'Kelso Packet, Robert Moir master;' and on this he made up his invoice, and inserted those names in it. But having occasion to send to the wharf in the

evening, he learned that the tea would go by the 'Union, Jo. Paterson;' and he altered his invoice accordingly, and sent it off on 6th February. He sent the tea to the wharf, but does not appear to have taken a receipt. The goods went by the Kelso after all, and were stranded. Two boxes were lost; one delivered damaged. Hesseltine brought his action, and succeeded. The Court proceeded, I believe, on these grounds:—1. That the shipper having reason to believe the information correct, and the buyer having it in his power to insure on ship or ships, it was enough; 2. That the goods being fixed with the wharfinger, the question thenceforward lay with him; and by the custom of trade, there is no reliance on the particular ship by which a shipping company is to send a particular package.

2. *Hammond & Co. v Porteous & Dewar*, 13 Dec. 1808, 15 Fac. Coll. 48. Porteous & Dewar, Perth, ordered nine chests of tea from Elton, Hammond, & Co. of London. An invoice was sent, bearing, 'Per Bridport Packet, Wishart, for Perth;' but no bill of lading or receipt. The goods went by the Active. The Bridport arrived in safety; the Active was lost. Lord Glenlee held the buyers liable for the price. The Court held Hesseltine's case as a precedent, and affirmed his judgment.

3. The same doctrine was held generally in the case of *Arnot v Stewart*. See below, note 5.

⁴ See, in *Cooke v Ludlow*, *supra*, note 2.

⁵ *Arnot v Stewart*, 25 Nov. 1813, 17 Fac. Coll. 462. Stewart ordered molasses from Redfair of London. They were sent to the shipping company's wharf, and went by the Kinloch, which sailed on 24th February. On 27th an invoice was sent, dated on that day, and bearing the Defiance as the name of the ship, but not mentioning the day of sailing. The Kinloch

is unduly delayed till it is too late to insure,¹ the seller will not be entitled to claim the price. Where the orders of the buyer are not observed, the risk is with the seller.²

CLAIMS ON THE PART OF THE BUYER.—The buyer, in like manner as the seller, has a right to insist on implement of the contract, by delivery of the goods; and this either before or after he shall himself have done his part. And on the same footing, on the bankruptcy of the seller, the buyer can claim as a creditor, either before the price is paid or after having paid it.

If the price has not yet been paid, the seller's creditors have it in their option to close with the buyer's proposal, and proceed with the bargain. The desire to have the bargain fulfilled may be on their side, where the bargain is a good one, or where the price has fallen, or where the goods have been spoilt or lost at the risk of the buyer; which cases have already been treated at large. Nay, should the buyer have failed, it may be more advantageous for the seller's creditors to insist even against the bankrupt estate of the buyer for such dividend as it will afford, leaving the trustee on that estate to make the best of the goods. But [448] the proper case to be discussed here is, where the buyer, either having paid the price or not yet having paid it, requires delivery of the goods, and the seller's creditors cannot or do not choose to make delivery.

The contract of sale raises only a personal action or claim; *jus ad rem*. And the claim for delivery of goods sold but not transferred resolves into a personal demand for damages; all personal creditors, whether for money or *ad factum præstandum*, being only personal creditors marshalled in the same class, and to be paid by a dividend of the inadequate fund.³

was lost, and Stewart refused to pay the price. The Judge-Admiral, and afterwards Lords Gillies and Bannatyne in the Bill Chamber, repelled the defence, and held the seller to have done his duty. The Court altered this judgment on these grounds:—1. That the invoice misled the buyer to believe that the risk was not commenced till the 27th, and that an insurance on that information would have been ineffectual; and, 2. That although no insurance was here made and avoided, the buyer was entitled to use his discretion upon just information.

¹ *Andrew v Ross, Park, & Co.*, 6 Dec. 1810, 16 Fac. Coll. 68. Andrew of Manchester was agent for Perkins & Co. of London, porter brewers. He took orders from Scotland, sent them to London, and the invoices were then sent to him and forwarded. His customers knew of this circuitous mode of transacting. Ross and others gave him orders in June, and the porter was sent to the wharf on 20th July. The ship was not to sail for a day or two; and the invoices were not sent off to Manchester till 27th. Andrew not being at home when they arrived, they lay till 10th August. The ship sailed 2d August, and on 10th was lost. The loss was known the day before the invoices came. The Court held clearly, that the buyers were not liable for the price. See above, p. 475, note 3. [*Hastie v Campbell*, 1857, 19 D. 557, where it was held that the seller could not be made responsible for not communicating by telegraph.]

² *Harle v Ogilvie*, 1749, M. 10095. Ogilvie of Edinburgh ordered sugars from Harle of London, 'if the convoy be not sailed;' and in a postscript he says, 'If the ships be all sailed, there is nothing for it but wait the first convoy.' Harle shipped the sugars in a ship with army stores, which was to fall down to join convoy. But the convoy was gone, and she made a run and arrived, but the sugars damaged. Here it seems to have been admitted 'that the property was certainly not transferred by being put on board, as it would have been

had the ship come under convoy; that it was in suspense till her arrival; and although, had the sugars come safe, it might have been no excuse for the defender's not accepting them that they had not come under convoy, yet as they came not safe, and that till they arrived at the port of delivery the property of the sugars was not transferred to the defender, neither could they be on his risk.' The defence was sustained. [See Story on Agency, sec. 200, note. *Caffrey v Darby*, 6 Ves. 496; *Davis v Garret*, 6 Bingh. 716; *Barker v James*, 4 Campb. 112; *Dale v Hill*, 1 Wils. 281; *May v Roberts*, 12 East 89. The seller, in shipping or engaging freight, is agent *ad hoc* for the buyer (see notes, *ante*, pp. 217, 220); and his duty is a question of agency.]

³ [By the Mercantile Law Amendment Act, 'where goods have been sold, but the same have not been delivered to the purchaser, and have been allowed to remain in the custody of the seller, it shall not be competent for any creditor of such seller, after the date of such sale, to attach such goods as belonging to the seller, by any diligence or process of law including sequestration, to the effect of preventing the purchaser, or others in his right, from enforcing delivery of the same; and the right of the purchaser to demand delivery of such goods shall, from and after the date of such sale, be attachable by or transferable to the creditors of the purchaser' (19 and 20 Vict. c. 60, sec. 1). It would seem that this enactment applies only to sales of specific goods. See *Wyper v J. & W. Harvey*, 1861, 23 D. 606. And where goods to be manufactured or reduced into some other *species* are sold under the denomination of the *species*, and the seller's estates are sequestrated before these goods are finished and deliverable, they pass to the seller's creditors as part of the seller's estate, the enactment in this section applying only to the case where the article has been ready for delivery, and left with the seller for mere custody, and being inapplicable to the case of an unfinished article remaining with the seller

The claim of the buyer, then, to whom delivery is refused, is twofold: 1. For repayment of the price, if already paid to the seller; and, 2. For indemnification of the loss sustained by non-fulfilment.

1. As to the claim for REPAYMENT OF THE PRICE, the buyer will rank as a personal creditor for the whole price, undiminished by any intermediate fall in the value of the subject. Thus, it may happen that a ship sold by the bankrupt has by sea-risk been much injured, or that corn has fallen greatly in price, or that manufactures have become unfashionable; so that, if now to be bought or delivered to the buyer, the subject would not be nearly of the same worth as when originally bought; while, considering the dividend to be paid from the estate, it may still be of advantage to the general creditors to retain the subject, leaving the buyer to his personal claim. The buyer, as a personal creditor, in such a case will be entitled to rank for the whole price, not merely for the diminished worth of the subject;¹ his claim being truly in the nature of a *condictio sine causa*.

2. INDEMNIFICATION FOR LOSS.—As to the claim for indemnification of loss, the principle is, that where the person bound to deliver is prevented by insolvency or other accident from fulfilling his engagement, the buyer's claim is for such damage only as at the time of the contract was foreseen as a necessary consequence of the failure to deliver the article. This principle points out as the proper object of such a claim, the indemnification of that sort of damage which is directly connected with the subject of the contract: loss, arising from the want of the article purchased; or gain, of which, by the failure to deliver it, the buyer has been deprived.² Thus, a dealer who is himself under contract to deliver a quantity of corn, buys and pays for 100 bolls at 25s. per boll; and being, on failure to deliver, obliged to go elsewhere for it, he, in consequence of the augmentation of price, pays 50s. for the same quantity;—he will be entitled not only to claim repayment of the price which he paid, but to claim also as a creditor for 25s. more. And, in the same way, if he buy on speculation, and can show that he might have sold the corn at 50s., he is entitled to claim repayment of the price paid, and 25s. more as gain of which he has been deprived.³ He will not, however, be entitled to enlarge his claim, so as by means of his dividend to recover the whole difference. In one sense, indeed, this is the amount of his actual damage; but when analyzed it resolves into two sorts of damage,—the damage on account of non-delivery, and the damage in consequence of insolvency. As every creditor, however, may be said in [449] the same way to suffer damage by his debtor's insolvency, the mutual claims in this respect would be neutralized. It is the amount of the loss, then, considered independently of the effects of insolvency, which constitutes the buyer's claim.

for the purpose of being completed. *Wylie & Lochhead v Mitchell*, 1870, 40 Sc. Jur. 258. A sale of an article in an unfinished state at its price in that condition, the article being then left with the seller to have additional labour bestowed on it for behoof of the buyer, may be different in regard to this section (*ibid.*). By sec. 2, a seller of goods is not entitled, in a question with any sub-vendee, to retain the goods as a security for obligations other than the price, which are due to him by his immediate vendee: 'provided always, that nothing in this Act contained shall prejudice or affect the right of retention of the seller for payment of the purchase price of the goods sold, or such portion thereof as may remain unpaid;' or for performance of conditions of his own contract of sale, or any right of retention, except as between the seller and such sub-vendee, or any right of retention arising from express contract with the original vendee. See also the provisions of sec. 3, enabling the seller of goods to attach the same, while in his own hands, by arrestment or poinding.]

¹ Among the civilians this question was much discussed; and we find Domat, and others of great name, of opinion that the contract of *emptio venditio* gives a secondary action to the buyer disappointed of delivery, only for the present value of his interest in the subject sold. See Domat, liv. 1, tit. 2, sec. 10, No. 15. But a more correct opinion came afterwards to be adopted; namely, that in default of tradition as well as in case of eviction, the secondary action, *Ex empto*, has two objects:—1. The restitution of the price, if paid,—the discharge of it, if not yet paid; and, 2. The indemnification of the buyer's loss. Molinæus De eo quod interest, Nos. 68, 69. See this controversy well and shortly stated by Pothier, Tr. du Cont. de Vente, No. 69.

² Cum per venditorem steterit quo minus rem tradat, omnis utilitas emptoris in æstimationem venit: quæ modo circa ipsam rem consistit. Dig. lib. 19, tit. 1; De Act. Empt. l. 21, sec. 3.

³ [See *Howie v Anderson*, 1848, 10 D. 355; *Dickson v Henderson*, 1849, 12 D. 306.]

But the general principles already explained will also extend to that sort of damage which, although not strictly attaching to the article sold, is by stipulation, or by necessary consequence at the time of the sale, placed in view of the parties, as foreseen effects of the non-performance of the contract; and as dangers from which, expressly or tacitly, the seller is by faithful performance to save the buyer.¹ Thus, a shipowner, for example, has entered into a contract for beef, stipulating that it shall be delivered in due time, for the supply of his ship, which is destined to sail with a particular convoy or on a certain voyage; the seller of the beef fails; and, in consequence of the non-fulfilment, the voyage is lost: a claim will lie not merely for the higher price to which beef may have risen, but for the damage arising from the loss of the voyage.²

In the further discussion of this matter of damages for non-delivery, attention must be paid to the two cases of damage now distinguished.

1. Where the direct loss arising from non-delivery of an article is in question, it may sometimes amount to much more than double the price of the article. Where the failure is not fraudulent, equity interposes in such cases to restrain excessive damages; an interposition more frequent in cases of estimated damages or penalties expressed in the contract. But the law by which, in the Roman jurisprudence, Justinian restrained the taxing of direct damages to double the value of the article, that value included,³ is held with us as an arbitrary rule, which does not regulate our courts.⁴ Justice is now to be done by a jury, fairly estimating the damage according to the circumstances. One consideration, however, ought ever to be kept in mind in such estimation of damages (and it has always prevailed while this matter remained with the judges), that in matters of contract regard must be had to the express or presumed will of the parties at entering into that contract; and so, in cases like this, the sum ought to be fixed with a view to the probable amount of the damage, in the circumstances in which the contract was made.

It frequently occurs as a difficulty, in settling direct damage for non-delivery, At what point of time the estimate of the damage, to replace expected gain, is to be struck? It is to be observed, that while delivery is possible, the buyer has his alternative to insist [450] for delivery in specie, or for damage. It seems to follow, 1. That if it was a purchase on general speculation, he may select that point of time which to him would have been most advantageous—between the moment when delivery was by the contract due, and the date of the sentence.⁵ And the Court has refused to qualify this by any speculative inquiry

¹ 'Quelquefois,' says Pothier, 'l'action *ex empto* s'étend aux dommages et intérêts que l'acheteur a soufferts *extrinsecus* et dans ses autres biens. Cela a lieu toutes les fois qu'il paroît par les circonstances qu'ils ont été prévus lors du contrat, et que le vendeur s'y est soumis, au moins tacitement, en cas d'inexécution de son engagement.' Tr. du Cont. de Vente, No. 73. See also Tr. des Obligations, Nos. 161, 162. The difference of expression in the last of these passages may be observed, where it seems more correctly to be required, not only that from circumstances it shall appear that the consequences were foreseen, and in the view of the parties at the time of the contract, but 'qu'il paroît que par le contrat ils ont été prévus, et que le débiteur s'en est, ou expressément ou tacitement, chargé en cas d'inexécution de son obligation.'

² Contrast *Dunlop v M'Kellar*, 31 May 1815, below, p. 480, note 2, with *Anderson v Goddard & Co.*, 21 Feb. 1809, below, p. 480, note 4.

Strachan v Paton, 1824, 3 S. 259, N. E. 184. Damages found due for short fishing, in consequence of the insufficient repair of a whale-ship. [In an action for non-delivery of the hull of a floating derrick, it appeared that the buyer intended it for a special purpose, but the seller supposed it to be for a

different and more obvious purpose. Held that the buyer might recover as damages the profits which might have been made from the purpose supposed by the seller, the actual damage being of greater amount. *Cory v Thames Ironworks Co.*, 3 L. R. Q. B. 181.]

³ Cod. lib. 7, tit. 47. De Sentent. quæ pro eo quod interest, l. unic.

⁴ 'It is rather,' says Stair, 'in the arbitrement of the judge to ponder all circumstances, and accordingly modify the value as at the time of dittay or citation, litiscontestation or sentence' (i. 17. 16).

This is now the province of a jury, as the tribunal best of all suited for such a determination. 6 Geo. IV. c. 120, sec. 28.

⁵ This was the principle of the case of *Morison v Boswell*, 1806, M. App. Dam. and Int. No. 1, 5 Pat. 649. This was a purchase of four puncheons of whisky at 5s. 4d. per gallon. On the same day, intelligence arrived of an intention to stop distillation in consequence of the failure of crops, and the prices rose to 16s. per gallon, more than three times the price at which the purchase was made. Damages were found due, and the estimation of them came to be fixed by the Court, before the introduction of jury trial in civil causes. The

into what, in the circumstances, might probably have been the fate of the article if duly delivered. 2. If the non-delivery has arisen from bankruptcy, the alternative claim for delivery or damages stops on that event; the claim *then* resolves into damage, on the maxim, '*In loco facti imprestabilis subsit damnum et interesse.*' 3. If the purchase was intended to supply a particular demand, and the buyer has been obliged to supply himself elsewhere, the claim of damage will lie for the price paid, in order to supply that demand.¹ 4. If the buyer, while yet he expected delivery, have entered into a contract to sell that article to another, he may claim as direct damage the difference between the price which he was to receive, and what he had paid or engaged to pay.² 5. It would seem that the buyer can be entitled to nothing more than the value of the article at the stipulated place of delivery.³

2. Where the damage is not strictly speaking direct, but extended to extraneous loss by construction of the contract, although this is not a case to which Justinian's rule was [451] intended to apply, the same equitable interposition will take place as in the former case. Indeed, the very principle on which this construction is grounded dictates the limitation. For the damage not being naturally direct, becomes so by construction of law, only in consequence of a presumption that the parties must have had this in contemplation as a danger against which the faithful performance of the contract was to protect the buyer; and in forming that presumption, no more can be assumed as in contemplation than the probable and manifest results of the transaction. The case quoted below may serve to illustrate at once the rule and its limitation.⁴

damage was laid in the summons at £200; and the Lord Ordinary found 'that, from what is stated by both parties, it appears the loss sustained by the pursuer was at least equal to the sum of £200 concluded for in the libel, on 1st November 1799, the date of citation to this action: modifies the damages accordingly to that sum, with interest.' The Court altered that judgment, and found damages 'according to the highest selling price of whisky per gallon, from 3d October 1799, the date of the sale, to 1st November thereafter, the date of citation.' But afterwards the Court returned to the Lord Ordinary's judgment, which gave more than the highest price between these points, and as high a price as could have been got before decree, and as the restriction in the summons would allow. In this case it was held, 1. That the buyer's demand was not to be limited to the price at the stipulated day of delivery; 2. That although the non-delivery be imputable to no fault, the buyer must be indemnified for his actual loss; 3. That the price at the day of citation was not to be taken as the criterion, since the call to fulfil his engagement would thus discharge the seller from the bad consequences of his subsequent refusal; and, 4. That it was not practicable, without throwing the matter entirely loose, to enter into the consideration of the probable time at which, had the delivery been duly made, the article would have been disposed of.

In *Shirra & Mains v Harvie & Co.*, 11 Dec. 1807, 15 Fac. Coll. 329, note, the above principle was confirmed. Shirra bought a quantity of whisky to be delivered immediately. Harvie & Co. having refused to deliver it, an action was brought before the sheriff, in which Shirra was successful. In a suspension, Shirra was found entitled to the value of the whisky as at the date of the sheriff's decree, deducting the contract price. [It has since been ruled in the House of Lords that this is not to be taken as a universal rule; and that, in estimating the quantum of damage in such cases, the

whole circumstances must be taken into view. *Higgins v Dunlop & Co.*, 6 Bell 196, affirming 9 D. 1407. And see *Watt v Mitchell*, 1839, 1 D. 1157.]

¹ *Taylor & Co. v Morison*, 17 June 1809, 15 Fac. Coll. 326, where the action was laid for 'the difference of price between 8s. per gallon, at which the spirits were sold to Taylor & Co., and the sum of 11s. 9d. per gallon, at which Taylor & Co. were under the necessity of purchasing spirits, in order to supply the place of the spirits which they should have received from the defender.'

² *Dunlop v M'Kellar*, 31 May 1815, 18 Fac. Coll. 382. Scougal & Co. bought from M'Kellar 144 bags of coffee. He afterwards sold those 144 bags, with 30 more, to Balfour, Junor, & Co. It became impossible for M'Kellar to deliver the coffee; and Balfour, Junor, & Co. refused to have any part of their purchase. Scougal & Co. having failed, the trustee on their estate brought an action of damages. The Court found him entitled to the sum of £159, as the loss of profit on the 144 bags, by inability to fulfil the bargain with Balfour, Junor, & Co., but refused to sustain any claim of damage for loss on the 30 bags, which was neither direct loss nor in contemplation of the contract with M'Kellar.

³ In *Anderson v Goddard & Co.*, observe that it appears to have been a part of the bargain that the buyer was to send a vessel for the grain. See next note.

⁴ *Anderson v Goddard & Co.*, 21 Feb. 1809, 15 Fac. Coll. 206. William Goddard & Co. agreed to sell 300 bolls of barley to Anderson. He was to send a ship for it to Leith from Beaulieu. The ship was accordingly sent; but Goddard & Co. failed to implement their engagement, and an action of damages was raised. Lord Glenlee found 'the pursuer Anderson entitled to the difference between the price at which the defenders agreed to furnish the grain and the market price thereof at Beaulieu, at the time when the vessel sent for it to Leith would have arrived at Beaulieu if the

SECTION II.

OF CONTRACTS OF HIRING.

The CONTRACT OF HIRING, or LOCATIO CONDUCTIO, is that by which the one party agrees, in consideration of a certain hire or rent which the other engages to pay, to give to that other, during a certain time, the use or occupation of a thing; or personal service and labour; or both combined. It may relate to lands, houses, moveables (including horses, cattle, etc.), or human labour; or these may be hired in various combinations.

In considering this contract in so far as relates to the real right of the subject let, some niceties in questions of property were formerly taken notice of, which may on bankruptcy arise from the complication of *locatio operis* with that of sale.¹ At present the subject of inquiry relates to the claims which may arise out of the contract, in so far as the respective personal obligations of the parties are concerned.

SUBSECTION I.—GENERAL PRINCIPLES OF THE CONTRACT OF HIRING.

The general principles of the contract are closely analogous to those which regulate the contract of sale; and indeed it may be said, that Hiring is nothing else than the sale of the use and benefit of the thing, or of the labour which forms the subject of it.²

This contract is completed, like that of sale, by consent alone. When the parties have finally agreed as to the subject, the hire, and the time, the contract is perfect; and requires neither delivery on the one hand, nor payment on the other, to entitle the parties to enforce their several rights under it.

The chief practical distinction which it is important to mark, is that the risk [452] does not alter, as in Sale. But in general the loss or injury of the property or labour hired falls on the owner; unless he can establish a ground of liability against the hirer, by reason of negligent or faulty conduct.³

The several varieties of this contract may be reduced under the two great divisions of LOCATIO REI and LOCATIO OPERIS: the former comprehending all contracts for the hire of lands, houses, and moveables, including horses, cattle, ships, machinery, etc.; the latter including the hire of workmen or labourers, and all the varieties of contracts for the carriage of goods. The subject of leases of land or houses falling under the first head has already been considered; and of those which come under the second, the hiring of ships, or charter-party, may be reserved for future consideration as a maritime contract.

SUBSECTION II.—HIRING OF MOVEABLES.

Without distinguishing the several occasions on which this contract is used in the daily intercourse of trade, it may be observed, 1. That fungibles⁴ are not the proper object

defenders had delivered the cargo; and finds that the pursuer cannot at the same time claim the above said difference in name of damages, and also the whole freight of the vessel, but must limit the claim in that respect to the additional expense incurred by him in consequence of the vessel's having been detained at Leith a greater number of days than would have been necessary if the defenders had fulfilled the bargain.' The Court unanimously adhered to this judgment.

Here, 1. The voyage and its successful issue, by placing the grain for sale at Beauvy, was in contemplation of the parties, as a direct result of the contract, depending on faithful performance. 2. This supposed the payment of freight (perhaps

correctly it should have included the insurance); but it was a necessary consequence of delay that damage should be payable, and this also must have been in contemplation of the parties. The judgment pronounced, therefore, gives effect to these the true principles of the contract.

[On the whole subject of damages, see the elaborate treatises of Mr. Mayne and Mr. Sedgwick.]

¹ See above, p. 275.

² Ersk. iii. 3. 14.

³ See below, p. 482.

⁴ See above, p. 275, note 2.

of this contract, since they are consumed by use; and, 2. That the contract may effectually be constituted, although specific subjects are not fixed upon; as a horse-hirer may engage to furnish horses for a carriage, although the parties have not fixed on any particular horses of which the use is to be given.

He who lets his property to hire is called the locator, or lessor; he who hires is called the conductor, or lessee.

CLAIMS UNDER THIS CONTRACT.

I. CLAIMS ON THE PART OF THE LESSEE OR HIRER.—The lessee or hirer may have several actions on the contract; or, on the bankruptcy of the person who lets the subject to hire, he may have different claims, according to the state of the contract.

1. Where the subject has not yet been delivered, the lessee will be bound to take possession, and pay the hire, if the lessor or his creditors choose to insist on the contract; and he is, at all events, entitled to demand possession, or damages for the want of it.

The impossibility, however, of delivering the subject (in consequence of its accidental destruction, for example), is a good answer to the lessee's action; and will save the lessor on the one hand from any claim of damages, while it will entitle the lessee to freedom from the hire on the other.

But refusal to deliver on account of insolvency (the subject being extant) will expose the estate of the lessor to a claim of damages; and the lessee will therefore, on a refusal by the lessor's creditors to fulfil the contract, be entitled to be ranked for the amount of his damage as a personal creditor. The same principles regulate the claim of damages under this contract which have already been considered relatively to sale.¹

2. If the subject has been delivered, the hirer is entitled to continue his possession of it under the contract, both against the lessor and against his creditors.

The lessee will be entitled to an abatement of the *hire*, proportioned to any partial destruction of the subject; for the risk is with the owner. The principle which distinguishes this case from sale is, that sale is the transference of the *property*; but in hiring, the *use and enjoyment* only is transferred.²

[453] The hirer or lessee will not be entitled to claim *damages* on account of any failure, destruction, or defect, occurring during his possession, if it should proceed from accident, without fault or neglect on the part of the person who lets to hire;³ but he will be entitled to damage if that failure proceed from refusal or from insolvency. Suppose, for example, that a person who has a steam-engine too powerful for his own occasions, lets out a share of the power, by affixing additional machinery, and communicating the motion to a manufactory in the neighbourhood, and fails; his creditors may find it inexpedient to keep the engine going; and so the hirer or lessee of the share of this moving power has his whole operations stopped: he will be entitled to claim his damages, with repayment of any advance of rent which he may have made.

3. Although the person who lets to hire will not be responsible, nor his estate on his bankruptcy, for any accidental failure or destruction of the subject, the hirer or lessee will be entitled to claim such expense as he has been under the necessity of laying out upon the subject let. To ground such claim, it will be necessary to show, 1. That the occasion of the expense was not to be ascribed to the hirer or lessee; 2. That the expense was indispensably necessary; and, 3. That the lessor had notice of it as soon as circumstances permitted.

II. CLAIMS BY THE PERSON LETTING TO HIRE, OR LESSOR.—A ground of action, or on the bankruptcy of the lessee a claim, may arise to the person who lets the subject to hire,

¹ See above, p. 478 et seq.

² Pothier, Tr. du Cont. de Louage, No. 112.

³ Ersk. iii. 3. 15; Pothier, Louage, No. 117

for payment of the hire of the subject, or for damages on account of injury to the subject of the contract.

1. The creditors of the hirer or lessee may, if they think proper, continue the possession, or insist in proceeding with the contract; in which case the estate will be liable for the hire, not merely for a dividend. But although they should choose not to do so, the person who lets to hire is entitled as a creditor to rank for his rents or hire of the whole term agreed on, as being his damage; deducting, however, the value of the yearly possession, which is given up to him by the lessee's failure.

2. It is an important question, how far the lessee or his estate shall be held responsible for injury received by the subject? This forms a part of the great doctrine of RESPONSIBILITY FOR NEGLIGENCE; a doctrine which has relations to all the several degrees of reliance, which in different contracts it is necessary or convenient for one party to repose in another's diligence or care, and which in Scottish jurisprudence is treated under the name of DILIGENCE PRESTABLE; in England, under BAILMENT.

This doctrine is the subject of an essay of Sir William Jones:¹ it also forms the subject of a short but admirable paper of Pothier.² The doctrine maintained by Pothier, and vindicated by Sir William Jones, is the established law of Scotland. It resolves Neglect into three species: Gross, or *lata culpa*; Ordinary, or *levis culpa*; and Slight, or *culpa levissima*. And the rule of responsibility under these three divisions is, that in contracts beneficial only to the owner, as Deposit or Mandate, good faith alone is required in the custodier, and gross neglect only can render him responsible; that where the benefit is reciprocal, as in [454] Sale, Hiring, Pledge, Partnership, and Joint Property, the care of a prudent man is expected, and responsibility will follow upon ordinary neglect; and that where a person has the custody of subjects only for his own benefit, the slightest neglect will subject him to a claim for indemnification.³

As applicable more especially to the contract of hiring, where the risk independently of fault is with the owner, the rule is, that the lessee is liable in a middle diligence, '*præstat culpam levem*.'⁴

¹ Essay on the Law of Bailments, by Sir W. Jones, Knt. In this essay Sir W. Jones has shown how the learning of a scholar and the liberality of a gentleman may be combined with the correctness of legal analysis.

² Printed as an Appendix to his Treatise on Obligations, vol. i. p. 455. This paper was occasioned by a tract of M. Le Brun, advocate of the Parliament of Paris, entitled 'Dissertation sur la Prestation des Fautes, Paris 1764,' of which Pothier speaks highly. He professes not to refute the reasoning of this essay; but he gives in the paper now cited a complete answer to the principles of the tract, and in his Pandectæ Justinianæ answers his arguments on the several laws which he quotes. See Pand. Justin. vol. iii. p. 770, sec. 981; vol. i. p. 489, sec. 32, note f, etc.

³ Ersk. iii. 1. 21.

[The distinctions here laid down as applicable, according to the abstract rules given, to cases occurring on the subject of negligence or diligence prestable, are now perhaps justly held to be of little practical utility. The degrees of negligence are not capable of being discriminated in actual cases; and the question whether there has been sufficient negligence to charge a party with liability, is held to be more properly a question to be determined by the complexion of circumstances in each case. See Toullier, Droit Civile, vol. vi. p. 239 et seq., vol. xi. p. 203; Mackelvey 191; and the late Lord Mackenzie's Studies in Roman Law, p. 186. The doctrine explained there as to diligence and *culpa*, which blots out

the distinction between *culpa levis* and *culpa levissima*, was adopted by the Court of Session in *Mackintosh v Mackintosh*, 1864, 2 Macph. 1357. So also in England, the validity of these distinctions, and their value as practical criteria of liability, have frequently been questioned, more especially that between negligence and gross negligence. See *Wilson v Brett*, 11 M. and W. 113—per Rolfe, B.; *Hinton v Dibdin*, 2 Q. B. 650—per Lord Denman; *Austen v Manchester Ry. Co.*, 10 C. B. 454—per Cresswell, J. See also *Blythe v Waterworks*, 11 Ex. 781; *Wylde v Pickford*, 8 M. and W. 443, 461-2. And so in America, as in *Steamboat New World v King*—per Curtis, J.—16 Howard 474; and in *Storer v Gowen*, 18 Maine R. 177, by the Supreme Court of Maine. See notes to *Coggs v Bernard*, in 1 Smith's Lead. Cases. It is not, however, to be supposed that in point of principle there are no differences in regard to the extent of responsibility for negligence. There are many cases, *e.g.*, where the gratuitous nature of an agent's undertaking seems to form a legitimate element in assailing the agent, under circumstances where probably a paid agent would have been held responsible. The question as to whether there has or has not been negligence, is said to be a pure question of fact (per Inglis, J.-C., in *Mackintosh v Mackintosh*, 2 Macph. 1364.)

⁴ Ersk. iii. 3. 15.

Sir W. Jones properly corrects the looseness of Mr. Justice Buller's expression (Introduction to Law of Trials at Nisi Prius, 72), where he says 'that the hirer must take all

A warehouseman having goods in his custody, or the hirer of goods having them in his possession, is not liable for loss by accidental fire.¹

A person hiring a horse is not liable for it if it be stolen from a livery stable.²

The chief difficulty in such cases lies in the evidence. It has been held in Scotland, that where any specific injury has occurred, not manifestly accidental, the *onus probandi* lies on the hirer or lessee to justify himself by proving the accident;³ while in England the rule seems to be different, it being held necessary for the lessor to give some evidence of negligence.⁴

Where the hirer or lessee has taken a use of the subject excessive and beyond the limits of the contract, such as hiring a horse to carry a certain weight, and overloading him, or riding him farther than bargained for, or overriding him,⁵ the lessee will be deemed guilty of a fault which will make him responsible.

[455] Where, again, the hirer or lessee has either not taken due care to prevent or remedy an accidental injury, or has adopted means extraordinary or hazardous, he must run the risk. Thus, if a horse become ill in the hirer's possession, and he take no means to relieve the malady, and the horse die or become useless when it might have been saved, he will be responsible.⁶ Or if he proceed himself to administer medicines when he might have

imaginable care of the goods delivered for hire,' reproving the words 'all imaginable' as too strong for practice, and as even in the mildest sense implying an *extraordinary* degree of care (p. 86). Sir W. Jones also corrects the expression of Lord Holt, that 'the hirer is bound to the *utmost diligence*,' as entirely grounded on a grammatical mistake in the translation of Bracton, who borrows *diligentissimus* from Justinian in the Institute, and which again was copied into the Institute from Gaius, a writer remarkable for the use of strong words, but who intended manifestly, instead of the superlative, to use merely the positive (p. 87).

[Where the hirer of a horse, which fell ill in his hands, prescribed for it himself instead of calling in a veterinary surgeon, he was held responsible by reason of his not having exercised the care expected of a prudent man towards his own property. *Dean v Keate*, 3 Camp. 4. See also *Davy v Chamberlain*, 4 Esp. 229; *Reading v Menham*, 1 M. and Rob. 234.]

¹ *Garside v Trent & Mersey Navigation Co.*, 1792, 4 Term. Rep. 581. Here the distinction was drawn between a warehouseman and a carrier, the latter being liable on a peculiar rule. See below, p. 492.

Longman v Gallini, 1790; Lord Kenyon, sittings at Westminster. The above rule applied to musical instruments burnt at the opera-house.

² *Trotter v Buchanan*, 1688, M. 10080. [Nor, it would seem, for the fault of an hostler. *Smith v Melvin*, 1845, 8 D. 264.]

³ *Binny v M. Veaux*, 16 July 1679, M. 10079, where the Court held, that if a horse hired should die, or fall sick or 'crooked' by the way, the hirer 'must prove the *casus fortuitus quem nulla præcessit illius culpa*;' and that it will not be enough to prove that he rode *modo debito*, and no farther than the place agreed on. Fountainhall thinks this '*perquam durum*.'

In *Robertson v Ogle*, 23 June 1809, 15 Fac. Coll. 348, a hired horse, after having been rode from Edinburgh to Aberdeen, and thence to Perth, was returned to the owner as unable to carry the rider farther, and was found on examination 'to be swayed or strained over the kidneys, or coupling of the back.' The sheriff held that the horse was a good useful

hack, and worth the sum libelled (£9) when it was hired, but had been ill-treated, and was useless when returned; and therefore found the owner entitled to the price of the horse, with costs. The Court held that the *onus probandi* lay on the defender, the horse-hirer, to show that 'the horse's malady arose from any cause for which the defender was not blameable, and which he could not control;' and as no such proof was given, the Court adhered to the sheriff's judgment.

Marquis v Ritchie, 1823, 2 S. 386, N. E. 342. [*Pyper v Thomson*, 1843, 5 D. 498.]

⁴ Thus, in *Cooper v Barton*, 1810, 3 Camp. 5, note, it was held by Le Blanc, J., that where a plaintiff proved the hiring of his horse; that the horse had before been often let out to hire, and had never fallen down; and that it had been returned to him with the knees broken, in consequence of a fall,—it was necessary for him to go further, and give *some* evidence of negligence; and as none had been given, the judge directed a nonsuit. It may be said (with old Fountainhall in the case above quoted) that this 'is *perquam durum*.' It may be impossible to prove a negligence, at the commission of which no man may be present. [Subsequent decisions support the author's view. See p. 488, note 2.]

[See, on this subject, *Story on Bailments*, secs. 410–12, and cases and authorities there; also, for more recent American decisions, *Parsons' Contr.* ii. 125, note (b); and see *Skinner v London, B. and S. Ry. Co.*, 5 Ex. 787.]

⁵ *Straiton*, 1610, M. 3148. Here a horse hired to carry sixteen stone was overloaded with twenty stone, and died. Action was sustained for the price of the horse.

Moffat v Moffat, 1624, M. 10073. Found relevant to raise responsibility, that a horse was overridden by galloping, and being hired to Stirling was ridden to Dunblane.

⁶ *Bray v Mayne*, 1818, 1 Gow 1. Mayne took a horse on trial, to pay £10 for the hire if not purchased, or £55 for the horse. He drove him from London to Worthing, where the horse appeared not to be affected otherwise than by a cold. Having afterwards driven him twenty miles in the morning, the hostler at the inn observed a swelling under his throat, and that he refused his food. Mayne, however, drove him from Ewell to London that day. During the journey the

had medical advice, and the horse die, he will be answerable where there is any unskilfulness in the means employed.¹

This implied obligation to diligence makes the master liable for his servants. The diligence is that of a *bonus paterfamilias*.

SUBSECTION III.—HIRING OF LABOUR.

LOCATIO OPERIS, or Hiring of Labour, includes the simple case of the hiring of Common or of Skilled Labour, which is '*Locatio operis faciendi*;' and the hiring of that particular kind of labour to which special rules have been applied, namely, the CARRIAGE OF GOODS, '*Locatio operis mercium vehendarum*.'

Referring to what has already been said respecting the property of the thing on which the labour is to be employed, the personal obligation, and the claims thence arising, are here to be considered.

Without being too curious about distinctions, there is some little difference observable between the hiring of the labour of an undertaker in any branch of art, and the hiring of the labour of workmen or servants. The former is a contract for performing some piece of work or operation of art, and has reference to its accomplishment; the latter is an engagement to labour under a master, and has reference to an appointed term.

A contract of *locatio operis*, to accomplish some particular piece of work or operation of art, implies that the materials shall be furnished by the employer, otherwise it is properly a sale.²

Two questions may arise on this contract:—

1. Where more has been done than the parties have stipulated and expressed in their contract, and there is on the one hand no acquiescence in the change, while on the other the work is inseparably connected with the property of the employer, it would seem that the employer is not bound to pay more than he has agreed to pay. But a departure from the contract, assented to by the employer, will, to the extent of that alteration, substitute for the contracted price the fair remuneration for work and materials, a claim for the [456] *quantum meruit*; and the workman will be entitled to payment by measure and value. The contract is binding so far as can be traced, and the *quantum meruit* applies to the remainder.³

2. Where the contract has not been performed in terms of a specific agreement, or has not been duly performed, the employer is generally speaking not liable. It is otherwise where the employer acquiesces in the work as performed.

These are the rules where the work performed is separate, and not united with the property of the employer. Unless he have acquiesced in the change, he certainly is not bound to take or pay for it, if not according to the contract; and will further be entitled to damages for non-performance. But where it is united with the employer's property inseparably, a point of greater difficulty arises: Whether, being thus compelled to take what he has

horse was much distressed, and came to the stables in a much worse condition. This was held a want of due care, and verdict went for the price of the horse. [Campbell v Lord Kennedy, 1828, 6 S. 806.]

¹ Dean v Keate, 1811, 3 Camp. 4. Keate having jobbed a pair of coach-horses, and one of them being slightly indisposed, he wrote a prescription for him. The medicine was not calculated to do injury to the horse; but after administering it, Keate had put the horse into harness, given him strong exercise, and kept him exposed to the inclemency of the weather: the animal was seized with an inflammation of the intestines, when the defender gave him a dose of opium

and ginger, and the horse soon after died. Medical advice was called in when too late. Dean, who had let the horse to hire, brought his action for the value of the horse. Lord Ellenborough held that Keate had not exercised that degree of care which might be expected from a prudent man towards his own horse, and was in consequence guilty of a breach of the implied undertaking he had entered into when he hired the horse from the plaintiff. The plaintiff had a verdict for sixty guineas.

² See p. 481.

³ [Brown v Rollo, 1832, 10 S. 667; Napier v Lang, 1834, 12 S. 523.]

not bargained for, he must pay for it? In England, it seems that he is not compellable to pay even on the *quantum meruit*.¹ But this appears to proceed on the peculiarity of English pleading at law. The rule in Scotland seems to be, that balancing the inconvenience and damage arising from the imperfect or faulty performance against the benefit actually derived, the workman is entitled to demand, or bound to make up, the difference.

Another question has been moved, Whether any action or claim will lie where the employer derives no benefit from the work and labour? as where the whole is accidentally destroyed before the workman's labour has been completed, or the thing delivered. There are high authorities in support of such claim, whether the work is finished or not; the reward in the latter case being restrained to the fair value of the work actually performed.² This rests on the principle that the workman is entitled to the price of what he has done, although by accident or force he has been prevented from completing it; and an additional consideration strengthens the rule where the work is an accessory to the property of the employer, and by accretion becomes his: in which case, as an accessory, it perishes with the work to the owner of both.³ Another opinion has been maintained, that in such cases the subject, and the undelivered work bestowed on it, will perish to the employer and workmen respectively.⁴ The rules seem to be: 1. That if the work is independent of any materials or property of the employer, the manufacturer has the risk, and the unfinished work perishes to him. 2. That if he is employed in working up the materials, or adding his labour to the property of the employer, the risk is with the owner of the thing with which the labour is incorporated. And, 3. That if the work has been performed in such a way [457] as to afford a defence to the employer against a demand for the price, had the accident not happened, it will be equally available after its loss.

These are questions which arise chiefly from the occurrence of accidental fires, as in dockyards, manufactories, printing-houses, etc.; and not unfrequently the rule of law is controlled by general or local usage.⁵

¹ *Ellis v Hamlen*, 1810, 3 Taunt. 52. A builder undertook to build according to a plan, with certain materials and dimensions specified. He had omitted to put in certain joists, and other materials of the specified dimension. He had received the greater part of the price, and brought his action for the remainder; and on the objection being stated, his counsel went into an inquiry to ascertain what would be requisite to make the house equal in value to that specified in the contract, contending that he was entitled to the whole balance under that deduction. Sir J. Mansfield directed a nonsuit, and would not even sustain action on a plea of *quantum valebant*. He said: Is the defendant to have his ground covered with buildings of no use, which he would be glad to see removed? and is he to be forced to pay for them besides? To be sure, it is hard that the plaintiff should build houses, and not be paid for them. But the difficulty is to draw the line; for if the defendant is obliged to pay in a case where there is one deviation from his contract, he may equally be obliged to pay for anything, how far soever distant from what the contract stipulated for.

² Dig. lib. 19, tit. 2, Locat. Cond. l. 59; Pothier, Tr. du Cont. de Louage, No. 433.

³ It would be a necessary consequence of this doctrine, that if the work had been defectively or unskilfully performed a defence would lie against the claim, as if the subject were extant with all its imperfections. Thus, if cloth were sent to the bleachfield, and burnt by lightning, the employer would not be bound to pay as for good work, if it should appear that the cloth was injured in the manufacture.

⁴ Bankt. i. 20. 21; Code Civile du Cont. de Louage, c. 3, sec. 3, No. 1790; Cours de Droit Commercial, par J. M. Pardessus, Professeur du Code de Commerce a la Faculté de Droit de Paris, 1814, vol. i. p. 549.

⁵ *Mentone v Athawes*, 1764, 3 Burrow 1592. Here a ship was to be repaired in dock by a shipwright. The dock was his own, and £5 was to be paid for the use of it. The day before the ship was to leave the dock, and when only three hours' work was required to complete the repair, a neighbouring brewery took fire, and the fire was communicated to the dock, and the ship burnt. The action was for work and labour in repairing the ship. The examples, of a carrier, when the goods perish before delivery; a jeweller setting a jewel; a tailor making a coat. On the other side, a farrier having a horse under cure; a pawnbroker having a pledge burnt. Lord Mansfield held the defence to be desperate; and said, 'Besides, it is stated he was to pay £5 for the use of the dock.' The rest of the Court concurred; and the Attorney-General, after taking time, would not argue it.

Gillet v Mawman, 1808, 1 Taunt. 137. This may be taken as a confirmation of the former. It was a demand for work and labour in printing a translation of the Travels of Anacharsis; the paper being furnished by the translator; the work not having been finished, and the whole having in that condition been consumed by fire. A custom of the trade was proved, that the printer is not entitled to be paid for any part of his work till the whole is completed and delivered. The Court held the general rule in favour of the workman to be controlled by the custom. They said: 'This custom is

CLAIMS UNDER THIS CONTRACT.

I. CLAIMS ON THE BANKRUPTCY OF THE EMPLOYER.¹—In consequence of the bankruptcy of the employer, the workman may be left unpaid while the work is entirely completed, or partly finished, or not yet begun. In these circumstances the following claims arise:—

1. If the work be completed, the workman has a claim as a personal creditor (secured by lien if the work is not yet delivered) for the stipulated hire.

2. If the work be partly completed, the workman may be called upon by the creditors to proceed with the contract, they engaging to fulfil the counterpart; or he will have his claim for the price of what has been finished, and for damages on account of the disappointment of the contract, which, however, it may be difficult to ascertain.

3. If the work has not been commenced, still the workman may have suffered loss by the failure of the contract. He may have declined another engagement; but it does not appear that this can form a ground for claiming damages to the amount of the loss thence arising. He may have incurred penalties to workmen and labourers hired to perform the contract; and that, as more direct, appears to afford a better ground for damages. It would also seem that he may claim as damage the profit which he might expect to gain by the performance of the contract according to its terms.

II. CLAIMS ON THE BANKRUPTCY OF THE WORKMAN.—1. The creditors of the workman may, with the bankrupt's assistance, or with the aid of others where the work is of a kind which may be so performed, insist on completing it, and earning for the estate the benefit of the hire. But if the contract be personal, and to be performed by the bankrupt himself as an artist, the creditors cannot compel the employer to proceed with the agreement, unless the bankrupt himself will fulfil it.

2. On the other hand, the employer may suffer direct damage in having to arrange a new contract on terms less favourable; or in having thrown on his hands, in an [458] unfinished state, goods which were to be returned completely manufactured at a particular time, and ready for the market. He will in such cases be entitled to claim damages from the estate of the workman, and to set off the amount against the value of what has been done. Thus, if a builder has undertaken to build a house, or a machinist to erect an engine, or a ship-carpenter to build a vessel, and has become bankrupt after the wages of labour have increased, the employer will have a claim on his insolvent estate for the difference between the sum at which he had contracted to finish the work, and that at which it can now be accomplished, this being direct damage. So, if goods are left unfinished, whereby the market is lost, and the price falls, the difference will form matter of direct damage, for which a claim may be entered. And on the principles already explained,² other consequences may, by the nature and terms of the contract, become legitimate ground of damage; as where goods are stipulated to be bleached or dyed for a particular voyage, but are still unfinished when the voyage must necessarily be performed; or to be ready for sailing with convoy, but are detained till the opportunity is lost. The damage arising in such cases by loss of the voyage raises a legitimate claim of damage. So, under such a contract, an additional insurance made necessary by the delay, or a claim of demurrage incurred by the failure, will ground a claim of damage against the undertaker.

the law of the realm, and so far as it extends, it controls the general law.'

[The rule in England as to the workman's remuneration is, that when the contract is entire for the performance of a specific work for a specified sum, he has no claim if the subject perishes by accident; but it is otherwise if he is to be paid from time to time as the work proceeds. *Appleby v Myers*, L. R., 2 C. P. 651; Add. on Cont. 6th ed. 394. See also *Adlard v Booth*, 7 C. and P. 108.]

¹ By a nicety in the application of the verbs *locare* and *conducere*, as Heineccius, and after him Sir W. Jones, observes, there is a sort of ambiguity in the terms used in the Roman law for the employer and workman in this contract. The employer is called *locator operis*, but he is *conductor operarum*. The workman is *locator operarum*, but *conductor vel redemptor operis*. Heinec. in Pand. p. 3, sec. 320, in note. Jones, Bailments, 90.

² See Of Sale, above, p. 477 et seq.

3. If the subject of the contract perish by inevitable accident, the loss is to the employer, and no claim will lie against the estate of the workman in whose hands the property perished. The rule is, *Res perit domino*. But the negligence, fault, or unskilfulness of the workman will cast the responsibility the other way. The rule by which such responsibility is judged of is that already explained,¹ namely, that the workman is bound to ordinary care; a criterion not less just because it is versatile, accommodating itself to circumstances, and according with the common sense of mankind. The care required in building a common doorway and in raising a marble pillar are quite different, but both come under the description of ordinary care. The responsibilities under these rules are those of safe custody and of adequate skill.

1. CUSTODY.—The care required of a custodier is such as a diligent and prudent man takes of his own property. The simple case of custody for hire is where one places his goods in a warehouse for which he pays rent: this is properly *LOCATIO CUSTODIÆ*. It is the contract by which goods are placed in the king's cellar under bond for the duties, or in a private warehouse till put on board ship or in a wharfinger's warehouse when unloaded. The case differs a little where a horse is sent to a livery stable; since in this case there is not mere custody, but also the labour of dressing and feeding.

In such cases, the place of custody must be secure against the ordinary accidents incident to the property to be preserved. The warehouse must be water-tight, secure from attacks without and from damage of fire within, and from all things else hurtful to the property. The grazing field must be properly secured against the escape of the cattle, and free from pitfalls and dangers which may lame or injure them. The livery stable must be wind and water tight, so as not to expose a horse to cold or wetness (besides the food being wholesome, and the hostler fit for his undertaking). A failure in these respects will expose the owner of the cellar, of the field, of the stable, or other place of custody, to a claim for the damage thus occasioned by his fault.²

[459] But if the party be made aware of any peculiarity in the condition of the place of custody, it may by acquiescence or tacit agreement become a part of the contract, or a limitation of the responsibility.³

¹ See above, p. 487; Stair i. 15. 5.

² See Sir W. Jones, Bailment, 91, 92. *Leck v Maestaer*, 1807, 1 Camp. 138. A ship was taken into a private dry dock on the Thames. The waters rose, and, when the workmen were absent during the day, burst the doors. Lord Ellenborough held it incumbent on the ship-carpenter to have had a sufficient number of men in the dock to take measures of precaution; and on the ground of this deficiency he was found liable.

See *Cailiff v Danvers*, Peak's Cases 114.

Clarke v Earnshaw, 1818, Gow's Cases at Nisi Prius, p. 30. Clarke gave a chronometer to Earnshaw, a watchmaker, to be repaired. He had a shopman well recommended, and deemed trustworthy, who slept as guard in the shop, but who stole the chronometer. The chronometer was in a locked drawer, while Earnshaw's own watches and chronometers were deposited in an iron chest. Earnshaw was held liable.

Broadwater v Blot, 1817, Holt's Cases 547.

[*Robertson v Connolly*, 1851, 13 D. 779, 14 D. 315; *Laing v Darling*, 1850, 12 D. 1279. On the same principle depends the liability of a wharfinger for negligent mooring of a vessel (*Wood v Curling*, 15 M. and W. 626, 16 M. and W. 628); of a grazier for leaving open the gates of the field where cattle are pasturing (*Broadwater v Blot*, *supra*); and of a warehouseman for injury to goods in loading or unloading (*Thomas v Day*, 4 Esp. 262; and see *Coggs v Bernard*, the leading case on this subject, Lord Raym. 909, 1 Sm. L. Ca. 6th ed. 177).

In distinguishing damage attributable to negligence from accident, the modern English decisions lay the *onus* on the bailee, or person employed, to prove that the loss or injury occurred through no want of ordinary care on his part. *Mackenzie v Cox*, 9 Car. and P. 632; *Reeve v Palmer*, 5 C. B. N. S. 84. The presumption is similar in actions against carriers (*infra*, Subsec. 4, notes); the reason in both cases being, that the care and oversight exercised is a fact personal to the care-taker, the affirmative of which therefore falls to be proved by him.]

³ *Whitehead v Straiton*, 1667, M. 10074. A gentleman sent his horse to the park of Holyrood House to be pastured, and the horse after a search could not be found. He brought his action against the tenant of the park, who defended himself on the ground of a placard affixed on the gate, intimating 'that he would be answerable for no horses put into the park, although they should be stolen or break their neck.' The Court ordered an inquiry into the fact, and parties to be heard 'on the terms of the agreement when the horse was put in; whether it was told or known to the pursuer that the keeper would not be answerable.' And it was held relevant, that no condition being expressed, 'it behoved to be understood on such terms as were usual with others, which were the terms expressed in the placard.'

Birnie, 1680, M. 10079; *Maxwell v Todridge*, 1684, M. 10079. In two other cases afterwards tried relative to the

The responsibility that belongs to carriers, innkeepers, etc., under the edict, *Nautæ, Caupones, Stabularii*, will be considered hereafter. See below, p. 495.

2. **SKILL.**—The general rule as to all workmen is, '*Spondet peritiam artis*,' and '*Imperitia culpæ annumeratur*.' The engagement, in short, is for a due application of the necessary attention, art, and skill.¹ Under this rule all professional men are comprehended. Their contract is *Locatio operarum*, not *Mandate*; and they, as well as smiths, farriers, bleachers, and ordinary artists of all kinds, wherever they engage their services for hire, are responsible for the skill and art necessary to accomplish safely what they undertake, in so far as ordinary skill and art can accomplish it. The public who employ them may exercise a judgment of selection; but having selected the person, they are entitled to presume that he has the ordinary skill in his art, which he holds himself out to the world as possessed of.²

The rules are: 1. That if one applies to an apprentice in an art, or to a man skilled in another, but not professing that in question, such person will be responsible only for the fair exertion of his capacity; as in Sir W. Jones' case, from the Mohammedan law, of a farrier employed to cure the eyes of a man.

2. That although it may be difficult to find a criterion of professional skill, some points at least are clear. Thus, 1. Where a specific act is ordered to be done, it must be done according to rule; neither neglected nor unskilfully performed. So, a notary employed to protest a bill, if he neglect or mistake any of the established rules which regulate [460] that duty, makes himself responsible for the loss arising to his client by the fault in the diligence. So, a messenger is liable who errs in executing a caption put into his hand;³ or an agent employed to expedite a confirmation, who neglects it till his client dies;⁴ or to frame obligatory missives, who fails to have them tested in terms of the statute;⁵ or an agent employed to lodge an aliment for a debtor applying for the act of grace, who fails to do it, and the debtor is liberated;⁶ or an agent who is to procure a security by bond and assignation, and neglects to have the assignation intimated;⁷ or a security by heritable bond, and executes it only with a holding *a me*, and takes sasine, but does not complete it by confirmation.⁸ 2. Where, although the act to be done is not settled by so unquestionable and fixed a rule, if yet the object to be accomplished may be safely attained by following a known method, the professional man is responsible if he neglects to follow such method. Thus, a law agent employed to 'do such diligence as will place his employer on an equal footing with the other creditors, and who contents himself with using inhibition, although the other creditors have adjudged, neglects a plain and common rule of the profession, and

same party, and the effect of the placard, the Court sustained the defence, unless it should be proved that the tenant was accessory to the loss by fraud or negligence.

In a subsequent case (*Davidson*, 1749, M. 10081), the defence for the loss of a horse was that the pasture ground was an extensive wood, fenced on one side only by the river Findhorn, which in some places was fordable. It was proved that this was in most cases pointed out to those who placed their cattle there; but it was not so proved as to the owner of the horse in question. The decision of the case does not appear; but it may in some degree be collected from the Court having recommended to the Lord Ordinary to order an inquiry as to the care usually taken of cattle in that wood, and what care was taken in this case; that, in their opinion, if the defender should justify himself by showing that there was no undue negligence in looking after the horses in so ill enclosed a field, and giving immediate notice, or making due search on the loss, the action should be dismissed.

¹ [*Pollock v Wilkie*, 1856, 18 D. 1311.]

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² There is a special law relative to 'ignorant smethis, who, throw ignorance and drunkynnesse, spillis and cruikes men's horses throw schoyn in the quick.' It is enacted: 1. That a smith who shoes in the quick shall pay the cost of the horse till he be hale; 2. That he shall, in the meantime, find a horse for the journey; and, 3. That if the horse will not hale, the smith shall pay his price to the owner. 1478, c. 11, 2 Act. Parl. 119.

³ *Atkinson v Macbean*, 1756, M. 13965; *Chatto v Marshall*, 17 Jan. 1811, F. C.; *Kennedy v M'Kinnon*, 13 Dec. 1821, F. C.

⁴ *Goldie v M'Donald*, 1757, M. 3527. [*Webster v Young*, 1851, 13 D. 752. On the subject of professional responsibility, see editor's notes, *infra*, on *Factory*.]

⁵ *Currie v Colquhoun*, 1823, 2 S. 407, N. E. 361.

⁶ *Dougan v Smith*, 3 July 1817, 19 Fac. Coll. 369.

⁷ *Lillie v M'Donald*, 13 Dec. 1816, 19 Fac. Coll. 234.

⁸ *Struthers v Lang*, 1826, Fac. Coll., and 4 S. 418, N. E. 421. [See also *Miller v Young*, 1843, 6 D. 149; *Cathcart v Mac-laine*, 1846, 8 D. 970; *Brown v Mackie*, 1852, 14 D. 358.]

must be responsible.¹ 3. Where the operation to be performed is complicated and difficult, a professional man, exerting fairly the best of his judgment, may err and be unsuccessful, and yet not be responsible;² and without some such limitation of responsibility, respectable [461] persons would shun the profession. 4. It is no defence to an agent employed in a joint transaction, as a loan, that he was employed by the granter of the bond, and not by him who suffers from any defect in the security. 'The liability does not depend on who gives the order, but for whose behoof it is given.'³ 5. The responsibility can extend only to the amount of the injury specifically caused by the act of carelessness or unskilfulness, for which reparation is due. Thus, if a farrier by want of skill kill a horse which is already lame, reparation can only be sought for the value of a lame horse. So, if a writer has committed an error which annuls the diligence, but it turns out that this diligence would on another ground have been ineffectual, he will be freed from responsibility.⁴

SUBSECTION IV.—HIRING OF CARRIAGE BY LAND.

This is the application of the contract of *locatio operis* to one of the most frequent occasions of temporary employment which occur in practice. It is called in civil law, '*Locatio operis mercicium vehendarum*;' but it may here be taken both as it relates to goods and to persons. The rules which regulate the contract of location in ordinary cases are also applicable to this example of the contract, but with this difference, that a more strict

¹ *Mason v Thom*, 1787, M. 5535.

² *Lennox v Grant*, 1784, M. 14381. In making up titles to property and succession, some extremely nice cases occur. And in one case, though of no extraordinary difficulty, it happened that the true method was neglected, and an erroneous one adopted, by which the client lost his debt.

Grant v M'Leay, 1791, Bell Oct Ca. 319. The consequence was an action of damages against the law agent. He defended himself on the difficulty of the professional question, which he proved by the fact that in the original question the judgments of the Court had varied. The Court held this to be a justification.

M'Lean v Grant, 1805, M. App. Reparation, No. 2. A lady was entitled to a provision of £300 out of her father's estate. This estate had come into the person of the son, who having failed, adjudications proceeded at the instance of the creditors, and she employed Grant to make her claim effectual. He led an adjudication, but committed two errors in doing so: 1. A great part of the estate was still in *hereditate jacente* of the father, but Grant used no special charge in adjudging from the son. 2. His adjudication was conjoined with one *posterior* to the first effectual. Other agents had committed the same mistakes, but on being informed of it led new adjudications, which Grant neglected. Upon those objections the adjudication was annulled; and the lady, having thus lost her debt, brought an action for reparation against her agent. The Court considered the matter in this light, that the error of conjoining with a posterior adjudication, though against the direction in the statute, was so far sanctioned by the practice of men of business, and by a difference on the bench in pronouncing the decision which found it to be erroneous, that it could form no ground for an action of damages against an agent. But then they held that the error of not having used a special charge was so clearly contrary to common rules, that the writer was liable, and accordingly the judgment was: 'Repelled his defences, so far as regards the

omission to lead a second adjudication on a special charge, for attaching Lots 3 and 4; and find him liable in the damage which has arisen to the pursuer from that neglect.'

Thus the claim of the pursuer for reparation, though on the whole successful under the above judgment, failed as to one of the grounds, viz. that Grant had improperly conjoined his adjudication with a posterior one. As to this it may be observed: 1. That the Act of Parliament having laid down a precise rule, it was a strong thing to hold a writer excusable for neglecting that rule, whatever looseness of practice had arisen under the Act; and, 2. That the Court held it to be a sufficient answer to this, that the words were not so absolutely clear that a question of construction might not be raised on them; and that the Court had been so doubtful on that question of construction, that they decided first one way and then the other.

There was a secondary question on the case, which will require very particular attention before it is relied on as a precedent. See below, note 4.

³ *Struthers v Lang* (p. 489, note 8), 1826, 4 Shaw and Dunlop 418, N. E. 421.

See *Wilson v Riddell*, 1826, 4 S. 732, N. E. 739. [*Cooke v Falconer*, 1850, 13 D. 157.]

⁴ In the above case of *M'Lean v Grant* (note 2), this principle produced a very singular effect. The agent had been guilty of *two* errors: one of them undoubtedly blameable, and for which the Court held him liable in damages; the other admitting of some question whether it was justifiable or not. If he had committed only the first error, he would have been held by the final judgment, as well as by the first one, liable in damages. But as he had the good fortune to combine this blameable error with another, which some of the Court thought equally blameable, others not, he escaped from the action of damages; the *justifiable* error having been found fatal to the diligence. [See also *Campbell v Campbell & Clason*, 1843, 5 D. 1081.]

responsibility has been imposed from views of public expediency, and in order to avoid the dangers to which the goods of merchants and travellers are exposed while entrusted to the care of the carrier.

CLAIMS UNDER THIS CONTRACT.

I. CLAIM BY THE CARRIER.—On the bankruptcy of the owner of the goods, a claim arises to the carrier for the carriage.

1. If the goods have been delivered by the carrier before the estate has come into the hands of the creditors by sequestration or private trust, this claim will be only as a personal creditor of the bankrupt for a dividend along with the other personal creditors.

2. If the goods are still to be delivered, the carrier is secured by his lien, of which hereafter.

3. In the middle case, where the carrier has completed the carriage of the goods, and delivered them to the administrators of the bankrupt estate, the *estate* is his debtor, and he will have preference on his demand for the whole price.¹

II. CLAIM BY PASSENGERS AND OWNERS OF GOODS.—The responsibility of carriers [462] for persons and goods entrusted to them, is in Scotland regulated partly by the law of the contract of hiring; partly by the rule of the Roman edict, '*Nautæ, Carpones, Stabularii*,' on the principles of expediency already alluded to. The former shall be considered here, the latter under the next section.

1. *Indemnification to Passengers*.—The remedy to PASSENGERS for damage sustained by the carelessness or unskilfulness of stage-coachmen and others, is upon the contract of *locatio operarum*. It comprehends those who for hire undertake to carry the persons or property of others; common carriers, proprietors of waggons, stage-coaches, hackney-coaches, or post-chaises; as well as all masters and owners of ships, ferrymen, bargemen, and other carriers by water.²

This responsibility is, according to the rule of the contract, for the sufficiency of the carriage, and ordinary care (*culpa levis*) of those employed. As to the sufficiency of the carriage, it is enough if it be sufficient as far as the eye *can* discover.³ The same is the case of one who lets to hire a private post-chaise or hackney-coach.⁴

But in construing this responsibility, courts of law and juries have shown an inclination in the case of Stage-coaches to bind the rule much tighter than could be insisted for on the ordinary principles of *locatio operarum*. The consideration of the danger to the public which may proceed even from slight faults, unskilfulness, or negligence in this particular case, and of the helpless state in which passengers are who trust themselves in such vehicles, have gradually led to a wholesome extension of the rule, so as to subject the principals for the most inconsiderable defect or insufficiency, and for the slightest fault. Neglect of the rules of the road; rashness in going too near to the edge of the road, or to any obstruction; want of skill in driving; racing against other coaches; taking up more passengers than the law allows, where the injury can be traced to overloading as a cause;—all of these will be held sufficient to charge the principals, with the effect of any accident from which loss or injury arises.⁵ In order to afford due protection and a ready [463]

¹ *Malcolm v Bannatyne*, 24 June 1813, 17 Fac. Coll. 404. This case related to a cargo of timber, of which part at least was delivered after it was known by the agent taking delivery that a sequestration was awarded; and therefore that he was thenceforward acting for the creditors under that proceeding. This ought to be marked as the point of the case. It is loosely stated in the report, and may be overlooked. The judges went on this principle, that the sequestered estate really was by adoption the employer; and by receiving the goods, was bound for the carriage.

² For the doctrine as to this last description of carriers, see below, Of Maritime Law.

³ 'If the axletree was sound as far as human eye could discover, the defendant was not liable.' Sir J. Mansfield in *Christie v Griggs*, 2 Camp. 81. See below, p. 492, note 1. See below, as to goods, p. 493, note 1. [Add. on Cont. 6th ed. 466.]

⁴ *Upshare v Aidee*, Comyn Rep. 25.

⁵ 1. *Rashness and injudicious driving*.—*Wordsworth v Willin*, 5 Espin. N. P. Cases 273, where it was held that the rule

remedy to the public, the presumption is against the owner of the coach where it has broken down or has been overturned.¹

Where the injury arises from a rash or undue apprehension or alarm, the coach proprietor will not be liable; as when a passenger, thinking himself in danger, leaps from the coach to save himself when truly there was no danger. Such conduct must be justified by a state of peril sufficient to show that the act done is a natural and prudent precaution to extricate one from a peril for which the coachmaster would have been liable. This delicate point must be left for a jury to determine on the evidence.²

Where the damage has arisen from unforeseen accident or misfortune, the owners are not responsible.³ This is different from the rule of the edict, *Nautæ, Caupones*, etc. See below, p. 495 et seq.

2. *Indemnification for Goods*.—In the same way, the owner of Goods has his remedy on the contract against the carrier, for damage received by insufficiency, or by actual fault or negligence.

As to insufficiency, it has been said that there is a distinction between the case of passengers and of goods; there being in the latter an absolute warranty, in the former a qualified engagement, to transport the person as safely as human foresight and care will permit. Under the contract there seems to be no sufficient authority to sanction this dis-

of the road is founded in good sense, but not always conclusive; that if a carriage coming in any direction leave sufficient room for any other carriage, horse, or passenger, on its proper side of the way, it is sufficient. But it is a question for the jury whether the loss arose from want of sufficient room.

In *Mayhew v Boyce*, 1816, 1 Starkie 423, where one coach attempting to pass another overturned it. There were two courses—one safe, the other hazardous. Taking the hazardous was held to make the coach owner responsible.

In *Jackson v Tollet*, 1817, 2 Starkie 37, the coach was going up a hill slowly; it was met by a waggon nearly in the middle of a road 30 feet wide; and the Worcester coach was descending the hill at a quick rate. In this situation the coachman deviated to the left, and the wheel was drawn on a hillock which, being frozen and unyielding, overturned the coach,—one of the passengers warning the coachman of his danger. Lord Ellenborough left it to the jury whether the coachman could have adopted a better course. In order to subject the master to damages, it must appear that there has been something to blame on the part of his servant; and he is blameable if he has not exercised the best and soundest judgment upon the subject. If he could have exercised a better judgment than he did, the owner is liable. Verdict for the plaintiff, whose leg was broken. 2 Starkie 37.

2. *Negligence*.—*Dudley v Smith*, 1808, 1 Camp. N. P. 167. Shocking example of negligence, in not informing a woman, an outside passenger, that an archway was too low to suffer her to pass, and she was struck off from the top. Verdict for £100 damage.

3. *Overloading*.—*Israel v Clarke & Clinch*, 4 Espinasse 259. Mr. Erskine stated it to have been laid down by Lord Kenyon, that if the owners of the coach take up more passengers than are allowed by Act of Parliament, that should be deemed such an overloading, that in case of an injury being laid in the declaration to have arisen from overloading, the excess above the number should be deemed conclusive evidence of the accident having arisen from that cause. Lord Ellenborough assented.

But it is no excuse that there has been no excess of number;

still the coach must be 'landworthy.' Lord Ellenborough said, in the above case: 'At all events, he would expect a clear landworthiness in the carriage itself to be established.' *Ibid*.

See *Crofts v Waterhouse*, 1825, 3 Bingham 319.

¹ So held by Sir J. Mansfield in *Christie v Griggs*, 1809, 2 Camp. 79, where a person travelling to London by the Blackwell stage was hurt by its breaking down, the axletree having snapped across at a place where there was a slight descent. Sir J. Mansfield said: 'Where the breaking down or overturning of a coach is proved, negligence on the part of the owner is implied. He has always the means to rebut this presumption, if it be unfounded; and it is now incumbent on the defender to make out that the damage in this case arose from what the law considers a mere accident.' Verdict went for the defendant. [*McGlashan v Dundee and Perth Railway Co.*, 1848, 10 D. 1397; *Cargill v Dundee and Perth Railway Co.*, 1848, 11 D. 216.]

² Such a case occurred in *Jones v Boyce*, 1816, 1 Starkie 493, where a coupling rein having broke, and one of the leaders becoming ungovernable while on a descent, the coachman drew the coach to one side of the road, where, coming in contact with some piles, the wheel came upon a post, and Jones leapt off to save himself, and was hurt. Lord Ellenborough left it to the jury. Verdict for £300. [Add. 6th ed. 466.]

³ *Aston v Heaven*, 1797, 2 Esp. Cases 533, where the coach was overset by the horses taking fright, from the reflection of the sun in a tub into which water was falling from a pump, and a passenger was hurt. The plaintiff relied on this, that the coach was at the time not on the left side of the road, but on the middle, where the horses chanced to be more exposed to the object which startled them. Lord Chief Justice Eyre drew the distinction between cases of the loss of goods by carriers, and this; and held that in such a case as arose out of the above circumstances, the owners are to be held responsible for the smallest negligence; but not, as in the carriage of goods, for everything but the act of God and the king's enemies.

inction. Under the *Edict*, indeed, there is a difference between goods and persons. But in so far as the *Contract* rules the case, the engagement and warranty seem to be the same; while any claim of damage for loss sustained must rest on negligence or fault.¹

As to fault or negligence, the responsibility is not in the character of public carrier, but under the private contract; and therefore a private person undertaking to carry goods safely for hire is liable to this as much as a public carrier. This responsibility will attach where a carrier is aware that a cask of brandy is leaking, and takes no pains to stop it;² [464] or where a parcel is left in the coach at unloading;³ or where the parcel cart is left unguarded in the street, and a parcel is stolen.⁴

There is a more extensive responsibility in the case of public carriers (in which they have, though not quite accurately, been likened to insurers) to be considered hereafter.⁵ But under the contract itself, the owner of the goods is not aided by any legal presumption. The ground of his action for damage is insufficiency, fault, or negligence; and he must establish his case by the proper evidence.

3. It is a part of the responsibility on the contract, that the master is liable for the acts of his servant.⁶ The servant himself is not in England liable to the public.⁷

4. The responsibility of the carrier begins from the moment the goods come to his hands, or to those of his servants.⁸ But it is not delivery to a carrier if goods be left in the yard of an inn, or in a warehouse at which other carriers have their goods:⁹ there must be special notice to him or his servants that they are so delivered. They must be either booked or delivered to the carrier, or to some one who can be proved to be his servant or agent, for the purpose of receiving them, and at the place where he is authorized to take them.¹⁰ This applies to the post office, where delivery to a bellman is not sufficient; though it is enough if delivery is made to an officer for receiving letters, or if goods be delivered to a servant of a carrier sent round with a parcel cart or otherwise.¹¹

5. The undertaking of a carrier, in respect to the delivery of the goods, may be discharged differently in different circumstances.

The general rule is, that the carrier is not discharged of the goods while anything

¹ *Crofts v Waterhouse*, 3 Bing. 319.

Anderson v Pyper & Co., 1820, 2 Murr. 261. Here the question was: Whether, supposing the axle of a coach, which broke down and was overturned, was defective and faulty, but sound so far as human foresight could reach, the proprietors were liable for injury done to a passenger? Verdict was for the defenders, on a direction that the proprietors were not liable in such a case, as they would have been in the case of goods. And a new trial, in which this direction was excepted to, was refused. It appears that too much was conceded in admitting, that in an action for damage to goods the proprietors would have been liable. [*Gilmour v Clark*, 1853, 15 D. 478; *Bates & Co. v Cameron*, 1855, 18 D. 186.]

² *Beck v Evans*, 16 East 244. [See Add. on Cont. 6th ed. 480.]

³ *Bodenham v Bennet*, 4 Price 41.

⁴ *Smith v Horne*, 1817, Holt's Cases 642. [*Denholm v London and Edinburgh Shipping Co.*, 1865, 37 Jur. 421.]

⁵ See below, p. 495, Subsec. 5, Digression on the *Edict*, *Nautæ*, etc.

⁶ See the cases in p. 491, note 5.

⁷ In *Williams v Cranston*, 2 Starkie 82, a watch delivered to the driver of a coach to be carried was held to charge the master, not the servant; and the action being against the servant only, the plaintiff was nonsuited.

⁸ *Stewart v Crawley*, 1818, 2 Starkie 323. A greyhound

was delivered to a carrier to be carried from London to Stanfield Lock, and a receipt given for him. He was afterwards tied by a cord which was round his neck in a watch-box; but he slipped his head from the noose, and was lost. The defence was, that being delivered without a collar, he was not in a state of security. Lord Ellenborough held that the insecurity being visible, and the custody of the dog undertaken, the carrier was liable. Verdict for the plaintiff.

⁹ *Selway v Holloway*, 1 Lord Raymond 46, where hops being lodged in the inn-yard, which other carriers also used, and no proof of acknowledgment by any servant of the carrier, the Court 'were all of opinion that the hops could not be said to be delivered to Holloway.'

¹⁰ See *Buckman v Levi*, 3 Camp. 414.

Howey & Co. v Lovel, 1826, Fac. Coll., 4 S. 752, N. E. 759. A parcel delivered to a carrier's servant, on the road between Edinburgh and Glasgow, not held to be duly charged on the master. [*Reid v Mackie*, 1830, 8 S. 948.]

¹¹ *Hawkins v Rutt*, 1793, at Guildhall, before Lord Kenyon. A bill was enclosed in a letter, and delivered to the bellman of the post office in the street. Lord Kenyon held it not good to charge the post office, or discharge the draft of the money. It should have been at the post office in Lombard Street, or to one of the houses authorized to receive letters.

See also *Clayton v Hunt*, 3 Camp. 27.

remains for him to do as carrier.¹ This may be regulated by custom, as in London, by the usage of the Thames, the master is liable while the goods are delivering into a lighter until the loading is completed,² or by special agreement, or by implied agreement, as by force of the address; for if the parcel be addressed to a person in the place to which the carrier professes to transport goods, the natural and legal implication from the address of the parcel, and the entry in the carrier's book, is that he shall deliver it to the person at the place mentioned in the address. It is one contract from beginning to end, the performance of which the carrier undertakes.³ The porters or carters whom he employs [465] are his servants, for whom he is responsible, whether portorage be paid or not; and whether it is payable for his behoof, the porter getting only a proportion; or he have only the election of the porter.⁴ And at all events, the carrier must give notice of the arrival of the goods.⁵

8. Where the carrier does not go all the length to which the goods are to be carried, then, if the journey is to be completed by another carrier unconnected, the delivery of the goods to that carrier, or to persons empowered to act as his agents or servants in taking delivery of goods, will discharge the original carrier.⁶ It has also been held in England, that where the carrier's journey is at an end, and the goods have reached their destination *quoad* him, they are not, while lodged in a warehouse or cellar in order to wait for another carrier, held under the high responsibility which subjects the carrier for every loss but inevitable accident or the king's enemies.⁷ If the journey is to be completed by subordinate

¹ [Bishop v Mersey Navigation Co., 1830, 8 S. 558.]

² *Cathy v Winteringham*, 1792, Peake's Cases N. P. 150.

³ It is different in the case of ships under bill of lading. See below, Of Maritime Contracts.

⁴ In *Hyde v The Trent and Mersey Navigation Co.*, 5 Term. Rep. 389, there was no occasion to determine the point. But the opinions of Ashurst, Buller, and Grose, Justices (*contra* L. Kenyon), were delivered in favour of the doctrine in the text.

Armstrong v Edinburgh and Leith Shipping Co., 1825, 3 S. 464, N. E. 323. A chest of tea was here delivered to a porter to be carried to the warehouse of a general agent, in order to be forwarded by another carrier. It appeared that the contents were abstracted and trash substituted, and that this was done between the delivery to the porter and the placing of it in the warehouse of the agent. The question was, Whether the delivery to the porter discharged the original responsibility? It was held not.

⁵ *Goldin v Manning*, 2 Black. Rep. 916.

⁶ *Denniston v Harkness*, 1791, Bell Oct. Ca. 260. Goods were delivered at Glasgow by Denniston to Harkness, carrier to Carlisle, addressed to Manchester, and so entered in Harkness' book. Harkness had no hire but to Carlisle. At Carlisle he delivered the goods to Wilson, the regular carrier between Carlisle and Manchester, and had them entered in his book, and received from Wilson the hire to Carlisle. The parcel was lost between Carlisle and Manchester; and Denniston brought an action against Harkness. He supported his action by evidence of an understanding among merchants, that in such circumstances the original carrier was liable; and the Lord Ordinary decided for him on that ground. The Court of Session were not only dissatisfied with the evidence, but held that such evidence could not be received, as tending to establish a practice contrary to law; and they held that it was quite sufficient for the original carrier in such a case so to fix the goods upon the intermediate carrier as to give the

owner his remedy against him. [*Bates v Cameron & Co.*, 1855, 18 D. 186; *Gilmour v Clark*, 1853, 16 D. 478.]

[In an action against a carrier who carries goods to their destination, it is sufficient *prima facie* evidence of loss or short delivery to show that the goods never reached the consignee (*Hawkes v Smith*, Car. and M. 72); but where the contract is to be performed by carrying the goods to a certain place, and there delivering them to another carrier, the sender of the goods must lay his action so as to show whether the loss occurred through the fault of his immediate contractor, or through the fault of the sub-contractor to whom the goods were delivered by the former, and for whom he is alleged to be responsible, and direct evidence must be adduced tracing the goods to the company through whose negligence the loss arose. See *Gilbart v Dale*, 5 A. and E. 543; *Griffith v Lee*, 1 C. and P. 110; *Midland Ry. Co. v Bromley*, 17 C. B. 372. Where goods are received by a railway company to be carried to a place beyond the bounds of the company's undertaking, the reception of the goods properly addressed is evidence from which a Court may infer a contract to undertake the carriage of the goods to their destination under the responsibility of common carriers. *Bristol and Exeter Ry. Co. v Collins*, 7 H. L. Ca. 194, and other cases cited in 1 Sm. L. Ca. 221. The company by which the carriage was undertaken would in such a case have recourse against the company ultimately responsible under their sub-contract. But if the aggrieved person knows which company is ultimately responsible, it will generally be more for his interest to bring his action directly against that company, as he may then expect to have the assistance of the first company in tracing the goods into their hands. In an action of this description, the pursuer must aver an employment of the company in default, on a contract of carriage, through the agency of the first company acting at his request. See *Caledonian Ry. Co. v Hunter*, 1858, 20 D. 1097; also 1 Macph. 750, 2 Macph. 781, and 7 Macph. 919.]

⁷ *Hyde v Trent Navigation Co.*, 4 Term. Rep. 58.

persons employed by the original carrier, or of his selecting, the responsibility seems to continue with the original carrier till delivery to the consignee.

The question, how far responsibility may be limited, will be discussed below, p. 501.

SUBSECTION V.—DIGRESSION CONCERNING THE EDICT ‘NAUTÆ, CAUPONES, STABULARII.’

The common rule of diligence and responsibility which exposes the labourer for hire only to losses arising from ordinary neglect, or *culpa levis*, is in particular cases augmented by a more rigid responsibility. This is a regulation intended to operate as a check on collusion and carelessness, for the safe conduct of that personal intercourse in the way of travelling, and that transit and conveyance of goods which the necessities of a rich and commercial country daily require. This stricter rule was first established by an edict of the Roman prætor, the spirit of which has been so universally adopted in modern Europe, that without any special law, the doctrine has been recognised even in those countries where the Roman law has no avowed authority.

The words of the edict are these: ‘NAUTÆ, CAUPONES, STABULARII, QUOD CUJUSQUE SALVUM FORE RECEPERINT, NISI RESTITUENT, IN EOS JUDICIUM DABO.’¹ The persons [466] enumerated, having once received the goods under their charge, must at all hazards answer for their restitution.

In so far as this enlarged responsibility rests on a voluntary undertaking, it extends no further than to reasonable and prudent care; and Sir William Jones has been at some pains to show, that although in some of the cases falling under the edict (as in the case of innkeepers, who receive nothing for the goods brought in by their guests) there is no direct hire given for the care of custody, so as strictly under the contract of location to ground this responsibility, there is not wanting another ground of responsibility in the application of the principle of the contract ‘*facio ut facias*.’² But there is a responsibility beyond that, proper to the contract of *locatio operarum*, resting on the principle of constructive negligence, and constructive fraud, or *quasi ex delicto*, as applied to the occasions of trade and safe intercourse. As the persons comprehended within this edict, shipmasters and carriers, innkeepers and stablers, have frequent opportunities of associating themselves or their servants with robbers, thieves, and pilferers of all descriptions, while the secret connection often cannot be detected, and as even their negligence cannot always be proved so as to ground a claim,³ the safety of the public is to be secured only by presuming everything against those persons, and taking nothing as an excuse or justification for the loss or injury to goods received by them, but evidence of a natural and inevitable accident.⁴

This edict is not to be considered as positive law in Scotland, but as effectual only in so far as it has become a part of the maritime law of Europe, or as by its general policy it stands recommended to our adoption, and is now in its great principle recognised as a part of our jurisprudence.⁵

¹ Dig. lib. 4, tit. 9, Nautæ, Caupones, Stabularii, ut recepta restituant.

² Sir W. Jones, Bailment, 93 et seq.

³ ‘Nisi hoc esset statutum,’ says Ulpian, ‘materia daretur cum furibus adversus eos quos recipiunt coeundi’ (l. 1, h. t.). Lord Holt has well expressed the principle in saying: ‘This is a politic establishment, contrived by the policy of the law for the safety of all persons, the necessity of whose affairs oblige them to trust these sort of persons that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any connection with them, by combining with thieves, etc., and yet doing it in such a clandestine manner as could not be possible to be

discovered. And this is the reason the law is founded upon in that point.’ 2 Lord Raymond 918.

See Stypmanni Jus Maritimum, ed. Hienec. 1740, p. 573, No. 12.

⁴ Lord Mansfield, in *Forward v Pittard*, distinguishes the two principles thus: ‘By the nature of his (the carrier’s) contract, he is liable for all due care and diligence; and for any negligence, he is liable on *his contract*. But there is a further degree of responsibility *by the custom of the realm*; that is, by the common law a carrier is in the nature of an insurer. It is laid down that he is liable for every accident except by the act of God or the king’s enemies.’ 1 Term. Rep. 28.

⁵ Stair i. 13. 3.

I. PERSONS LIABLE TO THIS RESPONSIBILITY.—The persons to whom this rule applies are public servants, holding themselves out as such, professing their willingness to take the profits of that employment, with the full responsibility which the law enjoins, and being compellable to undertake the charge which that particular department comprehends.¹ Such are, according to the words of the edict, shipmasters, innkeepers, and stablers. But it requires a commentary to set forth the several cases and questions which have in practice arisen under [467] this brief description.

1. CARRIERS.—Under the word *Nautæ*, strictly speaking, are comprehended only carriers by water. But the reason and principle of the law has in modern practice extended it to land carriers, both in this country and in England.² In England, where the principle has been applied without any reference to the words of the Roman edict, but on the common custom of the realm, carriers by land furnish the chief examples in the books of this sort of responsibility. And that the rule applies to common carriers never was doubted, since first the principle of expediency was adopted in English jurisprudence; or rather, perhaps, this is the case in which the rule was first judicially applied. The sole difficulty has been, whether the same rule should be applied to those who were not *common* carriers.³

The description of *Nautæ* fully comprehends the owners and masters of regular packets, carrying smacks, and ships on general freight. These are the proper cases. Barge-masters, hoymen, canal-boatmen, ferrymen,⁴ all come under the same rule.⁵ It has been held that steamboats, though for the conveyance of passengers, fall under the edict, even in respect of goods received on board, not as luggage of a passenger.⁶ As to particular ships freighted

¹ Ulpian gives as a reason why the edict should not be deemed harsh, that it is a spontaneous employment, 'nam est in ipsorum arbitrio ne quem recipiant;' but this is not an authority for holding it as in their election whether to receive goods or passengers. They may undertake or not the duty of a public servant; but having once undertaken it, they can reject no one. And the same excellent lawyer has said, 'Viatores sibi eligere caupo vel stabularius non videtur, nec repellere potest iter agentes.' Dig. lib. 47, tit. 5, l. unic. sec. ult. See Van Leuwin, Cens. Foren. lib. 5, c. 30, secs. 5, 6.

[As to the common law obligation attaching to railway companies and other common carriers to convey the goods of any person offering to pay the carriage, see *Johnson v Midland Ry. Co.*, 4 Exch. 367; *Pickford v Grand J. Ry. Co.*, 8 M. and W. 373; *Wyld v Pickford*, 8 M. and W. 443.

By the Railway and Canal Traffic Act, 1854 (extended to railway companies' steamers by 26 and 27 Vict. c. 92), provision is made for enforcing, by application to one of the superior courts, the duty of making arrangements for the receiving and forwarding of goods of every description without delay, and without partiality (secs. 1 to 6). A list of the decisions on the construction of the statute is given in 1 Sm. L. Ca. 6th ed. p. 208.]

² Bankton says: 'The edict is extended to common carriers.' Bankt. i. 16. 5. Erskine, with more reserve, says: 'This edict would possibly, from the parity of reason, be also applied against carriers.' Ersk. iii. 1. 29.

Ewing v Miller, 1687, M. 9235. Even in the case not of a common carrier, but a hired carter, the Court of Session applied the rule of the edict.

This doctrine is taken for granted, *M'Ausland v Dick*, 1787, M. 9246.

[Railway and canal companies are common carriers in relation to goods which they are bound by statute to carry, or which they profess to carry for the public, of which the

practice of the company is sufficient evidence. *Palmer v Grand Junction Canal Co.*, 4 M. and W. 749; *Pickford v Grand Junction Railway Co.*, 10 M. and W. 399; *Parker v Great Western Railway Co.*, 7 Scott N. R. 835; *Campbell v Caledonian Railway Co.*, 1852, 14 D. 806. The exceptions depend chiefly on the statutes defining their responsibility; as to which, *infra*, p. 505.

As to liability for passengers' luggage generally, see *Munster v South-Eastern Railway Co.*, 4 C. B. N. S. 676. Exceptions: (1.) Luggage taken by the passenger into the carriage in which he travels. *Le Conteur v South-Western Railway Co.*, *quære*, 1 L. R. Q. B. 54. (2.) Parcels containing merchandise delivered to the company as personal luggage to be carried free, without disclosure of their contents. *Cahill v North-Western Railway Co.*, 10 C. B. N. S. 154, and in Exch. Ch. 13 C. B. N. S. 818; *Belfast, etc. Railway Co. v Keys*, 9 H. L. Ca. 556. (3.) Passengers' luggage lost in the course of being put into a hackney carriage after arrival. *Stewart v London & North-Western Railway Co.*, 3 H. and C. 135, 33 L. J. Exch. 199, and previous cases.]

³ See Sir W. Jones, Bailment, 106. See next note.

⁴ [As to ferrymen, *quære*; Sm. Merc. Law, 7th ed. p. 282.]

⁵ Without looking back into the older cases, Lord Holt's direction may be taken in his celebrated argument on bailments, where, speaking of the fifth sort of bailment of goods to be carried, he says: 'It is either a delivery to one that exercises a public employment, or a delivery to a private person. First, if it be to a person of the first sort, and he is to have a reward, he is bound to answer for the goods at all events; and this is the case of the common carrier, common hoyman, master of a ship, etc. The law charges the person thus entrusted to carry goods, against all events, but acts of God and of the enemies of the king.' *Coggs v Bernard*, 2 Lord Raymond 917.

⁶ *Bain v Sinclair*, 1825, 3 S. 533, N. E. 368.

specially, unless there be a specific agreement, the edict applies.¹ Under this class have also been comprehended wharfingers in the English law,² as indeed the principle of responsibility seems applicable to them as well as the others mentioned.

The rule being once held applicable to land carriers (*supra*), it follows without much difficulty that all sorts of land carriers, holding themselves out as public carriers, are under it, and that no distinction ought to be made on account of the vehicle, whether a waggon, a cart, or a mail-coach or stage-coach. A distinction, however, seems to have been contended for in the case of stage-coaches, on some such principle as this, that their undertaking is for the carriage of persons, not of goods, and that they are not to be subjected, except for goods entered and paid for. This must appear to be a very questionable ground [468] of distinction, since it is not on the *contract* that the carrier is responsible, but on the principle of *public policy*, which is equally applicable to this as to any other sort of land carriage. In England at one time the distinction was actually entertained on the above ground,³ though it now seems to be abandoned, and stage-coachmen held universally responsible.⁴

Hackney-coachmen, however, seem to be in a different situation, as neither employed in the carriage of goods, nor in such journeys as make the carriage of luggage necessary, and as responsible for goods only by contract when received expressly and paid for.⁵

As the establishment of the GENERAL POST OFFICE has been accompanied with a prohibition of the carriage of letters and packets by common carriers, stage-coachmen, and others, it is natural to maintain that there should be a transfer of the responsibility as well as of the employment.⁶ But it is necessary here to make an important distinction. Responsi-

¹ Ersk. iii. 1. 29. Any particular observations relative to ships and sea-carriage, will be found in that part of the work where Charter-party is discussed.

² In a case which turned on a technical objection to an action as of trover, when it ought to have been on the case, to subject a wharfinger for goods which had been received by him, Lord Mansfield said: 'It is impossible to make a distinction between a wharfinger and a common carrier: they both receive the goods upon a contract. Every case against a carrier is like the same against a wharfinger.' *Ross v Johnston*, 5 Burr. 2825. I should have imagined this to imply merely an opinion that this sort of remedy was the same, not to go the length of holding the same responsibility; because it is not on the matter of *contract* that the degree of responsibility rests, though certainly the form of action will be affected by it. It seems, however, to be taken otherwise by English lawyers.

³ In *Middleton v Fowles*, 1 Salkeld 282, Lord Holt held a stage-coachman not to be within the custom as a carrier, unless where he takes a distinct price for the carriage of goods as well as of persons.

So in *Livett v Hobbs*, 2 Shower 127, it was said that when a stage-coachman commonly carries goods, and takes money for so doing, he is in the case of a common carrier, and is a carrier for that purpose, whether the goods be a passenger's or stranger's.

⁴ In *Clark v Gray*, 1803, the point was taken for granted. 4 Espin. N. P. Cases, p. 177; 1 Selwyn's N. P. 324, note.

It seems agreed at least, that where a custom prevails of charging for over-weight, stage-coachmen are common carriers.

[The result of the English decisions, as stated in Smith's Leading Cases, is, that a person who conveys passengers *only* is not a common carrier (6th ed. vol. i. p. 206), on the autho-

rity of *Sharpe v Grey*, 9 Bing. 460, and *Blake v Great Western Railway Co.*, 7 H. and N. 987, 31 L. J. Exch. 346, distinguishing cases in 3 B. and B. 54, and 5 Q. B. 747.]

⁵ So held in England, by Lord Holt, in *Upshure v Aidee*, Com. Rep. 25, 2 Comyn's Cont. 294, 1 Selwyn N. P. 323; Jeremy, Law of Carriers, 13.

[It has since been held that the acceptance of luggage by a cabman implies a promise to carry safely, with a corresponding liability. *Ross v Hill*, 2 C. B. 877; *Powles v Hider*, 6 El. and Bl. 207. See also *Brind v Dale*, 2 M. and Rob. 80; Add on Cont. 6th ed. 467.]

⁶ The post office was first established in England during the Usurpation, by an ordinance of Cromwell in 1656; not entirely at first for public convenience and safer intercourse, but also with a political view to the whole correspondence of the kingdom being under official inspection, for the prevention of conspiracies. By 12 Charles II. c. 35, the establishment was more fully regulated. In the time of King William, the first Act was passed for a general post office in Scotland, on much the same footing with that of England (1695, c. 20). And by 9 Anne, c. 10 (1710), both the English and Scottish Acts relative to the general post office are recited and repealed, and a new general post office established for the whole United Kingdom. By this Act the post office has become a branch of the revenue, and a branch of police. Of the revenue, the surplus is for the public after payment of the expense of the establishment; and it is secured to the public by requiring, as a branch of police, that the whole correspondence of the kingdom shall be under Government, and the direction and management of it committed to the Crown, and officers by the Crown appointed. The officers take the oath as public officers. They are subjected to heavy penalties; and what in common carriers is, in criminal jurisprudence, only a breach of trust, is with the officers of the post office a capital felony.

bility for *constructive* negligence, established against carriers for the public safety, has in the case of the post office been superseded by other precautions,—namely, the appointment of public officers, whose fidelity in their office is secured by penal statutes of more than ordinary rigour.¹ But the responsibility for negligence *actually committed* is reserved in full force, each person being liable in his department for the letters committed to his charge.² [469] The liability for servants does not hold here, as in the case of carriers. Each officer in the post office, from the postmaster-general to the lowest letter-carrier, is regarded as an independent officer, liable in his own department.

Mail-coaches are in this sense no part of the establishment, but mere stage-coaches. See above, p. 497.

2. INNKEEPERS AND STABLERS.—1. Letters of lodgings were by one decision of early date held to fall under the description of innkeepers.³ But in a recent case the Court of Session, where the point was raised, declared the decision not to proceed on this ground.⁴ Innkeepers are responsible, on the principle of the edict, for whatever is placed under their charge, or that of their servants, or brought into their inn by or for their guests (although not otherwise than collaterally the source of gain to them), provided the guest does not himself undertake the exclusive care of his goods.⁵ Where an article is given to an innkeeper to be sent by a carrier or coach going from his house, he is liable for it.⁶ But it has been doubted whether, under this law, an innkeeper is responsible for a parcel addressed to one who was not a guest, but merely called at his inn, and went on with post-horses.⁷

¹ *Lane v Sir R. Cotton*, 1 Lord Raymond 646. There was in England a case prior to the 9th Anne, in which it was questioned, Whether the postmaster, in consequence of the hire he receives, was not liable for all the damage that might happen, whether owing to the negligence or dishonesty of the persons employed under him to conduct and carry on the business of the office? The action was for recovering the value of exchequer bills which had been enclosed in a letter put into the post office. Lord Holt followed the analogy of the liability of a common carrier, confining the question to the case of a letter lost in the office. The rest of the Court denied the responsibility, except for actual negligence; and so the judgment went. The argument of Lord Holt is extremely elaborate.

Whitefield v Le Despenser, 1778, Cowper 754. In Lord Mansfield's time the question was again brought forward, as on the establishment of 9 Anne. He delivered the opinion of the Court, denying the doctrine of Lord Holt, and representing the case of *Lane and Cotton* as a judgment on which the bar and the country relied; and concluding that, 'if there could have been any doubt before that determination, the solemn judgment in that case having stood uncontroverted ever since puts the matter beyond dispute.'

Farries v Elder & Scott, 1799, M. 10103. The question came to trial in Scotland about twenty years after the decision of *Whitefield's* case, when the Court of Session, both on the general argument, and particularly on the English precedents, dismissed the action.

² Lord Mansfield makes the distinction in the case of *Whitefield* (see preceding note): 'As to an action on the case against the party really offending, there can be no doubt of it; for whoever does an act by which another person receives an injury, is liable in an action for the injury sustained. If the man who receives a penny to carry the letters to the post office loses any of them, he is answerable; so is the

porter in the business of his department; so is the postmaster for any fault of his own' (*Cowp.* 765).

On this distinction, it will be observed that a case decided by the Court of Session in 1724 (*Short v Hamilton*, M. 10091) is not, as stated by the editor of the last edition of *Erskine* (p. 491, note), contrary to that in *Farries'* case. For *Short's* was an action against the postmaster at Falkirk for gold sealed up in a letter, and delivered to him as containing money, and of which there was no further trace; but here there was the distinct negligence of the postmaster in not marking the letter as a money letter.

³ *May v Wingate*, 1694, M. 9236.

[In England the doctrine of special responsibility is limited to the business of innkeeping in its proper sense. A coffee-house is not an inn (*Doe v Laming*, 4 Camp. 77); nor is a boarding-house (*Dansay v Richardson*, 3 El. and Bl. 144); nor a hotel when used as such (*Parkhurst v Foster*, Salk. 388). As to lodging-houses, see *Holder v Soulby*, 8 C. B. N. S. 254.]

⁴ *Watling v M'Dowall*, 1825, 4 S. 83, N. E. 86.

⁵ See *Farnworth v Packwood*, 1 Starkie 249; *Burgess v Clements*, *ib.* 257, note.

⁶ *Williamson v White*, 21 June 1810, 15 Fac. Coll. 712. Here a parcel containing money was left with an innkeeper at Muirkirk, or his servants, to be sent by the carrier who went from his house to Sanquhar. It was put on the cart, and afterwards removed and put into a cellar where goods for that carrier were deposited. It was missing for twenty months, and when found it contained no money. The innkeeper was made liable for it.

⁷ *Meikle v Skelly*, 16 Feb. 1813, 17 Fac. Coll. 198. This was a money parcel, but without notice of its value, addressed to one who was not a guest, but had passed that way, and had post-horses at the house the day before. The parcel was received, left in the servants' hall of the inn, and

2. Stablers are liable not only for the horses placed under their charge, or that of their hostlers or servants, but also for the horse furniture, etc., which is brought into their stables.

II. EXTENT OF RESPONSIBILITY.—The rule of the edict is, that a public carrier, innkeeper, or stabler, being once chargeable with the goods, etc., as received into his custody, must answer for their restitution in the same condition,¹ unless they have perished, or have suffered injury by inevitable accident.

1. In the construction of this rule, a loss by ROBBERY is not to be received as an inevitable accident. Robbery is one of the main dangers against which the severity of this law was intended to operate as a preventive; yet our authors have spoken so loosely, [470] that robbery might almost be taken as held by them to form an express exception from the responsibility.² The rule as laid down in England is, 'that nothing is an excuse except an act of God or of the king's enemies;' and if an irresistible number of persons should commit the robbery, the carrier is nevertheless chargeable.⁴

2. There never has been any doubt in Scotland, any more than in England, that the responsibility extends to THEFT.⁵

3. FIRE is held as an inevitable accident in ordinary cases; but, looking to the policy of this law, it is not in England so regarded, and was not so held in the Roman law. Being by the act of man, it *may* be collusive, by the confusion, to favour depredations; and as there is a possibility of the carrier or innkeeper being participant in the crime, the risk is on them.⁶ And this view of the responsibility certainly leads to a wholesome correctness

lost. The innkeeper was held not liable, after much difference of opinion among the judges.

[By 26 and 27 Vict. c. 41, no innkeeper shall thereafter be liable for loss of or injury to goods or property brought to his inn, not being a horse or other live animal, or any gear appertaining thereto, or any carriage, to a greater amount than £30, except in the case of wilful default of such innkeeper or his servant, or unless such goods or property shall have been expressly deposited with him for safe custody (sec. 1). As conditions of exemption from further responsibility, the innkeeper is bound to receive the guest's goods for safe custody on demand (sec. 2); and is also bound to exhibit in the hall or entrance to his inn a copy of the first section of the statute (sec. 3).]

¹ See the cases, notes 6 and 7, p. 498.

² Erskine says: 'The law is express, that if the goods perish even without his fault, he is liable, unless the loss has happened *damno fatali* by an accident which could be neither foreseen nor withstood.' This is the true rule. But he has added an *example* of *damnum fatale*, which may be doubted: 'If, *ex. gr.*, they have been lost by storm, or *carried off forcibly by pirates or housebreakers*' (Ersk. iii. 1. 28). He quotes no case for this.

See also Bankt. i. 16. 1, vol. i. p. 379.

These authors refer to the third law of this title of the Digest. But Ulpian there says: 'At hoc edicto omnimodo qui recepit tenetur etiamsi sine culpa ejus (levi scilicet, says Pothier, Pand. vol. i. p. 159), res periit vel damnum datum est; nisi si quid damno fatali contingit. Inde Labeo scribit, si quid naufragio aut per vim piratarum perierit non esse iniquum exceptionem ei dari. Idem erit dicendum et si in stabulo aut in caupona vis major contigerit.' But the true meaning of the law, in using the words *vis major*, seems rather to be *hostile* force; with us, 'the king's enemies.' On this matter the commentators seem to differ. Voet is rather of opinion that the analogy holds with housebreakers: 'Cui

non absimile est si effracto per effractores fures domo vel stabulo res viatorum ablatae.' But he adds that the *onus probandi* lies on the innkeeper to justify himself against all suspicion. 1 Voet. Comm. ad Pand. 301. Peckius, in his Commentary, 'In juris civilis titulos ad rem nauticam pertinentes,' says: 'Est autem vis major cui resisti non potest, qua ratione defendi posse existimavero si exercitus præteriens seu hostis urbem vi occupans, res alicujus in hospitio depositas et fidei cauponis mandatas abstulerit' (Opera, p. 825).

But in judging of the analogy in Scotland, the principle of expediency, as established by many practical illustrations in England, will undoubtedly be received as of more authority than hundreds of *dicta* rescued from the cobwebs of the civilians.

Stair, the best of all our lawyers, says: 'They were made liable for the loss or theft of such things absolutely, from which they were freed by no diligence, but were not liable for accident or force; *that is, sea hazard must always be excepted*' (i. 13. 3).

³ Buller's N. P. p. 70; Sir William Jones, Bailment, 104.

Forward v Pittard, 1 Term. Rep. 27. Lord Mansfield lays it down thus: 'Now what is the act of God? I consider it to mean something in opposition to the act of man; for everything is the act of God that happens by His permission, everything by His knowledge. But to prevent collusive litigation, and the necessity of going into circumstances impossible to be unravelled, the law always presumes against the carrier, unless he shows the injury to have been done by the king's enemies, or by such act as could not happen by the intervention of man, as storms, lightnings, tempests,' etc.

⁴ *Coggs v Bernard*, Lord Raymond 919.

⁵ 1. *Case of Innkeeper*.—*Master of Forbes v Steel*, 1687, M. 9233; *Gooden v Murray*, 1700, M. 9237-8; *Brouster v Lees*, 1707, M. 9240; *Chisholm v Fenton*, 1714, M. 9241.

2. *Case of Carrier*.—*Ewing v Miller*, 1687, M. 9235.

⁶ Numerous cases in England are reported, in which the

and care, which might otherwise be utterly neglected. But it has, on the whole, appeared in Scotland, that this responsibility for fire is not to be held as within the true principle of the edict as adopted by us.¹ It is rather considered as *damnum fatale*, an inevitable accident, for which the carrier, etc., are not responsible.²

[471] 4. So far as the contract of carriage operates, the principal is liable for his servants and deputies (see above, p. 493); but the edict was extended to protect what may properly be said to be *deposited*, as in the case of luggage in an inn or stage-coach not paid for. And it extended the obligation (which in deposit does not make the depositary responsible for his servants) to a universal responsibility for all servants, and even strangers.³

5. *Proof of Loss*.—The value of the parcel or thing lost may occasion difficulty if not regulated by a general rule. A person cannot always have direct and positive evidence of the sum which may have been in his pocket-book when stolen from an inn; or of the value of his luggage taken from a coach. In order to get quit of the difficulty, a very clumsy and dangerous remedy formerly prevailed in Scotland,—namely, that the person should by his own oath be allowed to establish that value against the carrier or innkeeper;⁴ it being reserved to the Court to restrain the claim.⁵ The principle on which Lord Stair places this is, that access may be refused to travellers, ‘unless they show what they have; and otherwise he (the carrier) is presumed to trust to their oath.’ But this is not a practicable arrangement. It is not always safe, and in the hurry of travelling quite intolerable, that one should be required to show money or jewels in the confusion of a coachyard, or to undo a package, or turn out the contents of a portmanteau, to satisfy a carrier or stage-coachman. These precautions are quite unsuitable to our times. And the matter seems fairly and equitably to resolve into these propositions: 1. That as to the luggage of a traveller, the coachmaster must take his risk of the probable value, including such a sum of money as may reasonably

loss was by fire. In *Forward v Pittard*, 1 Term. Rep. 27, the fire began at the distance of 100 yards, and without any negligence whatever being proved on the part of the carrier.

In *Hyde v Trent and Mersey Navigation Co.*, 5 Term. Rep. 189, the loss was by fire.

¹ *M'Donnell v Ettles*, 15 Dec. 1809, 15 Fac. Coll. 466.

[The law is altered by 19 and 20 Vict. c. 60, sec. 17: ‘From and after the passing of this Act, all carriers for hire of goods within Scotland shall be liable to make good to the owner of such goods all losses arising from accidental fire, while such goods were in the custody or possession of such carriers.’]

² [(1.) The responsibility for injury, as distinguished from loss or abstraction of goods in the custody of innkeepers, rests not on the edict (which is a presumption raised by law to protect travellers against fraud), but on the rule as to diligence prestable by custodiers for hire. *Dawson v Chamney*, 5 Q.B. 164. Where the question was as to responsibility for injury to plaintiff's horse, which was killed by another horse in defendant's stable, Mr. Justice Cresswell told the jury that the defendant was liable if he or his servants had been guilty of direct injury or negligence, otherwise not. This direction was approved by the Court, subject to the observation that the damage raised a presumption of negligence in the innkeeper. See also, as to the distinction between loss and injury, *Morgan v Ravey*, 6 H. and N. 265, 30 L. J. Exch. 131.

(2.) The innkeeper is exonerated if it be made to appear that the abstraction of the goods was the result of gross negligence on the part of the guest, as where a cash-box easily opened was left in the commercial room of an inn, and the money was stolen (*Armistead v Fuller*, 17 Q. B. 261). And in order to exonerate the innkeeper, it is only necessary to

show that the loss would not have happened if the guest had used the ordinary care that a prudent man might reasonably be expected to take under the circumstances (*Cashill v Wright*, 6 El. and Bl. 891).

(3.) The guest is entitled to the benefit of the rule, in a case of theft or loss of goods when stopping at the inn for temporary refreshment, e.g. where a gig was stolen from the street in front of the inn while the horse was being fed in the stable. *Jones v Tyler*, 1 Ad. and El. 522; and see Lord Holt's *dictum* in *York v Grindstone*, 1 Salk. 388, 2 Lord Raym. 860.]

³ ‘By this edict,’ says Stair, ‘positive law, for utility's sake, hath appointed that the custody of goods of passengers in ships, or strangers in inns or in stables, shall be far extended beyond the nature of deposition, which obliges for fraud only or supine negligence in them who have expressly contracted for their own part. But this edict, for public utility's sake, extends it, *first*, To the restitution of the goods of passengers and travellers, and reparation of any loss or injury done by mariners or servants of the ship, or by the servants of the inn or stable, etc. *Secondly*, The edict extends this obligation even to the damages sustained by the fact of other passengers or strangers in the ship, inn, or stable, for which the master, innkeeper, or keeper of the stable, could be no ways obliged but by virtue of this edict.’ Stair i. 13. 3.

⁴ *Ewing v Miller*, 1687, M. 9235. This was even extended to the case of a packman or travelling merchant, though he should have been able to give some more unexceptionable evidence of the value.

⁵ *Brouster v Lees*, 1707, M. 9240; *Gooden v Murray*, 1700, M. 9237.

be carried in his travelling portmanteau for the occasions of his journey. 2. That if the luggage be of extraordinary value, this ought to be stated; and if demanded, a reasonable increase of hire paid, proportioned to the additional risk, otherwise the coachmaster will not be liable beyond the value to be reasonably supposed.¹ 3. That when a loss happens, such evidence as the circumstances of the case may admit, added to the oath *in litem*, shall be shown of the amount of the damage, in which inquiry care must always be taken to prevent the traveller from taking advantage of the accident to impose on the carrier. 4. That in the carriage of goods or parcels, although the carrier cannot insist to have the packages which have been made up with care for safe transportation undone, at least he may insist on seeing the invoice and knowing the value. 5. That when he does not take this precaution, he must be responsible for the value of the goods, as it may be [472] established by evidence. And, 6. That where the carrier is deceived as to the value, and made to undertake a high responsibility, supposing it to be the ordinary risk, he will not be liable on the edict, but only for his own fraud, or at least not liable beyond the reasonable value according to the appearance of the goods and other circumstances.² And, finally, reasonable evidence will now be required of the nature and value of the thing lost, together with the employer's oath *in litem*, rather as a precautionary measure to prevent an extravagant demand, than as being of itself the evidence on which the demand is to rest.³

III. LIMITATION OF RESPONSIBILITY.⁴—The question, how far the responsibility of carriers and others is capable of limitation, and by what evidence such limitation may be established, is very important. A sense of the severe responsibility laid on common carriers has, within these twenty or thirty years, given admission to a sort of limitation by means of notices in newspapers, and placards in the carrier's office; which the judges in England seem now to be sensible has been allowed to go too far, and against the evils of which they contemplate no remedy but by the Legislature. There has not yet in Scotland been any encroachment on the principles which ought to regulate this matter; and the doctrine adopted seems at once consistent with the law of the contract, and with the public policy which has been introduced into this class of cases.

It seems to admit of no doubt, *1st*, That, as matter of contract, carriers, innkeepers, stablers, and others, may, with the consent of those who employ them, undertake only certain risks and responsibilities. *2dly*, That one desiring to be admitted to an inn, or to be transported in a public stage-coach, or to have his goods carried in a public waggon, is entitled to insist that the innkeeper, stage-coachman, or public carrier, shall comply with his request, unless his inn or his vehicle be fully occupied.⁵ *3dly*, It seems to be a part of the same rule, that such public servants cannot within the line of their duty and public undertaking, unless with consent of the employer, insist on limiting their undertaking to a less extensive responsibility than the policy of the law has enjoined.⁶ But, *4thly*, Between

¹ If the appearance of the goods necessarily indicate a considerable value, the carrier will be liable, though he may have endeavoured by notice to restrict his liability. See *Beck v Evans*, 16 East 244, as to a cask of brandy. Contrast with it the case of *Down v Fromont*, 4 Camp. 40. So goods marked 'Glass:' *Wilson v Freeman*, 3 Camp. 527. [See *Gowans v Thomson*, 1844, 6 D. 606.]

² *M'Ausland v Dick*, 1787, M. 9246. M'Ausland sent by a stage-coach between Edinburgh and Glasgow £200 in an ordinary parcel, which he booked, and for which he paid 6d. The coachman defended himself on the unusual hazard; the circumstance of there being no proper place at that time in coaches to preserve such valuable parcels from the frauds of passengers; and the ignorance in which he was suffered to remain of the great risk which he ran by having this parcel occupy in the coach. He was held not liable.

³ See case of *Williamson v White*, *supra*, p. 498, note 6.

⁴ [Add. on Cont. 6th ed. 475; Sm. Merc. Law, 7th ed. 284.]

⁵ See Doctor and Student 270; Noy's Maxims 92. In the case of a common carrier (*Jackson v Rogers*, 2 Shower 327), and in that of a coachmaster (*Livett v Hobbs*, 2 Shower 127), this doctrine was fully established.

⁶ Ulpian, in commenting on the edict (Dig. lib. 4, tit. 9, l. 1; see above, p. 495), has been thought to ground the reasonableness of the risk on the power which the persons to whom the edict applies have of refusing the employment. But modern lawyers more correctly ground the responsibility on the very circumstance that such employment cannot be refused by those who, acting as public servants, exclude others.

[In *Morgan v Ravey*, 6 H. and N. 265, a question was raised as to the effect of notice at common law in limiting

these opposite principles there is another consideration which cannot be overlooked in this question. The extensive responsibility of the edict, proceeding on views of general policy and precaution, makes carriers and others answerable for fire, robbery, and other risks, although they may be innocent of any collusion or neglect, and the accidents may really be inevitable. But if it be allowable on the one hand to subject such persons to a heavy responsibility, in order to avoid possible evil and repress combination and villany, it is fair on the other that the innocent should be indemnified for the danger they run; and this can be done only by an augmented hire, combining in one payment the price of labour and a premium for risk. And it is considered also as equitable, that carriers should not [473] be made for a small hire to undertake the care of packages of a much higher value than from their appearance is naturally to be inferred.

It is partly under these last considerations, and partly, as it seems, under the power in certain descriptions of public servants to circumscribe their undertaking, that the whole doctrine of limitations by notice has grown up in England. Two points have been admitted. One is, that a carrier's general run of goods may be estimated, and notice given by him that he will not be liable for those of a different description, as jewels, money, etc. of extraordinary value, unless he be informed of the value. Another is, that for the greater risk attending such goods, and the greater care required, a higher consideration, partly as hire, partly as insurance, should be given. But besides limitation admitted in this way, and apparently on sound and equitable grounds, the power of limiting by notice has been carried to a much greater extent in some particular lines. The proprietor of a coach running for the avowed purpose of carrying passengers, not as a common carrier of goods, may also undertake to carry parcels of a particular description; and this limitation, when fully made known, may undoubtedly constitute a special contract with the owner of goods. Whatever licence there may be allowable to a common carrier to limit his responsibility, it seems not to be unlawful to restrict this undertaking. Lord Ellenborough, in summing up a case determined some years ago, gives this sketch of the history of such limitations: 'If this action had been brought twenty years ago, the defendant would have been liable, since by the common law a carrier is liable in all cases except two—where the loss is occasioned by the act of God, or of the king's enemies using an overwhelming force, which persons with ordinary means of resistance cannot guard against. It was found that the common law imposed upon carriers a liability of ruinous extent; and in consequence, qualifications and limitations of that liability have been introduced from time to time, till, as in the present case, they seem to have excluded all responsibility whatsoever: so that, under the terms of the present notice, if servants of the carriers had, in the most wilful and wanton manner, destroyed the furniture entrusted to them, the principals would not have been liable. If the parties in the present case have so contracted, the plaintiff must abide by the agreement. And he must be taken to have so contracted, if he choose to send his goods to be carried after notice of the conditions. The question then is, Whether there was a special contract?'¹ If the carriers notified their terms to the person bringing the goods by an advertisement, which in all probability must have attracted the attention of the person who brought the goods, they were delivered upon those terms.'²

the innkeeper's responsibility. In the bed-room occupied by the plaintiff was exhibited a printed notice, stating that the proprietor requested visitors to bolt their bed-room doors, and leave their valuables at the bar, otherwise he would not be responsible. The plaintiff did neither, and his gold watch and ring were taken from his bed-room during the night. He denied having read anything more than the word 'Notice.' The jury found that there was no negligence on his part, and the innkeeper was held responsible.]

¹ *Leeson v Holt*, 1 Starkie 187.

² *Maving v Tod*, 1 Starkie 79. On another occasion the question arose, Whether a wharfinger, held as in the same situation with a carrier, could avoid responsibility for fire? 'Holroyd submitted whether the defendants could exclude their responsibility altogether;' and added, 'they were going further than had been done in the case of carriers who had only limited their responsibility to a certain amount.' Lord Ellenborough: Since they can limit it to a particular sum, I think they may exclude it altogether, and that they may say we have nothing to do with fire. Holroyd: They were bound

The unhappy consequences of this doctrine are to be ascribed, as it would seem, to a wrong bias unfortunately admitted in the progress of its establishment, from not keeping a steady eye upon the principles which ought to have regulated the practice of giving notices. There seems to be only one point to which legitimately notices of public carriers can be admitted, viz. the regulation of the consideration for risk. Saving always the power of making an express contract, the effect of a mere notice ought justly to be restricted to this point, as to which alone it is competent for a carrier to refuse employment. On this principle, the law would have proceeded conformably to the general system of jurispru- [474] dence, and we should not have seen a sort of legislative power assumed by carriers. Any exorbitancy of charge would at once have been brought to a true standard by judicial determination; while the responsibilities of the carrier, under the common law of his contract, and on the principles of public policy, would have remained untouched but by positive agreement in each individual case. The operation of this law, however, might not have been very extensive, if held only to apply to those who are strictly speaking common carriers. The great extension of the doctrine of notice has been in regard to coaches of different descriptions, which are not strictly speaking within all the restraints to which common carriers are liable, in so far as they are employed to carry goods or parcels, not luggage of passengers; but are so to be considered only to the extent in which they profess to undertake that branch of Carriage.

Of the extravagance into which this doctrine of notice has run, and the distracting questions which come to be involved in it, the newspapers and the books of English reports are full. One carrier frees himself from responsibility for fire,¹ another even from the common responsibility of the contract for negligence.² One man is bound by a notice which has appeared in a newspaper that he has been accustomed to read;³ another, because a large board was stuck up in the coach office;⁴ while a third is freed from the effect of the notice in the office, because handbills were circulated of a different import.⁵ Then it is said, What if he cannot read? or if he does not go himself, but sends a porter, and *he* cannot read? or what if he be blind, and cannot see the placard? And thus difficulties multiply, the courts are filled with questions, and the public left in uncertainty.

In the proper case of a common carrier, it does seem not only a very dangerous doctrine, and admissible only from absolute necessity, but a thing quite against the principles of law, that the whole public shall be bound to take notice of advertisements by individuals, under the penalty of being held bound by the terms of those advertisements, whether in fact they have seen them or not. But, above all, it is against legal principle, that persons acting in the capacity of public servants, and by the law itself declared liable to certain rules of responsibility for the safety of their employers, shall have this power in their hands. To such a person any of the public is entitled to go, as to one who under the edict is bound to extensive responsibilities; and to disregard utterly every protest which may have been made against those responsibilities, unless actually and personally intimated to him at the time. If a carrier or other public servant choose to express the terms of his contract separately in an advertisement, with a view of recommending himself to public favour, and making known what he means to insist on in each case, it is well; but the *onus probandi* must in every case remain on him to show, either that he has insisted on the terms announced, and that they have been agreed to, or that a fair consideration for extraordinary risk has been refused; in which case his responsibility will in equity stand limited to losses from fault or negligence, to the exclusion of risks concealed or not paid for.⁶ In England, it is held incumbent on

to receive the goods. Lord Ellenborough: Yes, but they may make their own terms. I am sorry the law is so; it leads to very great negligence.

¹ *Maving v Tod*, *supra*, p. 502, note 2.

² *Leeson v Holt*, *supra*, p. 502, note 1.

³ Same case.

⁴ *Clerk v Gray*, 4 Esp. Rep. 177.

⁵ *Copden v Bolton*, 1809, 2 Camp. 103.

⁶ The only case which has occurred in Scotland on this question is still in dependence. It was this: A gentleman

a person wishing to rid himself of this responsibility, to prove effectual notice. A special [475] contract is required to be proved, and whether it exists or not, is always a question for the jury.¹ The delivery of a printed paper containing the notice to every person bringing a parcel to the office, has been suggested as an effectual and easy method of giving notice.²

The true line of distinction seems to be, 1. That in the proper case of a common carrier, notice against responsibility, unless the value is stated and paid for, will save the carrier from everything but the ordinary diligence of the contract,³ and the reasonable amount of loss, according to the appearance of the package delivered, if the owner does not choose to pay the premium;⁴ but that he cannot lessen that diligence, or relieve himself from responsibility altogether, without showing a *special* agreement, or evidence, not merely of *notice*, but of *assent* to that notice. 2. That coachmasters who carry passengers are not strictly common carriers, further than in relation to luggage, as to which the same rule ought to be applied. And, 3. That in respect to the separate carriage of goods and parcels by coaches, steamboats, etc., the proper business of which is the carriage of persons, it is lawful to limit responsibility by notice of the extent to which the carriage of goods is to be undertaken in that particular instance. And in England, in such cases, where goods of greater value than the restricted sum have been delivered to a coach, without paying for them the additional hire, it has been held that no action lies even for the restricted sum. This seems to proceed on the ground that there is in such case a legitimate special contract, under the terms of which no action can lie.⁵

Evidence of a specific bargain, however, cannot justly be required on *each* occasion of [476] sending goods by a carrier, or travelling in a particular coach. Provided such specific contract or assent to the terms can be established on a previous occasion, it will be held

travelling from Inverness to Edinburgh made the waiter of the inn carry his portmanteau to the clerk of the mail-coach. He himself saw it entered, and placed under the care of the clerk and the guard. Observed no placard, though it is believed there was one in the office; had no questions asked or terms insisted for in limitation of the responsibility; and afterwards, on entering the coach, asked the guard whether his portmanteau was safe, and was answered it was in the boot, and quite safe. On arriving at Aberdeen the portmanteau was missing; and notwithstanding every search, could not be recovered. The gentleman brought his action for the value of his portmanteau, in which were his travelling equipment and fifty guineas. The defence was rested on notices and advertisements, and the whole doctrine of limitation, as established in England. Lord Pitmilley held the contractors liable. *Cockburn v Richardson*; but the case was compromised without any judgment of the Inner House.

¹ *Keir v Willan*, 1817, 2 Starkie 53, where a truss of goods had been delivered at the office of Willan, a carrier, at the Bull and Mouth Inn, London, to be carried to Dumfries. The defence was on a notice of limitation of responsibility. The answer was, the porter who delivered the truss could not read the notice. Lord Ellenborough said, that 'by the common law the carrier is responsible for loss of goods, unless he enter into a special contract by which he limits that responsibility. This he may do by notice in the public papers, or by any other medium by which the party with whom he deals is effectually apprised of the terms on which he proposes to deal.' A verdict for plaintiff, £240, 15s. 6d. A rule for a new trial was refused. The Court said, that 'the necessity of giving effectual notice imposed considerable difficulty upon the carrier; but the difficulty arose from the attempt to

depart from the old rule of common law, which had prevailed for ages, and which could not be avoided without great exertion. No doubt, the rule of law might be superseded in the particular case by a special contract, since *modus et conventio vincunt legem*; but then such special contract must be proved; and whether it exists or not, is always a question for the jury.'

The same doctrine laid down by Lord Chief Justice Abbot in *Davis v Willan*, 2 Starkie 279. See *Munn v Baker*, 2 Starkie 255. *Rowley v Horne*, 1825, 3 Bingham 2. It was held not enough that the defender had for years taken in a newspaper in which this notice was advertised weekly.

² *Rowley v Horne*, preceding note.

³ In *Beck v Evans*, 3 Camp. 267, 16 East, a notice was found no defence against negligence, where the thing delivered was a cask known to contain brandy, etc., obviously above the value of £5.

In *Wilson v Freeman*, 3 Camp. 527, the bookkeeper was told the value; and though no additional sum was paid, the notice held unavailing to restrict.

⁴ *Beck v Evans*, 16 East 247. It does not seem to be very different even from the English doctrine. 'I think,' says Mr. Justice Le Blanc, 'that the exemption of carriers from general responsibility, by reason of notices of this sort, has been carried to the utmost extent, and cannot be supported on any other ground than this, that they shall not be held liable to a large amount, where they only get a small reward for the carriage.'

⁵ *Clay v Willan*, 1 H. Blackst. 298. *Yate v Willan*, 3 East 128. *Izell v Mountain*, 1803, 4 East 371. *Nicholson v Willan*, 1804, 5 East 507.

that, till altered again by specific contract, the future employment continues on the footing once acquiesced in.¹

SECTION III.

OF MERCANTILE AGENTS OR FACTORS.

Some points in the law relative to mercantile agency have already been touched, in speaking of the effect of possession and reputed ownership on property in the hands of factors;² and under the doctrine of lien, the effects of that sort of security in giving a

¹ [The doctrine of the limitation of responsibility by notice is now superseded in a great measure by the provisions of the Land Carriers Act, and the Railway and Canal Traffic Act.

(1.) By 11 Geo. iv. and 1 Will. iv. c. 68, no common carrier by land for hire shall be liable for loss (*Hearn v London and South-Western Ry. Co.*, 10 Exch. 793) or injury to any gold or silver coin, gold or silver in a manufactured or unmanufactured state, precious stones, jewellery, watches, clocks, time-pieces, trinkets (*Bernstein v Baxendale*, 6 C. B. N. S. 251, overruling *Davey v Mason*, 1 Car. and M. 45), bills, bank-notes, orders, notes or securities for the payment of money (*Stoessiger v South-Eastern Ry. Co.*, 3 El. and Bl. 549; *M'Call v Taylor*, 19 C. B. N. S. 301, 34 L. J. C. P. 365), stamps, maps, writings, title-deeds, paintings, engravings, pictures, gold or silver plate or plated articles, glass (see *Owen v Burnett*, 4 Tyrwh. 143), china, silks manufactured or unmanufactured, wrought up or not wrought up with other materials (see *Bernstein v Baxendale*, *supra*; *Brunt v Midland Ry. Co.*, 2 H. and C. 889, 33 L. J. Exch. 187), furs (see *Mayhew v Nelson*, 6 C. and P. 59), or lace contained in any parcel (other than machine-made lace, 28 and 29 Vict. c. 94, sec. 1), when the value exceeds the sum of £10, unless at the time of delivery the value and nature of the article shall have been declared, and the increased charges, or an engagement to pay the same, accepted by the person receiving the parcel. This Act applies to the case of a delivery to the carrier or his servant, whether at his office or elsewhere (*Hart v Baxendale*, 6 Exch. 769). By section 2, the carrier may demand for such parcels an increased rate of charge, which is to be notified by a notice affixed in his office, and customers are to be bound thereby, without further proof of the notice having come to their knowledge. The carrier loses the benefit of the Act, if after declaration of value he receives the goods without demanding the extra charge (*Behrens v Great Northern Ry. Co.*, in Ex. Ch. 7 H. and N. 950). By section 4, carriers can no longer by public notice limit their responsibility in respect of articles not within the Act. Special contracts, however, between the carrier and his employer are still allowed; and such a contract may be inferred from the fact of a notice given by a carrier to his customer, and the customer having subsequently sent goods to be carried without objecting to the terms of the notice. *Walker v York and N. M. Ry. Co.*, 2 El. and Bl. 750; *Van Toll v South-Eastern Ry. Co.*, 12 C. B. N. S. 75, and other cases cited in 1 Sm. L. Ca. 6th ed. p. 211. By section 5, the Act is not to protect carriers from their liability to answer for loss occasioned by the felonious acts of their own servants, nor is it to protect the servant from answering for his own neglect or misconduct.

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(2.) By 17 and 18 Vict. c. 31, sec. 7 (Railway and Canal Traffic), it is enacted that every such company shall be liable for the loss of, or for any injury (*Allday v Great Western Ry. Co.*, 5 Best and Sm. 903, 34 L. J. Q. B. 5) done to, any horses, cattle, or other animals, or to any articles, goods, or things, in the receiving (*Hodgman v W. Midland Ry. Co.*, 5 B. and S. 173, 33 L. J. Q. B. 233; aff. 35 L. J. Q. B. 85), forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants (*Van Toll v South-Eastern Ry. Co.*, 12 C. B. N. S. 75; *Harrison v London and Brighton Ry. Co.*, Ex. Ch., 2 B. and S. 152), notwithstanding any notice, condition, or declaration made and given by such company contrary thereto or in any wise limiting such liability, every such notice, etc., being declared null and void: provided that nothing in the statute contained shall be construed to prevent the companies from making such conditions with respect to the receiving, etc., of any of the said animals, etc., as shall be adjudged by the court or judge, etc., to be just and reasonable. Then follows a provision limiting the amount of damage to be recovered for injury to live stock.

After several conflicting decisions, it was finally adjudged by the House of Lords, in the case of *Peek v North Staffordshire Ry. Co.*, 32 L. J. Q. B. 241 (see also *M'Manus v Lancashire, etc. Ry. Co.*, 4 H. and N. 327), that under this Act the validity of conditions limiting the common law liability of the carrier is subject to their being both adjudged just and reasonable, and also embodied in a signed special contract. In the case before them, a condition exempting the company from responsibility for injury to marbles, unless insured, was held to be unreasonable (*idem* as to similar condition respecting live stock in the case of *M'Manus*, *supra*). But in *Beale v S. Devon Ry. Co.*, 3 H. and C. 337, a condition was held valid freeing the company from responsibility for loss or injury to fish from any cause whatever, *other than gross negligence or fraud*. *Idem* in *Rain v Glasgow and South-Western Ry. Co.*, 1869, 7 Macph. 439. Conditions applicable to loss from insufficient package were held unreasonable in *Simons v Great Western Ry. Co.*, 18 C. B. 805; *idem*, as to conditions disaffirming liability for delay, in *Allday v Great Western Ry. Co.*, 5 B. and S. 903. *Contra*, as to conditions stipulating for insurance of horses and dogs above a certain value (*Harrison v Brighton, etc. Co.*, 3 B. and S. 122); as to condition requiring claims within a certain time (*Lewis v Great Western Co.*, 5 H. and N. 867); and also as to disaffirmance of liability for damage beyond the limits of the company's railway (*Aldridge v Great Western Ry. Co.*, 15 C. B. N. S. 582, 33 L. J. C. P. 161). See, on this subject, Add. on Cont. 6th ed. 473; Smith, Merc. Law, 7th ed. 285.]

² See p. 278.

preference to factors for their general balance, or for special advances, shall be considered. In this place, the personal contract and its effects are to be discussed, independently of the questions which may arise as to the property or real rights of the several parties.

SUBSECTION I.—GENERAL PRINCIPLES RELATIVE TO MERCANTILE AGENCY.

1. *Constitution of the Power.*

In the civil law, MANDATE was a different contract from that by which in modern practice one appoints another to act as his representative, agent, or factor in conducting his mercantile transactions, in buying or in selling goods, in sailing or in freighting ships, in effecting insurances, or doing any other mercantile act in which the ministry of another is required. The one was a gratuitous, the other is an onerous contract. And as the effects of this difference on the rights and obligations of the parties are important, it is material to observe that the Roman jurisprudence relative to mandate, in questions arising between a merchant and his agent, is not on all occasions to be held as applicable in the decision of Scottish cases.

This is one of the contracts, in the application of which to the intercourse of life the different condition of ancient and of modern Europe is most apparent. In Rome, commerce and its relations and facilities were discouraged, or not regarded with favour. In the world as now constituted, they form the very object, and supply one of the ruling principles, of the jurisprudence of contracts. Instead of the amicable and gratuitous MANDATE, there has been introduced the onerous contract of agency or factory, the relation of principal and agent, imposing duties more imperative, entitling the principal to more entire reliance on the performance of his orders, and raising with third parties relations of great extent and importance in trade. Instead of SOCIETY, an arrangement merely for the joint management of a common subject, the important contract of PARTNERSHIP has brought into combined operation, for the extension of modern commerce, the skill, the industry, and the capital of many associated persons. The contract of INSURANCE may be said to be entirely modern, by which trading enterprise is so much encouraged and sustained; and the very circulating medium of a mercantile age, PAPER MONEY, in its various forms of bills, and notes, and bank-checks, was utterly unknown in the ancient world.

In mercantile agency there is a vast variety of forms in which the authority of a principal is in daily practice delegated to others. Besides the occasional authority by PROCURATORY [477] or PROCURATION to accept or draw bills of exchange,¹ the charge given to a clerk to manage a store or shop, which is called INSTITORIAL power, the extensive trust given to a shipmaster called EXERCITORIAL power, the powers of FACTORS, AGENTS, BROKERS, are all included under this contract.

1. A FACTOR is distinguished from a merchant in this, that a merchant buys and sells for his own direct mercantile profit; a factor only buys or sells on commission.² Again, a factor is distinguished from a broker by being entrusted with the possession and apparent ownership,³ as well as with the management and disposal of the property of the principal.

¹ See above, p. 424 et seq.

² See Lord Stowell's argument in *The Matchless*, Haggard's Admiralty Rep. 101.

³ [A factor is entrusted with the possession, and from his possession there arise extended powers, not incident to agency apart from such possession: as the implied authority to receive payment on a sale; the right to sell in his own name, so as to give the buyer right to set off debts due to him by the factor against the price claimed by the principal; the right of lien, and consequent power to receive payment, so far as

his lien extends, otherwise than in money; and other similar extensions of authority, as perhaps authority to give warrantice as to quality, and large powers as to the management and disposal of the goods. But it is quite a different thing to say, that in every case a factor has the apparent ownership of the goods, as if apparent ownership were a legal incident of factory. That will be just as the circumstances of each particular case may determine. As a general rule, a factor's possession and powers of disposal will not create reputed ownership. The statute of James I. c. 19, secs. 10 and 11,

He is distinguished from an agent, in his authority being extended to the management of all the principal's affairs in the place where he resides, or in a particular department. He is distinguished from an institor, in being in point of law a person separate from his principal; whereas an institor (at least where that term is confined to shopkeepers and clerks) is assimilated in all respects to his master, so far as relates to his transactions in that character. A factor is generally the correspondent of a foreign house, or of a merchant or manufacturer at a distance from the place of sale; and he usually sells in his own name, without disclosing that of his principal, and has an implied authority so to do.¹ He receives consignments on the one hand, and makes sales and remittances in return, proceeding for a considerable course of time, and balancing at regular intervals his accounts with his principal; and in general, he gives a *del credere* guarantee, and has a commission for it. Sometimes he makes large advances on goods consigned to him, while the sales of those goods are either made in his own name; or bills are drawn by his principal on the buyers, payable to the factor; or the bills are drawn by the principal, and sent to the factor to procure acceptance, with blank endorsements. The goods entrusted to a factor or agent, or the price of them, are impledged for his advances, and liable to retention for the general balance.

2. An AGENT is one entrusted with the accomplishment of a particular act or course of dealing; as the riding agent of a manufacturing house for taking commissions, or a supercargo sent out with goods to sell or dispose of them, or one appointed specially to manage the sale of a cargo, the purchase of a commodity, or the effecting of an insurance. His powers within the range of the thing committed to him, unless where expressly limited, are similar to those of a factor.

These are, strictly speaking, the true descriptions of agent and factor, as contradistinguished. But the names are generally confounded in common speech, factors being included under the name of agents.

3. BROKERS are employed merely in the negotiation of contracts relative to property,

—declaring that goods in a bankrupt's possession, order, and disposition, with consent and permission of the true owner, and whereof the bankrupt is reputed owner, and of which he takes upon himself the sale, alteration, or disposition as owner, shall be liable for the bankrupt's debts,—though very broadly worded, has always been considered not to include the case of a factor having property of his principal in his possession, though the case is not expressly excepted. So held in *L'Apostre v Plaistrier*, 1708, 1 P. Wms. 318, 1 Atk. 175—per Holt, C. J.—and afterwards by the Court of King's Bench; *Godfrey v Furzo*, 1733, 3 P. Wms. 185; *ex parte Dumas*, 1 Atk. 234, 2 Vesey 585; *Tooke v Hollingworth*, 5 T. R. 226; *Bryson v Wylie*, 1 B. and P. 82; *Garratt v Callum*, Buller's N. P. 5th ed. 42; *ex parte Oursell*, Ambl. 297. It is said by Lord Kenyon, that the case of a factor has been so frequently decided, and so much taken for granted for a series of years past, that it must now be considered as at rest. *Tooke v Hollingworth*, *supra*. The reason assigned is, that as factors must by the course of trade have the goods of other people in their possession, it does not therefore hold out a false credit to the world (per Buller, J., 1 B. and P. 83, in *Bryson v Wylie*), nor carry to the understanding of the world the reputation of ownership (per Le Blanc, J., *Horn v Baker*, 9 East 245). Possession, sale, and disposition of chattels by factors and commission agents for sale, in the ordinary course of their trade and business, is not a possession, sale, and disposition by them as reputed owners, although they sell their own goods as well as the goods of other persons, and all are confounded and mixed together, so that it is impossible to tell

which goods belong to them and which to their customers. Their possession is known not to be necessarily their own possession as owners. The principle extends to all persons in a trade in which there is a custom to receive and sell the goods of third persons on commission. (*Whitfield v Brand*, 16 M. and W. 282; *Carruthers v Payne*, 2 M. and P. 441; *Hamilton v Bell*, 10 Exch. 545; *Addison on Torts*, p. 345.) But there may be cases, undoubtedly, where the principle of the exception will be overcome by the facts indicating not merely a possibility that the goods *may be*, but that they *are*, the bankrupt's. See Paley, by Lloyd, p. 84, and note (z); *Livesay v Hood*, 2 Camp. 83; *Shaw v Harvey*, 1 Ad. and E. 920. So it is settled in England, that goods sent to the premises of a tenant for trading or manufacturing purposes, including goods sent to a factor, commission agent, warehouseman, or other agent, to be sold or exported, or otherwise dealt with in the course of trade, are by the policy of the law exempt from the landlord's right of distress. 'The principle of the exemption,' observes Parke, B., 'is the public good; that is, that all men may freely, and without interruption or danger of the loss of their goods, deal with those who carry on trades or businesses for the benefit of all indiscriminately.' (*Joule v Jackson*, 7 M. and W. 451; and cases in *Addison on Torts*, 507.) See *ante*, p. 270, note 5; and as to the statutory powers of factors to deal with goods of their principals by way of sale or pledge, see p. 521, notes.]

¹ See the distinction of factor and broker illustrated in *Baring v Corrie*, 2 Barn. and Ald. 137. [*Sm. Merc. Law*, 7th ed. 157-8.]

with the custody of which they have no concern. Having no property entrusted to him, the broker ought not to sell in his own name: he has no authority for it, and his principal is entitled to rely on his not doing so. The broker makes it his business to find out the buyers and sellers of commodities, to cultivate that sort of information which may best enable him to bring the buyer and the seller together, or the merchant and the insurer, or the bill-holder and him who is willing to buy bills. In this country, brokers are neither incorporated nor entered by any public authority. Their profession is private; and their success dependent on their integrity, intelligence, and skill. They take their distinguishing appellation from the particular object to which they attach themselves, as insurance-broker, stock-broker, bill-broker, etc. They are paid by an allowance or commission called Brokerage.¹

[478] Sometimes agents or factors act as the ostensible vendors of property belonging to merchants resident in the same place, having warehouses and places fit for exhibiting the goods for sale.²

Sometimes they act as factors both for buyer and seller, the sale being perfected and the delivery transferred by delivery of the bills for the price, and an entry in the factor's books to the debit of the one party and the credit of the other.

The character of factor and broker is frequently combined, the broker having possession of what he is employed to sell, or being empowered to obtain possession of what he is employed to purchase. But, properly speaking, in these cases he is a factor.³

Constitution of Mercantile Agency.—The power of a factor, or agent, or broker, is conferred either, *first*, In writing, formally by power of attorney, or more loosely in correspondence; or, *secondly*, By parole agreement;⁴ or, *thirdly*, By mere employment.

If the powers are special, they form the limits of the authority. If general, they will be more liberally construed, according to the necessities of the occasion, and the material or ordinary or reasonable course of the transaction and usage of trade.

1. In the management of the affairs of a foreign merchant, especially where there is occasion to discharge debts and receive money, or to carry on judicial proceedings, a power of attorney is the proper evidence of authority. It empowers the factor to represent the principal, and act as he might have done if present.

2. But agents, or factors, or brokers, are generally appointed in mercantile affairs by letter. So, a confidential clerk is authorized to accept or endorse bills by a letter addressed to him. It is expressed in the simplest terms, and without either technical words or the solemnities of a formal deed, the powers varying with the circumstances and intentions of the parties. The most extensive powers are sometimes thus conferred on a son or a confidential clerk, and the mandate runs in some such form as this: 'With power to manage his trade and business in general, to accept bills, make promissory notes, endorse and discharge bills and notes, grant bills for money, subscribe policies, and every other thing to do relative to the granter's trade and business.'⁵ So, in the course of correspondence, goods are consigned from abroad, with directions to the consignee to sell them, and either

¹ [It would seem that a broker employed by a purchaser cannot legally take a commission from the manufacturer, thereby increasing the price of the goods; and if he does so, he is bound to account to his employer for the sums so obtained. *Pender v Henderson & Co.*, 1864, 2 Macph. 1428; see also *Robertson v Dennistoun*, 1865, 3 Macph. 829.]

² [A man, it seems, cannot act as agent for both parties, where he is entrusted with authority to conclude the sale and fix the terms himself in behalf of each, for such a power would enable him to effect frauds. *Story on Agency*, sec. 31; *Wright v Dannah*, 2 Camp. 203; *New York Central Insurance Co. v National Protective Insurance Co.*, 4 Kernan 85 (Amer.); *Story, Sale*, sec. 89, where it is said that in making a contract

requiring the exercise of judgment or discretion, a person cannot act as the agent of both parties; and when he undertakes to do so, a Court of Equity will avoid the contract upon the application of either of the parties. But it cannot be meant that two parties may not give express authority to a broker to adjust a fair contract between them at his own discretion.]

³ [The distinction between factors and brokers is very well stated in *Story on Sale*, secs. 85-107. But see the observations of Bramwell, B., in *Baines v Euing*, 35 L. J. Ex. 194.]

⁴ [*Davidson v Robertson*, 1815, 3 Dow 218; *Anderson v Buck*, 1841, 3 D. 975.]

⁵ [See *Thomson v Fullerton*, 1842, 5 D. 379.]

to apply the proceeds in a particular way, or to place them to account; or merchants or manufacturers with an accumulation of goods on hand, place them with another (*ex. gr.* a general agent or another merchant), who agrees to manage the sales, and to advance a certain proportion, to be reimbursed out of the sales; or one is desired to buy goods for another, and either entrusted with credit or money for that purpose, or left to make the purchases as he can on his own or the principal's general credit; or goods are sent to the warehouse of a general agent, with particular directions as to their disposal, or to be sold at the ordinary rate of the market.

2. *Implied Mandate and Actio Institoria.*

I. IMPLIED MANDATE.—In the course of mercantile dealings, goods are placed with general agents, or sent to public warehouses, and the power of disposal entrusted to brokers; and so an agency to this effect is constituted without writing of any kind. Many merchants in London and elsewhere have neither goods nor warehouses in their possession, but entrusting all their goods to brokers and agents, confine their own attention to the great lines of commercial intercourse.

Where goods are consigned to one at a distance, there is an implied mandate to sell at such price and time as may seem most beneficial;¹ and this is especially to be [479] inferred where advances have been made on the goods.²

II. ACCREDITED SERVANTS.—Mercantile agents have authority frequently conferred on them by mere implication.³ This generally is grounded on the sanction given by the employer to credit raised by a person acting in his name. Such is the power implied from giving sanction to the acts of a procurator; as where a clerk accepts or endorses bills for his master, which that master pays as legitimately accepted, or allows to be as well transferred as if endorsed by himself.

Such also is the authority with which a domestic or other servant, or a rider or travelling clerk, is invested by his master's employing him in ordering or procuring articles, or in receiving orders for goods, and afterwards recognising his act.⁴ An agent or factor of any kind may in the same way be accredited.⁵ But in all those cases it is from the *recognition* of the act that the authority is inferred.⁶

III. PRÆPOSITURA.—There is also a delegation of power by presumption of the law, where one places another at the head of an establishment, or in the management of a shop, or in the management or command of a ship. The maxim of the law here applies, *Qui facit per alium facit per se*.⁷

¹ *O'Reilly, Hill, May, & Co. v Jameson's Creditors*, 1821, 1 S. 61.

² *Ure & Miller v Jaffray*, trustee for Jameson's creditors, 31 Jan. 1818, F. C. Jameson consigned goods to Jamaica, without any special directions; and Ure & Miller, a Glasgow house, partners of Ure & Miller of Jamaica, to whom they were consigned, made advances on them. The goods were laid in at prices too high; and after long trying the markets, Ure & Miller sold them at a great loss. They were held to have acted within the limits of their implied power, having acted fairly in all respects.

³ A chief example of this is in the case of shipmasters. See below.

⁴ *Fenn v Harrison*, 3 Term. Rep. 760. See also the distinction made by Lord Ellenborough between the case of a servant always furnished with cash beforehand to pay for the goods, from which no authority is to be inferred, and the case of a servant not so in cash. *Rusby v Scarlett*, 5 Espin.

76. [Add. Cont. 609. See also *Jack v Elder*, 1793, Hume 322; *Dewar v Nairne*, 1804, Hume 340.]

⁵ *Todd v Robinson*, 1825, before Abbot, Ch. J., 1 Ryan and Moody 217. Linen-draper in London had an order for goods by Womoe, residing in London, for Robinson, a shopkeeper in Yorkshire. There had been several former orders answered. Womoe appropriated the goods in the last order to himself. But verdict was given against Robinson, as bound by the order of his accredited agent.

Gilman v Robinson, *ibid.* 226, was a case of the same complexion, disposed of in the same way under Chief Justice Best's direction. [Add. on Cont. 6th ed. 606.]

⁶ *Courteen v Touse*, 1 Camp. 43, n. a. It is said here to have been held by Lord Ellenborough, that although one had often signed policies for another, there being no evidence of a loss had on such policies, it was not sufficient. Yet there is some confusion about this case as stated by Campbell.

⁷ [The institorial power was held to render the granter

1. A wife is by the law held to be *præposita rebus domesticis* while she remains in family with her husband. Things furnished on her order, within the range of domestic use, and proper for a family, are held as ordered by the husband. He is liable for the price as the sole debtor, although the articles may have been misapplied, or although he may have given to the wife money to provide them.¹ The presumption of this authority ceases, 1. Where the wife leaves her husband's family, and takes up her residence elsewhere;² and, 2. By the husband publicly depriving her of the administration by means of inhibition.³

Whoever is *de facto* at the head of the family, and in the management of the domestic establishment, is held as *præposita*.⁴

[480] 2. In the Roman jurisprudence, the prætor gave an action against the principal for the contracts and engagements of INSTITORS,⁵ or superintendents of shops and establish-

liable for bills accepted by the institor in the course of business, notwithstanding a stipulation in his appointment that he should not draw or accept bills. *Edmunds v Bushell*, 1 L. R. Q. B. 97.]

¹ *Ersk. i. 6. 26.*

² Even in this case, however, the husband is liable for the wife's necessities, if he has not furnished her with the means of providing them; and for the expense of law proceedings between them to the dissolution of the marriage. *Harman v M'Alister's Trs.*, 6 July 1826, 4 S. 799, N. E. 806. This does not, however, depend on *præpositura*; but the husband is liable to these as proper burdens on the common stock under his administration. [*James v Downie*, 1837, 15 S. 1151.]

³ *Ersk. ut supra.* [*Prestwick v Marshall*, 7 Bing. 565; *Huckman v Fernie*, 3 M. and W. 505; *Attorney-General v Riddell*, 2 Cr. and J. 493; *Plummer v Seils*, 3 N. and M. 422; *Lord v Hall*, 8 C. B. 627; *Renaux v Teakle*, 8 Exch. 680. The liability of a man for a woman with whom he cohabits as his wife is similar. *Watson v Threlkeld*, 2 Esp. 637; *Robinson v Nation*, 1 Camp. 245; *Ryan v Sams*, 12 Q. B. 460.]

⁴ See *Hamilton v Forrester*, 1825, 3 S. 572, N. E. 394.

⁵ [With regard to the constitution of mandate or agency, tacitly and by implication, prior to or simultaneously with the agent's actings (the question as to its creation by ratification being alluded to afterwards), the broad principle is, that whenever one man, to the knowledge of another, transacts any business belonging to that other, as for him and in his place, there intervenes, by that very fact, without more, a contract of mandate between them, whereby the latter charges the former with that business, and from which all the consequences of an express mandate shall ensue on both sides. (Poth. Mand. sec. 29.) The rule of the civil law is: 'Semper qui non prohibet aliquam pro se intervenire mandare creditur' (D. de Reg. Jur. 60; Mand. l. 6, sec. 2, l. 18, l. 53). Not only the appointment, but the extent of the authority conferred, at least in a question with third parties, is ordinarily ascertained by the acquiescence and recognition by the principal of acts so permitted to be done in the character of his agent. See *Prescott v Flinn*, 9 Bing. 19; *Davidson v Stanley*, 2 M. and G. 721; *Levy v Pyne*, Car. and Marsh. 453; *Hazard v Treadwell*, 1 Str. 506; *Summers v Solomon*, 26 L. J. Q. B. 301; *Pickering v Busk*, 15 East 38. If one is repeatedly employed to do certain things, any one dealing with the person thus usually employed is justified in believing him authorized to do those things with the assent and approbation of the employer, and in the way in which he has hitherto done

them, but not otherwise. (*Watkins v Vruce*, 2 Stark. 368; *Brockelbank v Sugrue*, 5 C. and P. 21; *Haughton v Ewbank*, 4 Camp. 88.) Thus, if a servant is usually employed to buy, but always for cash, this implies no authority to buy on credit. (*Rusby v Scarlett*, 5 Esp. 75; *Flemyng v Hector*, 2 M. and W. 181—per Abinger, C. B.) And wherever one regularly or repeatedly employs another to act for him in a specific character or capacity, or in a department of business to which certain powers are by usage always incident, the employer shall be taken to have given him authority to exercise those powers in any question with a third party ignorant of any limitation. The distinction between a general and a special agent, or a general and a special authority, is said by Lord Ellenborough, in *Whitehead v Tuckett*, 15 East 399, to turn upon this, that a general authority imports not an unqualified authority, but that which is derived from a multitude of instances, whereas a particular or special authority is confined to an individual instance. In that case, *Sill & Co.* were, it is said, general agents; for they had bought and sold, in a multitude of instances, in their own names, paid and received money in their own names, and blended their accounts of receipts and payments, without carrying each order to a separate account with the defendant; and although there was a communication between them and the defendant as to the price and time of sale, yet the world was not privy to the communication, and had no means of knowing that their general authority was controlled by the interposition of any check. In other authorities the distinction is made to turn on this, that a general agent is one who is appointed to transact business of a specific kind, or to act in a specific capacity, which usually requires, and has conceded to it by employers, certain powers in the agent; so that third parties dealing with the agent in that sphere of business, or in that capacity, are entitled, unless they have notice of any particular limitations, to suppose, without special inquiry into the actual limits of his authority, that he has the powers usually incident to such an agency. (Paley, by Lloyd, pp. 136, 199, note; *Parsons*, El. Merc. Law, 135; *Story on Agency*, secs. 17-22, 73, 126-133; *Smith*, Merc. Law, p. 128.) The importance of clearly understanding the distinction, if one can, lies in this, that while it is said that a person dealing with a special agent must inquire, at his peril, into the actual authority given to the agent, and is bound by the limitations placed by the principal on the agent's powers, a person dealing with a general agent 'cannot,' it is said, 'be limited by any private order or direction not known to the party dealing with him.' It rather appears, however, that too much has

ments for sale or purchase. And the principle of this remedy has been adopted in the law

been made of a distinction the precise line of which it is impossible in practice always to discern or follow; and there seems to be a tendency among writers on the subject to push the doctrine laid down as to general agency a great deal too far—so far, indeed, that if the courts were to give full swing to the principles laid down, they would go far to endanger in a serious degree the security and safety of transactions conducted through agents, and to make the employment of them at all a snare to the employer. The doctrine, however, as laid down in Story on Agency, secs. 126 to 131; in Smith on Merc. Law, 128; and in Paley, 136, has been materially shaken by the observations made in *Baines v Euing* (35 L. J. Ex. 194) in reference to these and similar passages in other writers; and, indeed, Mr. Story himself (sec. 73, and note to sec. 127) seems to have felt that the distinction was not satisfactory, nor even very useful, except in certain cases. He observes (note to sec. 127, and sec. 73) that there is but one general principle which pervades all cases on the subject, whether the party be a general or a special agent; and it is this: that the principal is bound by all acts of his agent within the scope of the authority which he *holds him out* to the world to possess, although he may have given him more limited private instructions, unknown to the person dealing with him. He adds: 'This is founded on the doctrine, that where one of two persons must suffer by the act of a third person, he who has held that person out as worthy of trust and confidence, and having authority in that matter, shall be bound by it. It will at once be perceived that this doctrine is equally applicable to all cases of agency, whether it be the case of a general or of a special agency.' This general maxim has often been applied to questions of agency, as per Holt, C. J., in *Hern v Nichols*, 1 Salk. 289; and per Buller, J., in *Fitzherbert v Mather*, 1 T. R. 12, 16, both referred to by Story, *l.c.* And if it be properly understood, and applied with the requisite limitations, no objection can be taken. But there is always a danger, in attempting to condense a department of legal doctrine into the compass of a maxim, of leaving out the limitations of the doctrine; and errors are perpetrated in name of the maxim which are not countenanced by the full doctrine, of which it is the imperfect compendium. The maxim in question appears to be merely such a summary of the doctrine of estoppel. Its inadequacy to the solution of questions of agency, unless under conditions which appear just to be the regulative conditions of the doctrine of estoppel, was pointed out by Abbott, C. J., and Bayley and Holroyd, JJ., in *Baring v Corrie* (2 B. and Ald. 137). In cases where the maxim is sought to be made use of, the question is often put as merely one arising between two innocent parties, each contending *de damno evitando*; and then it is said, that as one of the two must suffer by the fraud of the agent, or his assumption of an authority which he did not possess, it is just that the principal who selected and employed him, and trusted him, and held him out as a person worthy of trust and confidence, ought to suffer, as it was his employment of the agent that enabled him to commit the fraud, or put him in a position where he had the opportunity of assuming authority. There is no sound legal principle warranting this way of applying the maxim, which would just lead to the result that in no case whatever can the loss fall on a party dealing with

the agent,—a result tantamount to a *reductio ad absurdum*. The only ground of liability, on the part of a principal, to third parties dealing with an agent, for the acts of the agent done in excess of the powers given him, and which he would be held to have even in a question between himself and the principal, is such *culpa* or *quasi culpa* on the principal's part as would be a relevant ground for the plea of estoppel against his pleading the actual terms of the authority given to the agent. Where the principal by his words or conduct *witfully* causes another to believe the existence of certain powers in the agent, and induces him to deal with the agent on that belief; where the principal has, by words or by conduct, made a *representation* to another as to the agent's authority, *in order to induce* others to act upon it; where the representation or conduct complained of, whether active or passive in its character, has been *intended* to bring about the result, whereby the other dealing with the agent has altered his position to his loss;—in such a case, and in such a case alone, will the doctrine of estoppel apply to bar the principal from pleading against the third party the terms of the real authority which he gave to the agent. Mere negligence, although it may have afforded the agent an *opportunity* for the undue assumption of authority, or the perpetration of a fraud by which a third party has been damnified, is not of itself a ground of estoppel. See *Pickard v Sears*, 6 Ad. and El. 469; *West v Jones*, 20 Jur. Ch. 363; *Swan v North British Australasian Co.*, 32 L. J. Ex. 273–279; *Haines v East India Co.*, 11 Moore P. C. 57; *Piggott v Stratton*, 29 L. J. Ch. 9; *M'Cance v London and North-Western Railway Co.*, 34 L. J. Ex. 39; Smith's L. C. vol. 2, notes to *Doe v Oliver*; Parsons' Contr. ii. 792–800, and cases in notes; More's Lectures, ii. 265–6. If Mr Story's principle be understood with these qualifications as to what is meant by 'holding the agent out,' viz. as possessing certain *powers*, not merely as generally worthy of trust and confidence, it seems that it does afford a criterion equally applicable to all cases of agency, whether general or special; and if so, the importance of the distinction between general and special agency becomes very much diminished. No principal can be held, by merely appointing one as his agent, to guarantee the world against any undue assumption of powers on his part, or fraudulent abuse of the opportunities his agency may give him for deceiving others; and if, without any *culpa* creating a ground of estoppel against the principal's pleading the actual extent of the agent's authority, damage has accrued to a third party by the agent's assumption of authority or abuse of his position, the loss must fall upon the party dealing with him. See *Grant v Norway*, 10 C. B. 665; *Hubbersty v Ward*, 6 Ex. 330; *Coleman v Riches*, 16 C. B. 104; *Mechanics Bank v New York and New Hampshire Railway Co.*, cited in Parsons' Contr. i. 46. Where no positive blame of this nature can be attached to the principal, as misleading the public, the loss by an agent's fraud or abuse of his position, arising to those dealing with him, must fall on them, on the ground that, by not inquiring into the extent of his powers, they trust his veracity and honesty at their own peril, not at the principal's. See *Baring v Corrie*, *supra*, and the observations of Bramwell, B., in *Baines v Euing*, *supra*, and of the Lord Chancellor in *Barber v Meyerstein*, L. R. 4 H. L. 317. Care must be taken to distinguish between the agent's *autho-*

of Scotland. In England also, in the same class of cases, a *general* authority seems to be

ity to do a thing, as to accept a bill or conclude a charter-party; and the *purposes* for which he may abuse the powers of drawing the bill, or the improper *means* he may adopt for inducing the contract. Where the *power* to do the act is conceded, the misapplication of it to improper purposes, or the accomplishment of it by improper means, of which the third party dealing with the agent has no notice, will not make the act done, in virtue of the principal's authority, any the less his *proprium negotium*, than if the same act had been done for a proper purpose, or by means lawful or specially authorized by the principal. (Story, sec. 73.)

An agency may be confirmed and established, and its powers extended, or it may even be entirely created, by subsequent adoption and ratification on the part of the principal, according to the rule, *Omnis ratihabitio retrotrahitur et mandato priori æquiparatur*. (Coke, Litt. 207, a; Poth. Oblig. n. 75; Dig. 50. 17. 60, 46. 3. 12. 4.) The act of ratification draws back, and is treated throughout as if the transaction had been originally authorized: and this not only between the principal and unauthorized agent, in which case it operates not only to give authority where there was none, but to condone all misconduct and deviations from the limits of any mandate actually given; but, as a general rule, it also operates between the principal and third parties who have dealt with the agent, as if it had been an authority given him antecedent to the transaction. The ratification binds the principal, whether it be to his detriment or advantage, whether the act ratified be a writ or a contract; and once deliberately made, it cannot be recalled. *Hagedorn v Oliverson*, 2 M. and S. 485; *Lucena v Crawford*, 5 B. and P. 269; *Taylor v Plumer*, 3 M. and S. 562-580; *Bird v Brown*, 4 Ex. 786; *Routh v Thompson*, 13 East 274. But there are several conditions necessary, in order that ratification should have this effect. (1.) The principal must have full knowledge of all the material facts, otherwise ratification will not be equivalent to a mandate by him; and that whether his want of knowledge arise from designed concealment or misrepresentation by the agent, or from his inadvertence. In *Horsfall v Fauntleroy*, 10 B. and C. 755, where the agent stated, and the principal *bona fide* adopted a different contract from that really made, and on which the action was laid, the plaintiff failed in his action. *Davidson v Stanley*, 2 M. and G. 721; Story, sec. 243. (2.) For ratification to avail, the act must have been done by one purporting to act as agent of the principal, or by an assumed authority as from him. *Saunderson v Griffiths*, 5 B. and C. 909; *Wilson v Tumman*, 6 M. and G. 242; *Vere v Ashby*, 10 B. and C. 288; *Barber v Gingell*, 3 Esp. 60; *Lucena v Crawford*, 1 Taunt. 325; Leake, Contr. p. 269; Story, sec. 242; Pars. El. Merc. Law, p. 137. One cannot adopt as his own act what was not meant nor pretended to be done by his authority, or for his behoof as principal. But the subsequent ratification is in some cases equivalent to prior authority, where the agent professes to act for persons filling a certain character, though the actual persons are not then ascertained, or are not then known to him. (*Foster v Bates*, 12 M. and W. 226; *Hill v Pickergill*, 1 Brod. and Bingh. 282.) Thus an administrator, after taking out letters of administration, may ratify a contract made before the letters were taken out by an agent acting avowedly on account of the estate of the intestate. Nor in this case does

the objection (*infra*, (3.)) apply, that this particular administrator could not himself have legally made the contract at the time it was made; for the vacant succession *sustinet personam defuncti*; and it was on its account the contract was made, and the representative of the defunct confirmed it. (See Poth. Negot. Gest. No. 174, Oblig. No. 126.) And upon the same principle, a policy of insurance may be effected in respect of the interest of persons who could not be named at the time, provided they are such as were contemplated at the time of making the policy, and intended to come within it. (*Watson v Swann*—per Erle, C. J.—11 C. B. N. S. 756-769; *Lucena v Crawford*; *Routh v Thompson*, *supra*.) But where a broker, having effected a general policy with the defendant on goods 'to be valued and declared as interest might appear,' and having afterwards received an order from the plaintiff to insure certain goods for him, endorsed a declaration of the plaintiff's goods on the policy, it was held that the plaintiff could not sue on that policy, because it had not been made with him, nor on his behalf, and was not intended at the time it was made to be applied on his behalf (*Watson v Swann*, *supra*). And in *Saunderson v Griffiths* (5 B. and C. 909), where a written agreement had been made, purporting to be between an agent on behalf of plaintiff's wife and the defendant, it was held that plaintiff was not entitled to ratify the agreement, and join his wife in suing on it; for, as Holroyd, J., put it, 'If the agent, at the time when he made the agreement, had professed to have authority to act for the husband, then the subsequent ratification would have been a recognition of the authority which the agent assumed to have when he made the agreement; but here the husband never previously authorized the agent, nor is he named as the party for whom the latter professed to act.' So, in *Vere v Ashby*, 10 B. and C. 288, 298, Parke, B., said: 'The rule as to ratification applies only to the acts of one who professes to act as the agent of a person who afterwards ratifies.' (3.) It has been held that the act of ratification must, in questions with third parties, take place at a time and under circumstances where the ratifying party could himself have lawfully and effectually done the act as principal. (*Bird v Brown*, 4 Ex. 786. See Parsons, El. M. L. 139; Story, Jr., on Sale, sec. 324, sec. 77, and note.) In *Bird v Brown* a stoppage *in transitu*, without authority from the seller, was made by defendant. After the *transitus* was ended, but not before, the seller ratified what defendant had done. From that time the stoppage was the seller's act, but it was then too late for him to stop. The goods had been received by the purchasers, and had vested in them free of any authorized stoppage; and the Court refused to hold that the ratification could draw back over the mid-impediment created by the right they had acquired by obtaining possession, so as to place the parties' rights in the same position as if the stoppage had been authorized from the beginning. See *Hutchings v Nunez*, 1 Moore P. C. N. S. 243, but see *contra*, *Bird v Brown*; *Newhall v Vargas*, 13 Maine (Amer.) 93. There is a series of American cases cited by Mr. Story, Jr., sec. 77, notes, in which it has been decided that the principal cannot, by the subsequent ratification of the unauthorized act of one professing to be his agent, affect any right of a third party, which has attached between the act and the ratification. Though, as a general rule, the ratification draws back with

conferred, as contradistinguished from a *limited*. Under this rule, in Scotland, are included

complete retroactive efficacy; still, as between the principal and third parties, this is not always so where the unauthorized act afterwards ratified is one which, if authorized originally, would have created an immediate duty or obligation on the part of the third party, or made him immediately liable to any burden or charge, or have supported an action of damages against him. The ratification will not draw back to the date of the act, so as to validate it as the foundation of such claim or charge against the third person, if the agent's act—supposing it done only as of the date of ratification—would not *then* have created such claim or charge; nor will it draw back, as we have said, if the allowing it a retroactive efficacy would operate to defeat any right or interest which has vested in a third party in absence of any authorized interference on behalf of the principal, even though the principal's interference in time would have prevented such right or interest from vesting. Thus, when a lease was to determine on six months' notice, and notice was given as for the landlord six months before, but by a person who had no authority to do so, the subsequent adoption and ratification by the landlord of that notice will not draw back to defeat the tenant's right to remain for another term, acquired by his not having got notice to quit from the landlord in time. The tenant was entitled to notice on which he could have acted with certainty at the time he received it. (*Right d. Fisher v Cuthill*, 5 East 491; *Doe d. Mann v Walters*, 10 B. and C. 626; *Doe d. Lyster v Goldwin*, 2 Ad. and Ellis 143.) So, a demand for delivery of property on which to found an action of trover, and necessary to make out a case of wrongful conversion of the property, being made by an unauthorized person in name of the plaintiff, is not validated by the plaintiff's bringing his action on that demand, and adopting it as his own act; nor would a refusal to pay money on such unauthorized demand be construed as a refusal made to the creditor subsequently ratifying it, to the effect of preventing the defender from relying on a tender of the debt to the creditor between the demand and the ratification. Payment to an unauthorized demandant would not have discharged the debt, and the debtor was not bound to risk the chance of doing so. (*Coore v Callaway*, 1 Esp. 115; *Coles v Bell*, 1 Camp. 478; *Solomons v Dawes*, 1 Esp. 73.) So, timeous notice of the dishonour of a bill by a stranger, not a party to it, and not then authorized thereto, would not be good notice to bind a party to whom the holder is bound to give notice, and who, by non-receipt of notice at a given date, is liberated from liability. The adoption of the act out of due time will not draw back to validate the notice as at its date, so as to defeat the discharge from liability acquired in the interim by the debtor. (Story, Agency, sec. 247.) It is said, however, that there is a distinction as to ratification between an act the effect of which, if authorized, would be to create an immediate duty to be performed by the third person, on whom it operates, and liability for the breach thereof, and an act merely intended to assert on behalf of the principal some previously existing claim or right of the principal's, the assertion of which may be beneficial to him, without creating any immediate obligation, charge, or claim of damage against a third party. In this case it is said he is entitled to adopt the act, and to have his adoption drawn back for his benefit, as *e.g.* in

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the case where an unauthorized agent has kept up on his behalf a continual claim, merely preventing a right of his from lapsing, or has, on his behalf as landlord, made an entry on lands for condition broken by the tenant. But the principle of the distinction is not very clear. (Story, Agency, secs. 245-6.) Mr. Story says that the retroactive effect of ratification is allowed only in cases where the conduct of the third party on whom it is to operate cannot in the meantime depend on whether there be a ratification or not, illustrating the distinction by the case of a tenant receiving an unauthorized notice to quit, the tenant's action on receipt of which would depend entirely on whether it is or can be made a valid notice or not; while in the case of an entry on the principal's behalf, without authority, for conditions already broken by the tenant, the question is not as to any future act to be performed by the tenant, but as to a breach already committed at the time of the entry. The position of the principal, as having an election whether he will adopt the unauthorized act or not, is one which obviously gives him an advantage over the third party with whom the unauthorized agent has dealt, as the principal may ratify if that would be for his own benefit, or disavow if adoption would be to his disadvantage. Yet that element of unequal advantage, where the uncertainty of ratification has not left the third party uncertain as to his course of conduct in the meantime, has never been allowed to interfere with ratihabition. Thus in *Hagedorn v Oliverson* and *Routh v Thompson*, *supra*, it was held no defence by the insurers that the policy had only been ratified after the loss, and that the shipowner would not have been bound to adopt the contract or pay the premium if the ship had arrived in safety. For the underwriters had their claim on the agent for the premium; and if he had paid it, he could not have recovered it on the ground of having had no authority to insure, or of no interest having been insured by reason of the owner's refusal to adopt the insurance, for the owner had always the choice at any time of adopting the contract and saddling the underwriters with the risks (see Bayley, J., in *Routh v Thompson*; Parsons' El. M. L. p. 436, note). (4.) The ratification by the principal cannot be partial: he cannot ratify in part and repudiate in part, but must adopt the whole or none; and the ratification of a part being proved, establishes the whole transaction (*Thompson v Carrington*, 9 B. and C. 59); and once deliberately made, a ratification is *eo instanti* obligatory and irrevocable (*Smith v Cologan*, 2 T. R. 189, note; Paley, by Lloyd, 115, 172, 324, 331). Next, what amounts to ratification? Not only express, but implied confirmation, deduced from the acts or proceedings of the principal; and these will be construed liberally in favour of an adoption of the acts of the agent, and a small matter will be evidence of the principal's assent. (1 Livermore, Law of Principal and Agent, 394; Story, Ag. sec. 253; Paley, p. 171.) Generally, wherever one receives and holds a beneficial result of the act of another as his agent, he shall be held to have ratified the agency. Thus, if an agent sell goods below the price authorized, and send account sales to the principal, who draws for the balance due on account sales, that is ratification. So, if the principal were to sue the agent for the money received by him on such a sale, and not for damages, that would be ratification of the sale (*Wilson v Poulter*, 2 Str. 859; *Billen v*

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the superintendents of shops, manufactories, farms, banks, and all similar establishments for commercial purposes.¹

1. A clerk or shopman, having the management of the shop, is institor or *præpositus*, sells and receives the price, or buys articles in the course of the trade, so as to bind his master.²

2. A woman managing the shop of her husband, or keeping a shop herself, with his permission, is likewise institor; and for her contracts the husband is liable *actione institoria*.³

3. The manager of a bank, the officers placed there to deal with the public, or the agent managing a branch of the banking business at a distance from the head establishment, are all institors by whose acts the bank is bound. In this case, however, particular attention is necessary to avoid stretching this implied authority too far, considering the peculiar dangers attending money transactions, the precaution of the law in requiring written proofs as evidence of payment in money, and the very particular regulations and checks under which

Hyde, 1 Atk. 128; *Hovil v Pack*, 7 East 164. But see *Hunter v Prinsep*, 10 East 378, where a master, having sold cargo, the owner brought against the purchaser an action not on the contract, but for money had and received to his use. This form of action was held not to be an affirmation of the master's sale. Paley, p. 146, note; *Cornwall v Wilson*, 1 Vesey 509; *Taylor v Plumer*, 3 M. and S. 562; *Parsons' El. M. L.* 137, and notes; and acquiescence without objection, and even silence, frequently raises a conclusive presumption of ratification. If one, knowing that another has acted or is acting as his agent, does not disavow the agency as soon as he conveniently can, but lies by and permits another to go on dealing with the supposed agent, or to lose an opportunity of indemnifying himself, this is an adoption and confirmation of the acts of the agent. (Poth. Mand. No. 29; D. de Reg. Jur. 60; 1 Livermore, 49, 396, citing Decis. Rotæ Genuæ, 24, n. 4, 147, n. 4; Pars. El. M. L. 138, and American cases there; Emerigon, i. 145, case decided by himself, and authorities there; D. xiv. 6. 16; Cujacius ad l. 59 pen. D. Mand.; Story, Ag. 258.) If an agent makes a contract, and his principal ratifies it, he thereby ratifies the agent's representations made at the time of the sale, and in relation to it, and is bound by them. (So held by Story, J. in *Doggett v Emerson*, 3 Story 700. See *Udell v Atherton*, and cases cited *ante*, p. 469, note.) With regard to frauds and fraudulent misrepresentations by the agents of an incorporated company, the authorities seem to be somewhat contradictory. Any representations made by the agents of a company, which form the foundation of a contract between that company and a third person—these misrepresentations lying at the root of a contract—will entitle the other party to avoid the contract; and the company must in that case take upon themselves the consequences of the misrepresentations of their agents. (*Henderson v Lacon*—per Wood, V.-C.—Law R., 5 Eq. 261.) But in *The Western Bank of Scotland v Addie* (L. R., 1 H. L. Sc. App. 145) the following principles were laid down by Lords Chelmsford and Cranworth:—A company cannot retain any benefit which they have obtained through the fraud of their agents, but they may be made responsible at law for the frauds of those agents to the extent to which they have profited from them; and the fact that the complainant is himself a member of the company whose agents had committed the fraud, would not be a valid objection to his suit in equity for a rescinding of his contract to take shares. A person so defrauded, however, cannot bring an action for deceit against

the company; and if he wishes to pursue the remedy, he must bring his action against those who were guilty of the fraud personally. Their Lordships seem to have thought that if the company had made no profit, the party deceived would be without remedy against the company, and they seem also to have thought that the proper form of action would be for money had and received (pp. 158, 167). See, however, *Barwick v The English Joint-stock Bank* (L. R., 2 Ex. 259), where the Court of Exchequer Chamber held that a company would be liable for the fraudulent misrepresentations of their agent, as in general a principal is liable for the torts of his agent acting in the course of his employment. The Court also held that such misrepresentation would be properly described in common law pleading as the misrepresentation of the company. Willes, J., when delivering the judgment of the Court, seemed to think that an action for deceit would be still more appropriate than one for money had and received. The opinions of the common law judges thus appear in direct conflict with those of Lords Chelmsford and Cranworth in *Addie's* case, and of Lord Westbury in *New Brunswick Ry. Co. v Conybeare* (9 H. L. Ca. 711). As no part of the decision in the House of Lords, however, necessarily involves a principle inconsistent with the ruling in *Barwick's* case (which is distinctly in point with the question whether a company is bound by the misrepresentations of its agents or directors), the latter decision may fairly be regarded as a safer guide to the law on this point than the *dicta* in *Addie's* case.]

¹ *Bruce & Co. v Beat*, 10 Dec. 1765, M. 4056, where Lee was held the institor of certain gentlemen in carrying on a theatre in Edinburgh, and they were held liable for articles furnished on his order.

² [Where the authority is denied by the master, the contracting party may prove it by circumstantial evidence. *E. of Galloway v Grant*, 1857, 19 D. 865. Special authority must be proved with respect to transactions out of the ordinary course of business, e.g. borrowing money without security. *Woodrow & Son v Wright*, 1861, 24 D. 31. It has been held that an authority granted to a managing clerk to issue delivery orders for goods in the course of business, did not make the employer responsible for orders fraudulently issued, and not for value. *Colvin v Dixon*, 1867, 5 Macph. 603.]

³ *Wilson v Deans*, 1675, M. 6021. See, in English law, *Anderson v Sanderson*, 2 Starkie 204. [*Scott v Yates*, 1800, Hume 207; *Buchanan v Dickie*, 1828, 6 S. 986.]

banks always place their officers, especially in regard to their power of receiving money so as to charge the bank. When this question first occurred, the Court of Session applied the strict rules of the *actio institoria*, without any very critical examination of the vouchers on which money was paid into the hands of the bank agent. Taking his official place and station, as institor of the bank, to imply sufficient authority as a general agent to receive money for his principal, they held the bank chargeable with money so received.¹ On the next occasion on which the question arose, the Court at first viewed the matter differently, and held the bank chargeable only where the powers delegated to the agent were correctly exercised. But afterwards nearly the same views prevailed as in the former case.² On appeal to the House of Lords, a doctrine considerably different was applied to this [481] class of cases. The notion of a general agency or implied authority, as in the *actio institoria*, was rejected; and the case of a bank agent placed on the footing of a limited agency, like any other limited mercantile agent or factor, his power being measured by his commission, and his principals no otherwise chargeable than as the authority granted to the agent gave him power to bind them.³ And it is a strong confirmation of this view, that in all bank transactions, being dealings in money, the law requires correct written evidence, the terms and import of which the party must be bound to examine.⁴

IV. TRAVELLING AGENTS.—Another case, in which it is sometimes contended that there is an implied power, somewhat of the nature of the institorial, is where a mercantile or manufacturing house employs a RIDER or TRAVELLER to receive their debts, and take orders to be executed by the principal. The authority of such a person may depend either on the instructions which he receives, or on the custom of the trade, or on the extent to which his exercise of authority has been recognised. In general, it appears that a riding or travelling agent has not only authority to receive payment for his principal of the moneys due to him, but to take orders by which the principal shall be bound as much as if he himself had accepted and bound the contract.⁵

¹ *Paisley Banking Co. v Gillon*, 20 June 1798. This bank had a branch at Alloa under the care of Birnie, with whom, as agent for the bank, Gillon discounted several bills. They were endorsed to the bank and transmitted, and when due were returned to Birnie to recover payment of them. In this situation Gillon remitted various sums to Birnie for the purpose of paying those bills; but Birnie did not enter those sums in the bank books, and the bills remained in his hands to be cancelled. He became bankrupt and absconded, and in the repositories of the bank the bills were found. The bank raised action against the parties in the bills, and the defence was payment. The question therefore was, Whether the bank was chargeable with the remittances sent to Birnie? The Court held that it was, and dismissed the bank's action.

² *Watson v Bank of Scotland*, 1806, M. App. Mandate, No. 3. The Bank of Scotland had a branch at Brechin, under the management of James Smith & Sons as their agents. The place of business was in a room, over the door of which was painted, 'The Bank of Scotland's Office.' Receipts for money paid to the bank were engraved with blanks for sums and dates, and were signed 'James Smith & Son, agents for the Bank of Scotland.' The agents did much business, and in particular discounted bills, and as bankers received deposits of money on their own account. They transacted their business in the bank office, and they gave notes for sums deposited, engraved as the bank receipts were, dated 'Bank Office,' and signed 'James Smith & Sons.' Watson placed £60 in the bank, and received a receipt of the latter description; and on the failure of Smith & Sons, raised an action for the

money as deposited with the bank. The Court found the bank liable for the contents of the receipt, chiefly on the ground 'that it would be of dangerous consequence to the public, as well as contrary to the implied nature of such a business, if banks were not answerable for the transactions at their known office by the clerks and servants employed by them in the common operations of banking.'

³ *Bank of Scotland v Watson*, H. L., 26 March 1813, 1 Dow 40. The Lord Chancellor said: 'There was nothing peculiar that he knew in bank agency to take it out of the rule that the agent could not bind his principal beyond the limits of his authority. The Chief Justice Ellenborough had sat at the table at the hearing of the case, and had observed that if it had come before him, it would not have occupied more than ten minutes. There were a variety of considerations and circumstances stated to raise a presumption in favour of the respondent, but all of them appeared to him insufficient to show that this was an instrument by which the bank could be bound.' Lord Redesdale concurred in this opinion. [See also *Normand v Macartney*, 1823, 2 S. 404; *Craw v Commercial Bank*, 1840, 3 D. 193; *Chanter v Borthwick*, 1848, 10 D. 1544; *National Bank v Martin*, 1848, 11 D. 1.]

⁴ [As to the implied authority of the manager of a bank, see *Parsons' El. M. L.* pp. 139-40, and series of American cases there; *Story, Agency*, secs. 114, 115.]

⁵ *Milne v Harris, James, & Co.*, 1803, M. 8493. An order was given by Milne to Callender, a rider of Harris, James, & Co., which was executed. In his next round, another order was given by Milne to Callender, which he transmitted to his

3. *Commission and Diligence Prestable.*

This contract, while it partakes of the contract of mandate, in so far as it involves a delegation of power, may be classed with *locatio conductio*, in so far as the skill, labour, and attention of the factor, agent, or broker, are purchased by the payment of a hire or commission. This commission is regulated either by stipulation or by usage. In England, the rate of brokerage is in some cases settled by statute; and it is enacted by the 12 Anne, statute 2, c. 16, which applies to Scotland (in the second section), that the rate of brokerage for procuring a loan of money shall be limited to 5s. for £100, under the penalty of £20.¹ It is by the effects dependent on this admixture that the modern contract of commission or factory is contradistinguished from the mandate of the civil law.

The diligence prestable by a proper mandatory, as understood in Scottish jurisprudence to be grounded on the equity of the Roman law, is only for his actual intromissions, and such diligence as he employs in his own affairs.² But the diligence implied in the onerous [482] office of a mercantile factor, agent, or broker, is that of a prudent man in managing his own affairs.³

Besides the ordinary commission, there is frequently stipulated a commission *del credere*, the responsibility under which has already been considered.⁴

4. *Extent of Authority.*

In all those cases in which there is not a general authority implied, as in the case of institors and others already treated of,⁵ the extent of a factor's authority and his powers are to be gathered from the mandate under which he acts.

1. If the mandate be general, it is to be construed according to its object, as implying all powers within the scope of the employment;⁶ if limited, it is to be executed strictly according to its terms.⁷

2.⁸ Even a special agent's authority is held to include all the necessary or usual means of executing it with effect. Thus, if one authorize his agent to get a bill discounted, without restraining him as to the way of doing it, this is an authority to endorse it in the principal's name, so as to bind him.⁹ An order to send goods implies a power to load them generally, so as to bind both the goods and the principal for the freight.¹⁰

3. An agent or factor cannot, without express power, or power necessarily implied in

principals. But they refused to execute it, as Milne had not settled the former dealing correctly. Milne immediately wrote that cash should be paid down, but his order was not answered. Harris, James, & Co. defended the action by Milne, on the ground that Milne's offer was not accepted by them. The Court held the rider to have authority to receive orders, and to bind his principal to the execution of them. Some of the judges held that this general rule must admit the exception of a refusal for sufficient cause, and the irregularity of the former dealing they held sufficient; but this did not prevail. See *Telford v James, Wood, & James*, 3 Shaw and Dunlop 167, N. E. 113.

¹ The 17 Geo. III. c. 26 does not apply to Scotland.

² Ersk. iii. 3. 36.

Sir William Jones, in his Essay on the Law of Bailments, has placed the obligation to stricter diligence than seems to accord with a gratuitous contract on its fair principle; namely, that an undertaking to do an act may happen to infer a degree of diligence beyond responsibility for the mere violation of good faith (p. 53).

³ See above, p. 483. [*Ramsay, Bonnar, & Co. v Mackersey*, 1840, 2 Bell 30; *Houldsworth v Br. Linen Co.*, 1850, 13 D. 376.]

⁴ See above, p. 394.

⁵ See above, p. 508.

⁶ A very full argument on this point by Lord Loughborough will be found in *Howard v Baillie*, 2 H. Blackstone 618. [*Thomson v Fullarton*, 1842, 5 D. 379; *White v Maxwell*, 1850, 12 D. 955; Smith, Merc. Law, 129.]

⁷ *Ross v Rose*, 29 June 1791, where grain was sold on credit under a power to sell for money, and the agent was found liable for damages.

East India Co. v Hensley, 1 Esp. Cases 3. [*Duncan v Clyde Trs.*, 1851, 13 D. 518; 1853, 15 D. (H. L.) 36.]

⁸ [As to incidental powers, see Story, Agency, secs. 97-125.]

⁹ *Fenn v Harrison*, 4 Term. Rep. 177. But if he had himself refused to endorse it, and desired the agent to get it discounted or sold, it would be otherwise. Same case, 3 Term. Rep. 757.

¹⁰ Molloy, de Jure Maritimo, 442, sec. 9.

the circumstances, delegate his authority to another.¹ But delegation is sometimes necessarily implied. Thus, an order to an agent to recover a debt implies a power to delegate the execution of the necessary diligence to the proper officer; or to delegate to the agents necessary or fit to be employed before the courts to which resort must be had; and the natural consequence is, an implied guarantee by the agent so delegating his authority, of remuneration to persons who may be utterly ignorant of the credit of the principal.²

4. The construction of mercantile commissions is to be extended, restrained, qualified, and in general assisted by the usage of trade. Thus, it is the custom to sell goods upon credit, and an agent employed to sell without special restraint may follow that course; but as it is the custom to sell stock only for ready money, a factor is not, without special authority, empowered to dispose of it otherwise.³

5. *Factor's Power to Pledge.*

It has been much questioned, both on the Continent and in Great Britain, what [483] power a factor has to pledge the goods of his principal. In England, at common law, he had no such power. In Scotland, it has been decided that he has the power, to the effect of conferring on one who lends money on the security of the goods, an unexceptionable real right; or of raising to a sub-factor, or other person receiving the goods and advancing money on them, an effectual lien. And on this point the law of England has by statute been placed nearly on the footing of the law of Scotland.⁴

The doctrine of the law of Scotland on this subject may be reduced to the following propositions:—

1. Where a factor, having made advances on goods sent to him for sale, transfers to another the right of pledge or lien which he himself holds, the transfer is effectual. Even in England he is entitled to do this, provided he does it fairly and openly: for lien is not a mere *jus incorporale*, but is accompanied by possession of corporal subjects, and consists in the continuance of that possession. As the creditor to whom the lien is assigned holds only the qualified possession which his debtor was entitled to, his right, like that of the assignee to a liferent, expires with the original lien; but to this extent the security is as complete as the factor's own; that is to say, the creditor will be entitled to avail himself of the pledge to the extent of the balance due to the factor.⁵

2. Although at first it was held that a factor having goods in his possession could not pledge those goods, or receive advances on them, to the effect of constituting a lien available against the owner,⁶ yet this soon yielded to views of commercial expediency, first in

¹ Ersk. iii. 3. 34. [But see *Skinner, Notman, & Co. v M'Indoe*, 1857, 20 D. 283.]

² See *Chalmers v Masson*, 1824, where an Edinburgh solicitor before the Supreme Courts employed a solicitor before the inferior courts, on account of a client of his. On a report from the several law societies, it was held that the former was responsible for the latter; but this was altered on a specialty. 3 S. 408, N. E. 286. [*Milne v M'Lean*, 1825, 4 S. 46; *Gordon v Sinclair*, 1826, 4 S. 714.]

³ In *Wiltshire v Sims*, 1 Camp. 258, Lord Ellenborough applied this doctrine to a case where a broker having sold £500 of the stock of the Commercial Road, on a credit of fourteen days, by promissory note, the plaintiff, in an action to have the stock transferred, was nonsuited.

Mr. Justice Chambre lays down the law thus: 'There is no doubt of the authority of a factor to sell upon credit, though not particularly authorized by the terms of his commission so to do. *Houghton v Mathews*, 3 Bos. and Pull. 489; *Scott v*

Surman, Willes 407, S. P. But this doctrine is founded on "the constant and daily experience, that factors do sell upon credit, without any special authority," and therefore confirms the general maxim, that when an agent is employed to do any act, he shall be supposed to have an authority to do it in the manner in which it is usually done. Goods are almost always, stock is scarcely ever, sold upon credit; and hence the distinction between the powers of the factor and the stockbroker. An agent can in no case bind his principal by any act beyond the scope of his authority. *Fenn v Harrison*, 3 Term. Rep. 757.' 1 Camp. 259, note.

See *Houghton v Mathews*, 3 Bos. and Pull. 485.

⁴ 4 Geo. iv. c. 83, as amended by 6 Geo. iv. c. 94 [and extended by 5 and 6 Vict. c. 39].

⁵ See the case of *M'Combie v Davies*, 7 East 7, 8; and *Man v Skiffner*, 2 East 529.

⁶ *Mitchell v Burnet & Mowat*, 1746, M. 4498. The goods were Mitchell's, but were lodged in a warehouse at Campvere

a foreign case, in deference to the laws of Holland;¹ and afterwards it was held that a person holding goods in this country as factor for a trader abroad, could place those goods [484] with another, as his factor or consignee, and take advances on the security of them, to the effect of conferring an unexceptionable lien for the advances available against the true proprietor of the goods.²

3. Where a factor, however, places goods in the hands of another as factor, or for any

in Holland by Sinclair. There they were arrested by creditors of Sinclair; and a competition arose between the arrestors and Burnet & Mowat, the owners of the warehouse, who alleged that the goods had been pledged to them by Sinclair for debt. The Court found the goods the property of Mitchell; and that the impignoration was neither proved, nor relevant to encumber Mitchell's property.

See next note.

¹ Lord Kilkerran says, on a review of the judgment: 'It seemed to be the opinion of the Court that the sentence had gone too far in finding the impignoration not relevant, at least so far as concerned £57 advanced to Sinclair on the credit of the goods; for that, however, at common law, a man's property can only be affected by his own deed, and that the presumption of property from possession *cedit veritati*, yet the expediency of trade and commerce requires that wherever any person is vested in the nominal property by a bill of lading, third parties contracting with him as proprietor, whether by sale or pledge, should be safe. But as there was no proof of such impignoration, there was no occasion to give judgment upon this point.' The case finally terminated in favour of the pledgee, upon an allegation that by the custom of Holland a factor who gives credit on goods lodged with him can detain them till he is paid; and this was allowed to be proved 'by four merchants in Edinburgh.'

² 1. *Colquhoun v Findlay, Duff, & Co.*, 15 Nov. 1816, 19 Fac. Coll. 208, First Division. Twenty hogsheads of sugar were consigned by Mr. Colquhoun from the West Indies to H. Crawford to be sold. The invoice was directed to him, and the bill of lading deliverable to him or his order. Crawford employed Findlay, Duff, & Co. as brokers to sell the sugars; and he gave an order on the keeper of the bonded warehouse to deliver them to their order. Findlay, Duff, & Co. took the goods to be Crawford's, and made advances to him on the credit of them. The judgment of the Lord Ordinary, Alloway, 'finds, That by the bill of lading, the sugars in question appeared to be the sole property of Mr. Crawford: That upon the 20th September 1814, Mr. Crawford, by a regular invoice and order, desired the persons in whose warehouse the sugars were deposited, to deliver the same to the order of Messrs. Findlay, Duff, & Co.; and that from this period, when the said order was delivered, these persons continued to hold the sugars for behoof of Messrs. Findlay, Duff, and Co.: That the possession of the sugars being thus transferred by Mr. Crawford, apparently the unlimited proprietor, to the defenders, they were entitled either to sell the same, or to advance money to him on account of those sugars; and that having made advances to Mr. Crawford, *bona fide*, without ever having heard of the claim of the pursuer, who sent the sugars to Mr. Crawford, they are entitled to retain and apply the proceeds of those sugars to account of the advances made by them; and are only liable to account to the pursuer for any balance of the proceeds of the sugars which may be in their

hands beyond the amount of these advances; and decerns.' The Court adhered. '*Per curiam*, the transaction cannot be correctly considered as a pledge. The factor did not exceed his powers; besides, it is clear that a factor authorized to sell can effectually pledge the goods of his constituent. The English authorities on this point ought to have no weight.'

2. *Ede & Bond v Findlay, Duff, & Co.*, 15 May 1818, 19 Fac. Coll. 509. In August 1814, Francis Garden & Sons, extensive West India merchants, had, as consignees and importers, thirty-nine hogsheads of sugar in the bond warehouse in their own name. They had thus an apparent ownership of those sugars; and having put them into the hands of Findlay, Duff, & Co., with power to sell, and given an order of delivery, which was duly intimated at the king's cellars, Findlay, Duff, & Co. advanced £1000 on the consignment. They afterwards sold them for £1500; and Garden & Sons becoming bankrupt, Ede & Bond of London claimed the proceeds, as being the proprietors of the goods which Garden & Sons had held merely as factors, with no authority to pledge. The Lord Ordinary found, 'that Findlay, Duff, & Co. were entitled to retain and apply the proceeds of the sugars to account of all advances made or obligations come under by them on the credit of these sugars.' To this judgment the Court adhered.

3. *Johnson & Manley v Findlay, Duff, & Co.*, 13 Feb. 1818. This was a similar decision in circumstances nearly the same. The goods (coffee) had been entrusted to Garden Brothers & Co. as managing partners of a joint adventure. They consigned them to Findlay, Duff, & Co. to be sold. Large advances were made by Findlay, Duff, & Co. on the faith of this consignment. They insisted on a lien, both for those advances and for their general balance on transactions with Garden Brothers & Co. as their factors. Lord Pitmilley, as Ordinary, gave his 'opinion that the bill of lading of the coffee having been made out in the name of Garden Brothers & Co., and the coffee deposited in their names in the bond warehouse in Leith, the defenders, Findlay, Duff, & Co., were entitled, on receiving an unqualified order for delivery of the coffee from Garden Brothers & Co., to make advances to that company on the faith of the coffee thus delivered to and *bona fide* received by them.' But before pronouncing final judgment in the case, his Lordship ordered further discussion of the right to retain for the general balance.

4. *Johnson v James Scott & Son*, Nov. 14, 1818, 19 F. C. 561. Johnson, residing at Wakefield, was desirous of turning his capital to account; and having applied to Hickson, he helped him to purchase a cargo of deals for Leith. It came consigned to James Scott & Son from Hickman, though Johnson was the true owner; and the consignees knew nothing of Johnson's interest. Hickman being partner of a company whose acceptance had been discounted by James Scott & Son, he wrote to Scott & Son, that the company could not pay the bill, and desired Scott & Son to retire it, and take

other purpose which in the case of his own goods would confer a lien for a general balance, the sub-factor, though ignorant of the true ownership of the goods, must, in so far as he has not made *actual advances* on the consignment, but claims only a *general* balance, take [485] the goods under the qualification of the limited right which the factor himself had in them.¹

But although these were the rules followed in Scotland, they had been established chiefly on grounds of public expediency, and from favour to commerce, though undoubtedly bottomed on a sound principle of law, by which property in moveables is presumed from possession. The same course was followed on the Continent; and against authorities of great weight, the bias of favour and encouragement to the free transfer of goods in trade had influenced the whole practical jurisprudence of the trading nations of Europe. The general rule of the civil law was, *Nemo plus juris ad alium transferre potest quam ipse habet*.² And under this general rule the power to pledge was absolutely denied.³ In France it was held that one could not pledge the property of another for his own debt.⁴ In Holland the same law was established.⁵ In Italy also this was held as law.⁶

But an abstract rule laid down in law books sometimes does not square with the actual business of life; and in favour of commerce a relaxation of the above rule was introduced, to the effect of allowing the possessors of moveables, and those otherwise in the apparent right of commodities, not only to sell, but to pledge them.⁷

reimbursement on the consigned cargo. They answered that they would take up the bill, and pass it to account of the consignment. No reply was made; and on Hickman's failure James Scott & Son had notice of Johnson's right. They claimed retention for the bill, and sent the balance to Hickman. The Court held James Scott & Son to have an effectual security for the advanced money, holding the application of the proceeds by order of the consignor to be an advance.

¹ *Black & Co. v M'Call & Co.*, 22 June 1820. In this case sugars were bought by Thomson, Gibson, & Co., as agents or factors, for and to the use of a secret company or joint adventure of Thomson, Gibson, & Co., William Tennant, and Gibson and Duncan, and were placed in the hands of M'Call & Co. on a mere broker's commission, not as factors. They were the agents of Thomson, Gibson, & Co., and had so acted for them on a large commission for occasional advances. Of course in these circumstances M'Call & Co. made no advances on the faith of those sugars. But there being a considerable balance due to them on their account with Thomson, Gibson, & Co., and all the parties becoming bankrupt, M'Call & Co. claimed retention for their general balance against the creditors of the joint adventure. And so the question was, Whether they were entitled to exercise the same right for security of this balance, which by the above cases they would have had for advances on the goods? The Court drew the distinction clearly, and rejected the claim of lien on this principle, that either a factor may sell, or pledge, or make advances of money on the security of retention as a pledge; yet a sub-factor, whether he knew the true owner or not, can take, as a resulting security for his general balance, only such right as the primary factor has. This judgment was affirmed in the House of Lords. The affirmance cannot be taken as establishing the doctrine of the judgment in the Court of Session, but it does not invalidate it. The view taken in the House of Lords was, that without inquiring into the right of M'Call & Co., had they in this acted as proper factors, there was sufficient ground for affirming the judgment in the fact that the goods in question came into their hands not as factors, but on a brokerage commission, a character not entitling them to a lien.

The judgment was moved by Lord Gifford, 4 May 1824, 2 Sh. App. Ca. 188.

² Dig. lib. 50, tit. 17, De reg. juris, l. 54.

³ Cod. lib. 8, tit. 16, Si aliena res pignori data sit, l. 6; Dig. lib. 20, tit. 3, Quæ res pignori vel hypothecæ datæ obligari non possunt, l. 2; 1 Voet, 880; Heineccius, Elem. secundum ord. Pandect. 4, No. 27; Observ. Theoretico-Practicæ ad Pand. p. 4, No. 27, vol. vi.

⁴ Basnage, Tr. des Hypothèques, pp. 4 and 6; Pothier, Tr. du Cont. de Nantissement, No. 27, vol. ii. p. 953.

⁵ Van Leewin, Censura forensis Theoretico-Practica, lib. 4, c. 7, sec. 17, p. 472.

⁶ So the law is laid down by the learned Professor Averanius of Pisa, Interpretat. Juris, lib. 4, c. 22, sec. 13 et seq.

Casaregi reports a case decided by himself, of a valuable string of pearls delivered by a lady to Maranna, a jeweller, to be sold, which he pledged to his creditor to prevent his imprisonment. The pledge was held bad, and the plea rejected, that, as a public dealer in jewels, Maranna was a person from whom the free course of trade entitled the pledgee to take those pearls. Discursus de Commercio, 106, vol. i. p. 334.

The same doctrine seems also established by a decision of the Court at Genoa. Rot. Genuæ de Mercatura, etc. Decisiones, No. 199,—a book which Casaregi says, 'In causis mercantilibus maximæ est auctoritatis.' Disc. 36, sec. 3.

⁷ In Holland this exception is asserted by some authors, while it is denied by others.

Groenwegen, in his Tract de Leg. abrogatis et inusitatis in Hollandia, p. 56, says: 'Si quis rem sibi traditam aut commodatam citra formam mandati vendat, aut quovis modo alienet, moribus hodiernis adversus eum qui rem justo titulo et bona fide accepit actionem non habet rei dominus: aut si res non alienata sed tantum modo pignori data sit rei suæ vindicationem non habet nisi pignus luat.' This Van Leewin vehemently reprehends as not correct: 'Qua in re non admodum perspete judicasse mihi videtur Groenwegen' (p. 472). And speaking of a statute of Antwerp, to which that author refers, he says: 'Sed irrationabilis et odiosa mehercule hac in re est dicti statuti ratio in favorem forte mercaturæ ibidem

[486] In the inquiries ordered by Parliament concerning this matter, it was found that in foreign countries the rule of lien, as applied to moveable property, is, that 'possession constitutes title,' and that persons making advances of money upon such property are not required to inquire to whom it belongs, and are fully protected for the advances they make.¹

In England the law had towards the middle of the last century taken a bias against the direction which it had received both here and abroad, and which is said not to have accorded with the spirit of the former law, and indeed to have proceeded rather from an erroneous report than from the judgment of the case by which it had been supposed to be established. This was the case of *PATERSON* against *TASH*, tried before Chief Justice Lee, who is reported to have held, 'that though a factor had power to sell, and thereby bind his principal, yet he cannot bind or affect the property of the goods, by pledging them as a security for his own debt, though there is the formality of a bill of parcels and a receipt;' and so the jury found.² This doctrine appears to have been first shaken by the authority of Lord Eldon in 1800.³ But still the course of decisions proceeded against the right [487] implied in possession.⁴ The bad effects of this doctrine on trade were so much felt, that the House of Commons named a committee of inquiry, who, after very extensive investigations into the law and practice of trade both at home and abroad, were inclined to report, 'that if no easy mode suggested itself for the alteration of the law, so as to remove

contra dispositionem juris communis introducti quod sane ultra ejusdem civitatis territorium extendi minime potest, quum vel alias statuta juris communis correctoria strictissimam accipiant interpretationem.'

In Italy, we have seen Casaregi deciding a case by the rule of law. But there are other cases reported by him, in which, on a very elaborate discussion, he gave full weight to the exception in mercantile law. The doctrine of an exception in favour of mercantile dealings he lays down in his 76th Dissertation, No. 4 et seq.; and in his Treatise, entitled *Il Cambisto Istruito*, c. 3, No. 43 et seq.; and in the introduction to his judgment in the case of *Greenwood & Cooper*, Disc. 124, No. 1 et seq. In that case, David Cayrel had consigned from D. Vais Nunez a cargo of sugar, which he impledged with *Greenwood & Cooper* for his own debt. Nunez claimed the goods by *rei vindicatio* as theirs. The Court of Leghorn decided in favour of *Greenwood & Cooper*; and Casaregi, in a court of appeal, affirmed the sentence. In explaining the grounds of his judgment, he says: 'In istis impropriis furtis vel rebus dolose ac fraudulenter extortis, favore libertatis publici commercii præmittere pro indubitabili regula oportet, talium rerum aut mercium dominum rei vindicationis actione illarum restitutionem minime prætere posse, nisi prius per eum persolvatur pretium vel pecunia mutuata vel quicquid aliud datum aut creditum restituatur illi cui respective venditæ, etc., dummodo hic de tempore venditionis, vel in solutum dationis vel hypothecæ aut hujusmodi nullam habuerit scientiam, rem aut mercem in eum perventam ad alios proprietatis ac dominii titulo spectare.'

In another case, where a trader at Ferrara had consigned a bale of silk for sale to a Florentine merchant, who pledged it for a loan of money, and afterwards sold the bale to a third person, under burden of paying the loan; the Florentine merchant failed, and a question arose between the owner and the pledgee for the price in the hands of the purchaser. Casaregi adjudged the case for the pledgee, on the same grounds with the above cases. Disc. 187. To the arguments

of the owner Casaregi says: 'Attamen respondebam hac nullatenus procedere inter mercatores, quia de eorum universali stylo, aut consuetudine, contrarium servatur; et sic cum jure communi iste præcipuus stylus seu mercatorum mos prævalere debeat, ideo cessant omnes juris regulæ quæ desuper in contrarium allegantur vel allegari possunt.' And he proceeds to say, that he was not only satisfied that this was the constant usage of merchants, from his own long continued practice in such cases, but from careful inquiries he had made.

Ansaldus treats of this question in the general dissertation with which he concludes his excellent work, *De Commercio et Mercatura*, ed. of 1751, p. 371, and contends for a preference to mercantile usage over the rules of the common law, sec. 41 et seq.

¹ 'This,' the Committee says, 'may be taken to be the law of France, Portugal, Spain, Sardinia, Italy, Austria, Holland, the Hanse Towns, Prussia, Denmark, Sweden, and Russia.' Report from the Select Committee on the Laws relating to Merchants, Agents, or Factors, etc., p. 20.

² *Paterson v Tash*, in 1743, 2 Strange 1178.

³ *Sir W. Pultney v Keymer*, 3 Espin. 182. Here Sir W. Pultney employed Petrie & Campbell as his agents in London for the sale of West India produce. Sugars were consigned to them, and they placed them with Keymer as a broker. He advanced money and bills on account of them to the extent of £18,000. Sir William gave Keymer notice not to sell; and offered indemnification for any demand or advance on account of the sugars, but he did not offer to indemnify against the acceptances. He was nonsuited by the direction of Lord Eldon, Chief Justice, on the ground that he was bound to relieve them of the bills as well as cash, being both in the nature of charges on the goods.

⁴ *Daubigny v Duval*, 5 Term. Rep. 604; *Newsom v Thornton*, 6 East 17; *Martini v Coles*, 1 Maule and Selw. 140.

See also *Pickering v Busk*, 15 East 38; *M'Combie v Davies*, 6 East 538, 7 East 5; *Jolly v Rathbone*, 2 Maule and Selw. 298.

the present inconvenience, consistent with other principles of our jurisprudence, it would not be unwise to adopt the principle of foreign laws, that "possession constitutes title," because, though your committee are aware that some frauds would be the consequence of such an alteration in the law, yet the great and almost universal benefit to be derived by trade from the removal of injurious restrictions, would so enormously overbalance the disadvantage as to render it of comparatively little importance.' It was thought better, on the whole, considerably to limit the remedy, and the statute of the 4 Geo. iv. c. 83 was the result.¹ But the words of this Act were not held adequately to reach the full extent of the evil, and therefore the Act of the 6 Geo. iv. c. 94 was passed; whereby, 1. Any person entrusted for consignment or sale with goods, wares, or merchandise, who shall have shipped them in his own name, or any one in whose name goods shall be shipped by another, shall be deemed the true owner, to entitle the consignee of such goods to a lien thereon for money, etc., advanced for the use of such person, as if he were the true owner; provided the consignee shall have no notice by the bill of lading or otherwise, at or before the time of advance, that such person is not the true owner, etc. 2. Persons entrusted and in possession of bills of lading, dock-warrant, warehousekeeper's certificate, etc., shall be deemed owners, so as to give validity to any contract for sale, in whole or in part, or for the deposit or pledge thereof as a security for money, etc.; provided there is no notice by the document, etc. 3. No one is to acquire by deposit, pledge, etc., of goods in the hands of an agent or factor, for any debts or demand previously due, any further or better right, title, or interest, than was possessed by such person so possessed and entrusted at the time of the pledge or deposit. 4. That all persons may contract and agree with factors, known to be such, to the effect of purchasing and paying for articles entrusted with and in possession of such factors, provided the agreement be in the ordinary course of trade, and that such person shall not at the time have notice of the factor's power to sell. 5. That goods may be taken in pledge from known agents, but only to the effect of acquiring such interest as the factor has. 6. That the true owner shall be entitled to follow and demand his goods in the hands of his agent, or of assignees in bankruptcy, on paying the advances secured upon them. 7. That agents fraudulently pledging the goods of their principals shall be deemed guilty of a misdemeanor, and on conviction subject to transportation not exceeding fourteen years. 8. But this not to apply to a case where the factor has impledged goods only to the amount of his own right over them, provided it be not for bills accepted but not paid.²

¹ By this Act,—

1. Persons in whose name goods shall be shipped shall be deemed the true owners to entitle the consignees to a lien thereon, in respect of their advances, or of money or negotiable securities received by the shipper, provided the consignees have no notice that the consignors are not the actual proprietors of such goods.

2. All persons may take goods or bills of lading in deposit or pledge from consignors, to the effect of acquiring only such right, and no more, than the consignee has.

3. The true owner shall have right to follow his goods, whether in the hands of his agent or of the assignees of the agent in bankruptcy, and to recover them upon paying advances secured upon them.

² [By 5 and 6 Vict. c. 39, the provisions of the last-mentioned Act are re-enacted, and in some respects extended to meet decisions in which, by the stringent constructions of the courts, cases supposed to be within the former statutes had been excluded. The most important of these decisions were: *Evans v Trueman*, 1 Moody and Ry. 10; *Taylor v Kymer*, 3 B. and Ad. 320; *Fletcher v Heath*, 7 B. and C. 517; *Phillips v Huth*, 6 M. and W. 572, 9 M. and W. 647; *Bonzi v Stewart*,

4 M. and G. 295. Thus, by sec. 1, the statutory powers are made applicable to the case of 'any agent who shall thereafter be entrusted with the possession of goods, or of the documents of title to goods;' and agreements under the powers of the statute are declared to be binding, 'notwithstanding the person claiming such pledge or lien may have had notice that the person with whom such contract or agreement is made is only an agent.' According to the English decisions, the word 'entrusted,' at the commencement of the enabling sections in these Acts, has a limiting signification. On the construction of sec. 4 of the Act of 6 Geo. iv., it was held that a wharfinger who received flour in that capacity, but without any authority to sell it, was not within the meaning of the words an 'agent entrusted with goods,' so as to be able to sell, although he was in the habit of doing business as a flour factor. *Monk v Whittembury*, 2 Barn. and Ad. 484; and see *Phillips v Huth*, 6 Mus. and W. 572; *Hatfield v Phillips*, 9 Mees. and W. 647. So in *Lamb v Attenborough*, 1 B. and Sm. 831, it was held that a clerk employed to do dock business, and who had been in the habit of holding and transferring documents of title, was not an agent or so entrusted with the documents as to be able to pledge them. In *Hayman v*

6. Termination of Factor's Powers.

[488] The subsistence and determination of a factor's powers have been supposed to depend on certain metaphysical distinctions. And in attempting to settle the principles by which questions of this sort are to be determined, it has been said on the one hand, that

Flewker, 13 C. B. N. S. 519, Mr. Justice Willes observed that the Act does not apply in the case of a mere servant or caretaker, or one who has possession for carriage, but not in order to sell. In that case, a picture dealer, whose ordinary business was not to sell pictures, but who was authorized to sell the particular pictures in controversy, was held to be an 'agent' entrusted with the goods under the Act, so as to validate a pledge of them by him. In *Baines v Swainson* (4 B. and S. 270, 32 L. J. Q. B. 281), the plaintiffs, cloth manufacturers, were informed by E, a factor and commission agent, that he could get them a customer for some of their goods, giving the name of Sykes as that of the intended purchaser. It is a common practice for manufacturers to send their goods to agents, who warehouse them and sell them in their own names. The plaintiffs sent the goods to E's warehouse to be 'perched,' and E was then to send them to Sykes. E's statements about Sykes were untrue, and he sold them to defendants, who purchased *bona fide*. It was held by Wightman and Crompton, JJ., that E was an agent entrusted with the goods within the Act, and the sale valid; and by Blackburn, J., that at any rate the question should be left to the jury to say whether or not the facts showed that E was such an agent, and whether the sale was in the ordinary course of business. Crompton and Blackburn, J., were of opinion that the agencies referred to are such as are mercantile only, and of persons who, as mercantile agents, would have to make sales in the ordinary course of business, as had been previously held by Wigram, V.-C., in *Wood v Rowcliffe* (6 Hare 183); not merely mercantile agencies to forward or keep, but agencies to sell, the goods in the ordinary course of business, and to receive payment. Blackburn, J., drew attention to the 4th section of the Act of Victoria, which says that an agent in possession of the goods 'shall be taken for the purposes of this Act to have been entrusted with them by the owner, unless the contrary can be shown in evidence;' and added: 'I do not think that the mere fact of an agent having possession of the goods, although they have been handed to him by the owner knowing that he carries on such a business, amounts to an "entrusting" him as agent, though I think that under the 4th section of 5 and 6 Vict. c. 39, to which I have called attention, the fact that he had given them to the agent is a fact calling upon him to give a satisfactory explanation, and to show that it was not an entrusting. I do not think that the mere fact that the agent was in possession, and that possession was given by the owner, amounts to an entrusting. There are cases in which the goods might come to a known agent from having been lent to him, or from being pledged or hired, or in fifty other ways; but I do not think that would be an entrusting, independent of authority to pledge or sell.' After alluding to *Monk v Whittembury*, he then adds: 'It seems to me, therefore, that the question to be determined is whether the goods came from the owner to E as a branch of that agency, which in the ordinary course of business would be to sell goods belonging to others, and re-

ceive payment for them.' In *Fuentes v Montes*, *infra*, Willes, J., expressed an opinion, that in holding E to be an agent in the sense of the Act, the Court of Queen's Bench had in *Swainson's* case carried the law to its utmost stretch. But he deliberately adopted the construction put by Blackburn, J., on the words at the end of the 4th section, above quoted, which attributed to these words the effect of enabling the owner to set aside a sale or pledge if he could succeed in disproving an ostensible entrusting in the character of an agent for sale. The language of the learned judge is: 'In the case of an agent for sale, whose general business it is to sell, being entrusted for a purpose other than sale,—as, for instance, if he were entrusted upon an advance against the goods, but with directions not to sell, being a mere lender, and upon his pledge of them; or, if he happen to have a warehouse, though his general business was that of a factor, and not that of a warehouseman, and on the particular occasion the goods were put in his warehouse at a rent,—in both cases he would be a person who *prima facie* would be justified in dealing with goods under the Factors Acts. And yet there is an express provision with respect to such a person, that he shall only be *prima facie* in the situation of being able to deal with the principal's goods more generally than the principal has authorized him; that the principal, on proving the true nature of the transaction between them, should be able to rebut the presumption of his enlarged authority under the Factors Acts, and should be entitled to call for a better account from a third person dealing with his goods without his authority than that they were obtained from an agent; and that the Factors Acts applied.' He assented to the opinion of Blackburn, J., in 4 B. and S. 285, that it is sufficient for a person making an advance on goods to show that the agent who was in apparent possession of them was an agent whose general business was one that would bring him within the operation of the Factors Act, and thereby throw upon the principal the burthen of proving that in the particular transaction, with respect to the goods in question, the agent was not such agent, *i.e.* an agent for sale of the goods as above described. Accordingly, in that case of *Fuentes v Montes* (L. R., 3 C. P. 268, 37 L. J. C. P. 137; affirmed in Cam. Scac. L. R., 4 C. P. 93), the Court of Common Pleas held it competent for the owner to show that the former agency for sale under which the agent had got possession had been withdrawn prior to the pledge, and that although the revocation was unknown to the *bona fide* pledgee, to the effect of defeating the pledge, the mere apparent ownership not being sufficient to conclude the question. Mr. Justice Willes took the view of Blackburn, J., in *Swainson's* case, that 'the authority given by the Factors Acts *quoad* third persons was an authority superadded and accessory to the ordinary authority given by a principal to his factor,'—an authority of a special kind; and that the intention of the Acts was not to create anything like apparent ownership in factors generally, nor 'to provide a remedy for those hardships which have accrued to innocent persons by

mandate operates by an incessant renewal of the consent which confers the authority, like the operation of gravity on a descending body; on the other hand, the force of mandate has been ascribed to the effect of the first act of will operating like impulse on a natural body, the motion from which continues after having been once communicated. The cases attempted to be distinguished or assimilated by these analogies are those of death and insanity,

dealing with people in the apparent ownership of goods as if they were the real owners.' And see also the observations of Crompton, J., on same point. Accordingly, the agent whose right to possess had been revoked not being at the time within the terms of the Act, the Court laid it down, 'that the person who under the Acts is to create a valid pledge of his principal's goods must be an agent who is entrusted at the time of doing the act which is to have that effect. That being so, it appears that an agent whose authority has been revoked, and who wrongfully retains possession of goods which he is bound to give up at the time when he purports to make a pledge, is not an agent at all, but a wrongdoer, and is not within the Acts, nor is the pledge a transaction within their protection.'

By sec. 3 (5 and 6 Vict. c. 39), if the pawnee is aware that the agent has not authority to pledge, or is otherwise guilty of *mala fides*, the pledge shall not be valid. See Add. on Cont. 6th ed. 281; Sm. Merc. Law, 7th ed. 133; *Pochin v Robinow & Co.*, 1869, 7 Macph. 622.

It is to be observed that the statutes do not protect a party taking goods from a factor in satisfaction or security, directly or indirectly, of an *antecedent debt*, but only apply to goods taken in security of advances made at the time or subsequently. *Learoyd v Robinson*, 12 M. and W. 745; *Navulshaw v Brownrigg*, 2 D. M. and G. 450; *Jewan v Whitworth*, 2 L. R. Eq. 692. A pledge in security of a current acceptance or other contingent liability is not a valid security under these Acts; *Macnee v Gorst*, 4 L. R. Eq. 315. As to the power of extending the pledge so as to cover subsequent advances, see *Portalis v Tetley*, 5 L. R. Eq. 140.

With regard to what notice is required to invalidate a sale or pledge, it may perhaps now be considered as established, that it is not necessary for the owner seeking to recover property thus alienated to show that the receiver had *positive information*; but that it is sufficient if the circumstances are shown to have been such as might, and with a reasonable man would, have led to the conclusion that the agent had not authority to pledge or sell. See per Lord Tenterden in *Evans v Trueman*, 2 Mood and M.'s N. P. C. 10; and the report by Mr. Paley from his own notes, in Paley, by Lloyd, pp. 227-9. Slight suspicion, his Lordship said, would not be enough; but he left to the jury the question, in the absence of evidence of direct notice, whether the circumstances were such that a reasonable man, and a man of business, applying his understanding to them, would know that the agent had not authority. Still it must be remembered that Lord Tenterden's views on this subject, in connection with the taking of bills in the course of business, have been materially modified. See *Goodman v Harvey*, 1836, 4 Ad. and Ellis 870; *Raphael v Bank of England*, 1855, 25 L. J. 33, and cases there. The incidence of the principle is, however, not the same in a case as to the transference of moveables, and the transference of a document *ex sua natura* negotiable.

Although the Factors Acts were pleaded in *Smith v M'Ewen*

in H. L. (6 S. Bell, 340), and in *Pochin v Robinow* (1869, 7 Macph. 622), the Court avoided the question whether they applied to Scotland, but from the terms of sec. 7 of the Act 6 Geo. iv. c. 94 it appears that they do; and Mr. Brodie (App. Stair, 896) expresses an opinion that they are general statutes, and have considerably modified the Scotch law on the subject with which they deal. If the English judges are right in the view that the effect of these statutes is not to interfere with the ordinary question of apparent ownership, but to create a special authority in the particular kind of agents for sale referred to in the Acts, they may very well apply to Scotland, to the effect of investing such agents with the statutory power, and still leave a large number of cases, relative to the dealing of agents with their principals' property, to the operation of our common law. The case of the transfer of negotiable securities or instruments, in which the property passes by the delivery alone, such as navy bills or bills endorsed in blank, depends on the principle that the title of a *bona fide* holder is derived from the instrument itself, and not from the title of the person he received it from; and therefore the only question is as to the honesty of the transaction on the part of the person receiving. (Paley, by Lloyd, p. 233; *Goldsmid v Gaden*, 1 Bos. and Pull. 649; *Collins v Martin*, 1 B. and P. 649; *Beauchamp v Parry*, 1 B. and Ad. 89; *Peacock v Rhodes*, Doug. 633.) In the case of *Mitchell v Burnett* and *Mowatt*, referred to by Mr. Bell, it is clear from Kilkerran's report that the Court went greatly, in sustaining the relevancy of the alleged impignorator by the agent, upon the consideration that, although at common law a man's property can only be affected by his own deed, and that the presumption of property from possession *cedit veritati*; yet the expediency of trade and commerce requires that, wherever any person is *vested in the nominal property by a bill of lading*, third parties contracting with him as proprietor, whether by sale or pledge, should be safe. The Court, in short, went on the ground that the property passed by the bill of lading,—a doctrine now exploded, so far at least as concerns any question not arising in precise terms of the Factors Acts, by the doctrine laid down by Lord Campbell in *Gurney v Behrend* (3 E. and B. 622, 23 L. J. Q. B. 265), and by Lord Loughborough in *Lickbarrow v Mason*. See *ante*, note 2, p. 214. But observe, that in any question under the Factors Acts, there appears to be some reason for thinking that bills of lading, as well as dock-warrants, warehouse-keepers' certificates, warrants or orders for delivery of goods, were intended to be dealt with by the Legislature in a character different from that in which the common law regards them, viz. as documents of title, *i.e.* documents the title represented by which is derived from the instrument itself, and not from the title of the person the holder received it from. See, on the apparent conflict between the common law and statutory conception of these documents, and of their operation and effect, Benjamin on Sale, 607-624. Perhaps, however, the meaning of the statute of Victoria, sec. 4,

which give birth to many interesting difficulties in the law of mandate. Without entering into these subtleties, it may be observed that no question of this sort, practically considered, can be settled on its true principles without recollecting that there are three parties concerned—the principal, the factor, and the public; the interests arising to the public under delegated authorities giving birth to many exceptions to the ordinary rules, by which the authority of the factor as in a question with the principal is regulated.

The general rules are, that the power expires, 1. By death; 2. By recall; 3. By renunciation.¹ But the dealings of a commercial people do not present themselves in forms so simple, that general rules of this sort can always be usefully applied. The factor has begun operations before his death, or the principal dies after important contracts have been set in motion by the factor. The death of either happens in a foreign country, and is long unknown to the other; or the mercantile world, trusting to the arrangement which has been formed, have proceeded in good faith with transactions after the factor's powers have secretly expired. It is for the decision of cases of this complicated description that courts of law are resorted to; and digests of jurisprudence are defective where they do not supply rules on which such cases may be determined. It may be useful, in this view, to distinguish some of the more prominent cases.

The first case to be distinguished is that of general mandate, *præpositura*, or institorial power. Under a power such as is occasionally conferred in this way,² the trade is managed, and the acts of the procurator relied on. To the recall of such a power two things are necessary: 1. The will or intention to recall; and, 2. Special notice or general notoriety.

1. DEATH is held to be a recall of such a power, sufficiently answering both requisites. Either it is, according to one hypothesis, the intended termination of the authority; or, accord-

is that these documents are merely, in questions under the Act, to raise a presumption of title 'unless the contrary be shown in evidence,' which would bring the view of their operation taken by the statutes near to that taken by the Court of Common Pleas in *Dracacchi v Anglo-Egyptian Navigation Co.* (L. R., 3 C. P. 190, 37 L. J. C. P.). In questions not under the Factors Acts, the law laid down in *Gurney v Behrend* will rule, *i.e.* that the mere possession of an endorsed bill of lading can confer no greater right to the goods than the endorser himself had, and intended to convey. Apart from these Acts, it should seem that the mere possession by a factor of his principal's goods creates no ostensible ownership (note 3, p. 506 *ante*); nor will the possession by him of documents relating to the goods, such as a delivery order in his favour to enable him to get possession, be of any higher force than mere possession itself; unless the document were one which in law carried title with it, like a bank-note, if there be any such document relating to chattels known to the law, *i.e.* any document having the effect which was erroneously ascribed to a bill of lading in *Mitchell v Burnett's* case. It seems that unless the case is within the Factors Acts, or unless the agent hold some document such as is supposed, the question between the owner and a *bona fide* vendee or pledgee, receiving the goods from an agent with no authority to sell or pledge, must come to be decided not on any loose notions of commercial expediency, but on the strict rules of the law of estoppel, already explained (p. 305, note 2, and p. 511, note, *ante*). See *Swan v N. B. Australasian Co.*, 32 L. J. Ex. 273, 2 H. and C. 175. Where the document held by the agent is merely a delivery order, or document enabling him to obtain possession, but contains no representation by the principal that such possession is intended to complete a right of property, arising

in virtue of some antecedent transaction between him and the person holding the document, it seems to be clear that a pledgee, trusting to the agent's representations that such is the purpose for which he holds it, is misled by his own misplaced confidence in the veracity of the agent, or by some mistake as to the legal effect of the document, as of itself creating more than a right to receive physical possession of the goods. But there is no misrepresentation there on the principal's part which should create an estoppel against the principal's pleading that there was no such intention; and to hold that there was such estoppel, would merely be to hold that the agent's fraud or the pledgee's ignorance could convert what the law holds to be a mere document of possession, into what the law holds it not to be—a negotiable document of title. (See *Baring v Corrie*, 2 B. and Ald. 137; *Baines v Euing*—per Bramwell, B.—35 L. J. Ex. 194; *Barber v Meyerstein*—per Lord Chancellor—4 L. R. H. L. 317; and *M'Ewan v Smith*, 6 S. B. 340, 352—per Lord Cottenham, C.) Certainly the basis on which the author places the security of the pledgee—viz. public expediency, favour to commerce, and the presumption of property arising from possession all combined—is not satisfactory in point of legal principle; nor do all or any of these elements afford a practical criterion by which cases can be decided, unless every case is to be decided in favour of the pledgee, which is the logical but inequitable result to which this application of the presumption from possession would lead.]

¹ Potissimæ causæ ex quibus mandatum solvitur hæ sunt: mors mandatorii; mors mandatoris; si mandator revocaverit mandatum; si mandatarius mandato renunciaverit. Pothier, Pand. Justin. vol. i. p. 473.

² See above, p. 508 et seq.

ing to the other, the cessation of that will, the continuance of which is necessary to the existence of the factor's power; while on either supposition the event is or is supposed to be notorious. But exceptions are admitted where the death is unknown, and the authority in the meanwhile is in action, and relied on.¹

2. BANKRUPTCY is a revocation of such powers, as of all delegated authority, by which the principal may be bound or his property altered; and it also is notorious. But where a factor holds a power to sell, and has made advances on the consignment or goods in his hands, the bankruptcy of the principal is not a recall of the mandate: the factor is [489] still entitled to sell for his indemnification.²

3. INSANITY is not an implied natural termination to a mandate; nor is there an existing will to recall the former appointment; nor is the act notorious by which the public may be aware of such failure of capacity. It was to this interesting question chiefly that the metaphysical discussion already alluded to was applied; but the strong practical ground of good sense on which the question was disposed of, as relative to the public, was that insanity, considered as terminating the agent's authority, is contradistinguished from death by the want of notoriety; that all general delegations of power on which a credit is once raised with the trading world, subsist in force to bind the granter till recalled by some public act or individual notice; and that while they continue in uninterrupted operation relied on by the public, they are in law to be held as available generally, leaving particular cases to be distinguished by special circumstances of *mala fides*.³ The question does not appear to have occurred in England; but the opinion of very eminent English counsel was taken on the case which was tried in Scotland, and they held the acts of the procurator to be effectual to the public against the estate of the person by whom the procuratory was granted.⁴

EXPRESS REVOCATION will not be available in such a case, unless it be publicly made known.⁵ But it may be difficult to establish such publication. Perhaps the analogy of the publication necessary in the dissolution of partnership would be followed; namely, special notice or circular letters to the customers, and advertisement to the world at large.

1. Where the authority has reference to a particular occasion (as proceeding on a narrative of the granter's absence or indisposition), the natural expiration of the power is on the return of the granter or his reconvalescence. But the credit attached to general powers, when once raised, may be continued by mere permission, while the exercise of the authority is unchecked.⁶

2. The next case is that of a common mercantile factor. Express or tacit revocation

¹ Instit. lib. 3, tit. 27, sec. 10, De Mand.; Ersk. iii. 3. 41; dictum of Mr. Justice Buller in *Salt v Field*, 5 Term. Rep. 215; Pothier, Tr. des Oblig. No. 448, vol. i. p. 231. See also Pand. Justin. vol. i. p. 406; and Tr. du Cont. de Mandat. No. 109, vol. ii. p. 892.

A factor for one in the West Indies was held entitled to act (and his acts were accordingly sustained) until he received authentic information of the death of his principal. *Campbell v Anderson*, 1826, 5 S. 86, N. E. 80. [*Kennedy v Kennedy*, 1843, 6 D. 40.]

² *Broughton v Stewart, Primrose, & Co.*, 17 Dec. 1814.

³ *Pollock v Paterson*, 10 Dec. 1811, 16 Fac. Coll. 369. The case in which this question occurred to be tried was compromised, after the first decision given on the question. The opinions of the judges are peculiarly worthy of perusal; not being confined to the narrow state of the question as it occurred technically, but extending to a large and comprehensive discussion of the general question as to the effect of insanity on such powers. [*Wink v Mortimer*, 1849, 11 D. 995.]

⁴ After stating the terms of the procuration, and that after the insanity of the granter the procurator had continued to carry on the business of a banker for the principal, the question put was: 'Whether, in these circumstances, the transactions of Mr. John Paterson, under his father's procuration, are good to those who transacted with him from the date of it to the period of stopping.' The answer by Sir Vicary Gibbs (afterwards Lord Chief Justice of the Common Pleas), Sir Samuel Romilly, and Mr. Adam (now Lord Chief Commissioner of the Scottish Jury Court), was, 'We think they are good.'

⁵ Pothier says: 'Les préposés obligent leurs commettants tant que leur commission dure; et elle est toujours censée durer jusqu'à ce qu'ils aient été révoqués, et que la révocation ait été connue dans le public.' Tr. des Oblig. No. 448, vol. i. p. 231.

⁶ In the above case of *Paterson*, the procuration proceeded on the propriety of appointing one 'to act for the granter at any time when absent.'

by act of the principal, or by death, bankruptcy, or insanity, will have no effect either to deprive the factor of the benefit of his authority in extricating himself from transactions already begun, or from the consequences of his having acted; or to deprive others who have relied on his powers of the benefit of the transactions on which they have previously entered with him; or even to disturb transactions entered into, while he still appeared to hold his authority undiminished.

[490] 3. Limited mandates for doing a special act expire by performance of the act, or by death or revocation, and are not, like general powers, capable of extension by mere inference and *bona fides*.¹

SUBSECTION II.—CLAIMS UNDER THE CONTRACT OF COMMISSION OR MERCANTILE AGENCY.

Under the contract of mandate or mercantile agency, various claims may arise on a sudden disorder in the affairs of the several parties. These may be either on occasion of the bankruptcy of the principal, or on the bankruptcy of the factor or agent.

I.—CLAIMS ON THE BANKRUPTCY OF THE PRINCIPAL.

Two classes of cases may arise on occasion of the bankruptcy of the principal: one, of cases involving the rights of the principal, now vested in his creditors, as in relation to the party with whom the factor has entered into contracts; and another, comprehending the claims which may competently be made against the principal's estate.

1. *Claims by the Creditors or Bankrupt Estate of the Principal.*

To the creditors or estate of the principal, claims may arise against third parties, or against the factor.²

¹ [The doctrines of the English law with regard to the absolute expiry of mandate by the death of the mandant, whether known or unknown to the mandatory and those dealing with him in the belief of the continued subsistence of the mandate, appear to be so strict and rigid, that little illustration can be drawn from them in aid of a jurisprudence founded like our own on the more equitable doctrines of the civil law. In *Smout v Ilberry*, 10 M. and W. 1, it was held that the authority which a married woman has, in the absence of her husband, to pledge his credit for necessities supplied to her, is revoked by his death, so that his executors are not liable for such necessities supplied to her on the husband's credit after the death, although before notice of it had been received. Nor is the wife herself liable in such case, because she contracted merely as agent, and did not pledge her own credit. See *Campanari v Woodburn*, 24 L. J. C. P. 13; *Tasker v Shepherd*, 30 L. J. Ex. 207; *Watson v King*, 4 Camp. 272; and cases cited in *Smart v Sandars*, 5 C. B. 895, 917, note (a). In America, the influence of the civil law, and of our own, has apparently enlarged the views of the courts on this subject. See Story, sec. 488, note; Livermore, ii. 310; Parsons' Contr. i. 71, notes and cases. With regard to the right of a factor to sell for his own indemnification, either on the bankruptcy of his principal, or in the event of the principal revoking the agency without settling the claims of the agent against him, see Story, secs. 74, 371, 477; Parsons' Contr. i. 70, 98. The case of *Smart v Sandars*, 5 C. B. 895, where it was held by the English judges that a factor's autho-

riety to sell is revocable at the will of the consignor, notwithstanding advances to the full value, and a request for payment uncomplished with, is contrary to the course of American decision on the subject, as well as contrary to the principles of the civil law, and our own, and apparently also to natural justice (Story, secs. 466-8, sec. 424). But see *De Comas v Probst*, 2 Moore P. C. C. N. S. 158, where it was held that mere advances by a factor, whether at the time employed as such or subsequently, cannot have the effect of altering the revocable nature of an authority to sell, unless the advances are accompanied by an agreement—the existence of which, however, may be inferred from the circumstances—that the authority shall not be revocable. As to revocation by the principal's insanity, see Kent, Comm. ii. 645; Parsons, Contr. i. 71, notes.]

² [As to the Rights of the Principal on the Agent's Contracts against Third Parties.—Where an agent contracts, whether in his own name or the principal's, the principal, as the party having the ultimate interest, and liable to implement the contract, is also in the general case entitled, as against the third party, to all the advantages and benefits of the contract. Where it is made in his name, he is the only person who can sue thereon. (Story, Agency, sec. 419.) But in suing, even in this case, he is not only bound by the terms of the contract itself as made with the agent, but also—*ad civilem effectum*—by all the consequences of any false and fraudulent representations held out by the agent to the third party as inducements to enter into the contract. Where the agent has acted

I. CLAIM AGAINST THIRD PARTIES.—The creditors of the principal are entitled, against the party with whom the factor has contracted, to demand performance of the contract, but under certain qualifications. Thus, 1. Where the factor has acted in his own name, and has

as if he were the sole party concerned, the principal is entitled at any time to step in and supersede the agency by disclosing himself as principal, and suing on the contract; but in this case he will be liable to all the pleas the third party would have had against the agent, supposing the agent to have been the real principal. (*Sims v Bond*, 5 B. and Ad. 393; *George v Claggett*, 7 T. R. 359; *Warner v Mackay*, 1 M. and W. 591; *Skinner v Stocks*, 4 B. and Ald. 437; *Cothay v Fennell*, 10 B. and C. 671; *Garrett v Handley*, 4 B. and C. 664.) Although the contract is in the name of the agent alone, and in writing, parole or other extrinsic evidence is admissible to show that he contracted, in reality, not for his own behoof but as agent only, and that either at the instance of the principal, to the effect of giving the benefit of the contract to the unnamed principal, or at the instance of the third party, in order to show that the contract was really made with the principal, who has chosen to describe himself by the name of his agent, just as it would be admissible to show his identity if he had used a feigned name; for neither of these things is to contradict the written agreement, but to apply it. (*Higgins v Senior*, 8 M. and W. 834-44; *Trueman v Loder*, 11 A. and E. 589; *Beckham v Drake*, 2 H. L. C. 579, 9 M. and W. 79.) The cases of bills of exchange, and in England of contracts under seal, are exceptions (per Parke, B., in *Beckham v Drake*, 9 M. and W. 79, 96; *Siffkin v Walker*, 2 Camp. 308; *Emly v Lye*, 15 East 7; *Bottomley v Fisher*, 31 L. J. 417): for if a person uses his own name as a party upon such instruments, though in reality he is acting for a principal, the liability is exclusively his; and the principal cannot either be charged, nor can he sue on the instrument. But where an agent signs a contract in his own name, without mentioning his principal, it is not competent for the agent to introduce parole proof to show that he did not intend to bind himself. (*Higgins v Senior*, *supra*; and see Smith's L. C. vol. ii. 349, in notes to *Thomson v Davenport*.) The right of an unnamed principal to intervene and claim the benefit of the contract made by his agent is subject to the condition that the other party to the contract is not prejudiced thereby. Thus, if an agent entrusted by the owner with the possession of goods for sale, sells them in his own name or as his own, and the buyer does not know that he is an agent in the transaction, though the principal may intervene and sue the buyer for the price, the buyer may set off in such action, against the demand of the principal, any debts previously due by the agent on his own account to the buyer himself. (*Raboné v Williams*, 7 T. R. 360 (a); *Stracey v Deey*, *ibid.* 361 (c); *George v Claggett*, *ibid.* 359; *Carr v Hinchliff*, 4 B. and C. 547; *Purchell v Salter*, 1 Q. B. 197.) But such set-off will not be allowed if the buyer knows at the time of the sale that the person selling to him is an agent, though he may not know who the principal is. (*Moore v Clementson*, 2 Camp. 22; *Baring v Corrie*, 2 B. and Ald. 137; *Fish v Kempton*, 7 C. B. 687; *Ferrand v Bischoffsheim*, 27 L. J. C. P. 302; *Semenza v Brinsley*, 34 L. J. C. P. 161; *Dresser v Norwood*, 32 L. J. C. P. 201, 34 *ibid.* 48.) Nay, if the buyer had the means of knowing, though not expressly told, and must be supposed to have known, that the party dealt with was only an agent for some one or other, he

will not be allowed to plead a set-off against the principal upon his own personal claims against the agent. (*Ibid.*; Smith, L. C. vol. ii. in notes to *George v Claggett*.) In *Dresser v Norwood*, *supra*, where the plaintiff sold through an agent, and the buyer also bought through an agent, and the purchasing agent knew that the goods were not the property of the person immediately selling them, this knowledge on the part of the purchasing agent was held to be knowledge on the part of his principal, so as to disentitle the latter to a set-off against the plaintiff of a debt due by the plaintiff's agent personally. In order that the buyer may succeed in establishing a plea of set-off against the principal on a debt due to the buyer by the agent personally, it must be shown, (1) that the contract was made with a person whom the principal has entrusted with the possession of the goods; for, generally speaking, and apart from special powers given, or implied by previous dealings, or by usage of the particular trade, an agent who has not possession has not authority to sell in his own name; and though he should do so, the principal will have the same rights and remedies against the purchaser as if his name had been disclosed by the agent, inasmuch as in selling in his own name he exceeded his proper authority (*Baring v Corrie*, 2 B. and Ald. 137; *Story*, Agency, sec. 28, sec. 88): or, (2) that the agent has sold the goods as his own, and in his own name as principal, by the authority of the principal: (3) that the defendant dealt with him as, and believed him to be, the principal: and (4) that before the defendant was undeceived in that respect, the right of set-off accrued (Smith, L. C. vol. ii. p. 117, 6th ed.). The right of the principal to intervene and claim the benefit of the contract made by the agent, may be excluded by the terms or circumstances of the contract expressly restricting the title under it to the actual party making it; as, where one of several partners making a contract in his individual capacity, but really for the firm, declared that he alone was interested in it, it was held that the other partners could not join in an action on such contract, though they might be jointly interested. (*Lucas v De la Cour*, 1 M. and S. 249.) So also where the third party contracts with reference to the known personal capabilities or character of the agent appearing as principal. (*Robson v Drummond*, 2 B. and Ad. 303.) See also *Humble v Hunter*, 12 Q. B. 310, and per Pattison, J., 316. It is said by *Story* (Agency, sec. 423), that wherever an exclusive credit is given by the third party to the agent, the principal cannot be considered a party to the contract, or entitled to sue on it. But the authorities he refers to do not bear out the proposition, and it seems to be very questionable in point of principle as a matter of Scotch law. The principal is entitled, according to the plainest principles of the civil law, to demand from his agent a cession of all rights of action which he has in the execution of his mandate acquired (*Poth. Mand. No. 60*, L. 8, sec. 10, D. Mand.); and even if the third party has no claim against the principal by having renounced it or barred himself of it, the principal seems still entitled, without the formality of an assignation in this more than in any other case, to sue on the agent's contract made for his behoof, being of course liable, as any assignee would be, to the defendant's counter claims against the agent. It is not easy to see how

been relied on as principal, the third party cannot be deprived of the benefit of the securities which he could fairly contemplate as resulting from the contract. And so he may set off against the demand of the principal, for the price of goods sold by the factor, a debt due

the third party's election to abandon his claim against the principal, and to trust entirely to the credit of the agent, should, without the assent of the principal, involve an abandonment on the part of the principal of his rights against the third party, under a contract made for him and by his authority. The right of a principal against a third party will also be limited by payments already made at the time the principal makes his demand against the third party to the agent, provided the agent had authority to receive such payment, and it was made in such a way as to bind the principal, and that whether the agent has or has not paid over the money to the principal, and whether the existence of the principal was or was not known to the third party paying to the agent. All such payments are obligatory on the principal, and he must allow them in accounting with the third party. An authority in an agent to receive payment is not—apart from usage or other implications than those involved in the bare fact of his being deputed to receive it for the principal—an authority to receive it in any mode the agent may choose. He is ordinarily deemed entrusted with power to receive it in money only. (*Favenc v Bennet*, 11 East 38; *Blackburn v Scholes*, 2 Camp. 343; *Todd v Reid*, 4 B. and Ald. 210; *Russel v Bangley*, 4 B. and Ald. 395; *Bartlett v Pentland*, 10 B. and C. 760; *Scott v Irving*, 1 B. and Ad. 605; *Barker v Greenwood*, 2 Y. and Coll. 415; *Richardson v Anderson*, 1 Camp. 43; *Bousfield v Cresswell*, 2 Camp. 545; *Howard v Chapman*, 4 C. and P. 508; *Hudson v Grainger*, 5 B. and A. 27.) He cannot without special authority receive payment so as to bind the principal in any other way, as *e.g.* by receiving goods, for which he does not pay the party, but gives him instead a discharge of the debt belonging to his principal; or by setting off a debt due by himself to the principal's debtor against the sum due to the principal; or, if instead of actually receiving money from the third party, he discharge a debt due from him to the payer, and then give a receipt as for money paid to the principal. (*Todd v Reid*, *Russel v Bangley*, *Bartlett v Pentland*, and *Scott v Irving*, *supra*; *Cattell v Hindle*, 1 L. R. C. P. 186, 35 L. J. C. P. 161.) Nor can he take a note, or bill, or banker's check (*Ward v Evans*, 2 L. Raym. 930; *Thorold v Smith*, 11 Mod. 71, 87; *Sykes v Gill*, 5 M. and W. 645; *Williams v Evans*, 35 L. J. Q. B. 111), or other personal property. (Doct. and Stud. 286.) So, an agent authorized to sell for money cannot barter. (*Howard v Chapman*, 4 C. and P. 508; *Guerreiro v Peile*, 3 B. and Ald. 616.) In these cases, the debtor cannot in a question with the principal plead that he is discharged, and that the agent himself has become debtor to the principal. But if an insurance broker or other mercantile agent has been employed to receive money for another in the general course of his business, and where the known general course of business is for the agent to keep a running account with the principal, and to credit him in that account not only with sums he may have received in cash, but with sums which he may have received by credits in account between himself and the debtors with whom he also keeps running accounts; it must be understood that if one of these debtors' accounts is *bona fide* settled according to that known usage, the original debtor is discharged, and the agent becomes

the debtor according to the meaning and intention and with the authority of the principal. (*Stewart v Aberdein*—per Lord Abinger—4 M. and W. 228; and cases in Arnould on Insurance (MacLachlan's ed.), i. 183.) Whether such a mode of settlement, however customary between agent and debtor, be of any binding effect upon the principal, is a question of fact as to his assent to this kind of settlement, see *Sweeting v Pearce*, 30 L. J. C. P. 109, 113—per Bramwell, B.; and on Lord Abinger's *dicta* in *Stewart v Aberdein*, the observations of Judge Duer (Duer on Insurance, ii. 260-1). Again, if the principal, being indebted to the agent, authorize the agent to receive money due to him from the debtor, intending that the agent should thereout pay himself his own debt, he is held to authorize the agent impliedly, to the extent of that debt at least, to receive payment in any way he may think fit. An agent with an authority of that kind is only bound to receive payment in such a way as thereby to put it in his power completely to discharge the duty he owes to his principal. If, therefore, he is bound to pay the whole over to his principal, he must receive it in cash from the debtor; and a debtor who pays an agent, and who means to be safe, must see that the mode of payment does enable the agent to perform this his duty. If the agent be not creditor of the principal, he must receive the whole in cash; for otherwise he does not, by the act done between him and the debtor, put himself into the situation of being able to pay it over. See cases of *Todd*, *Russel*, *Bartlett*, *Scott*, *supra*. If the principal is debtor to the agent, and the principal intends, when he makes him his agent to receive, that he shall retain his own debt out of the sum received, his agent's only duty is to pay over to the principal the balance, after deducting his own debt. If he therefore receives in cash that balance, he is put in a position as completely to discharge his duty to the principal as if he received the whole in cash. It can make no difference to the principal whether the agent receive the whole and retain part, or receive only the balance, which he himself is entitled to receive in turn from the agent. A person, however, who does not take the ordinary and proper course of paying the whole in money, must take care to be able to prove that the agent is in this situation. If he pay by settlement on account or otherwise, he takes on himself the risk of being able to show the debt due by the principal to the agent, and the specific circumstances under which the agent was appointed to receive the money. (*Barker v Greenwood*—per Alderson, B.—2 Y. and C. 418.) The same reasoning ought to apply where the agent has a lien or right of retention over moneys coming into his hands on account of the principal, to the effect of entitling him to receive payment to the extent of his lien otherwise than in money. (*Barker v Greenwood*, *supra*; *Howard v Chapman*, 4 C. and P. 508; *Hudson v Granger*, 5 B. and A. 27; *Paley*, by Lloyd, 287, 326; *Drinkwater v Goodwin*, Cowp. 251.) The right of the debtor to pay to the agent to the extent of his lien holds even after notice, and after revocation of his agency. (Per Bayley, J., in *Hudson v Granger*, *supra*; Lloyd's *Paley*, pp. 287-8.) The debtor, however, by paying the factor after notice, takes on himself the proof of the factor's right to receive. (Cowp. 255, per Lord Mansfield.) Of

by the factor to himself.¹ 2. Where the contract is impeachable for fraud or concealment by the agent, the objection equally affects the principal. 3. Even where the bargain has been

course a payment to an agent, in whatever way it is made, will be valid against the principal where the debtor had no knowledge, at the time of payment, of any other person being a party to the contract. (Paley, p. 326.) Some doubts, however, appear now to exist in England as to the debtor's right to set off payments made to a factor where the factor was believed to have a right to sell, and has sold, to pay himself. (Warner v M'Kay, 1 M. and W. 595; Smart v Sandars, 5 C. B. 399; Fish v Knapton, 7 C. B. 694—per Creswell, J.) Where there is no lien or right in the agent, as the surrogatum of the lien, to pay himself out of the money received, the principal may intercept such payments by notice to the debtor not to pay; and if payment is made after that notice, when there is no lien or right to pay himself in the agent, it is not a valid payment as against the principal, and must be paid over again to him. (Mann v Forrester, 4 Camp. 60, Buller's N. P. 130, Strange 1182.) The factor having such lien or right should give the buyer or debtor notice thereof, and require him not to settle with the principal, otherwise a payment to the principal will operate as a discharge to the buyer. (Coppin v Walker, 2 Marsh. 497, 7 Taunt. 237; Williams v Millington, 1 H. Bl. 81; Robinson v Rutter, 4 E. and B. 954; Coppin v Craig, 7 Taunt. 243; Holmes v Tutton, 5 E. and B. 65.) But if the factor have such lien on the price for his balance, it entitles him to receive payment in preference to the principal, even though the purchaser is aware of the representative capacity in which the agent dealt. (Paley, p. 326.) It is sometimes said that the factor's or agent's standing *del credere* for the price entitles him to receive, and the debtor to pay him, even after interpellation by the principal (Paley, by Lloyd, *ib.*); but that is not law. The mistake arose from *Grove v Dubois*. See Mr. Lloyd's note, Paley, pp. 111-4. With regard to the two distinct questions—(1) the validity of payment by the debtor to the agent in face of a prohibition by the principal; and (2) the debtor's right to set off the agent's debt to him against the principal's claim,—observe that the former turns on the title of the agent to receive the money; and therefore, if such title exist, it is of no moment whether the agency was known to the debtor at the date of the contract, or not until the receipt of the interpellation. But the latter question turns not on the right of the agent, but of the debtor; and the debtor's right is built on the principle, that when the debtor has been led to contract under the impression that his contract is with one person, he cannot be deprived of the rights acquired as against that person by the introduction of a third to whom he was a stranger, and therefore this right cannot exist if he had notice of the agency at the time of the contract. Again, wherever the debtor pleads payment to the agent against the claim of the principal, he must show that the payment was made to the agent in the course of business, and that it was appropriated by the payer to the specific purpose of extinguishing the debt sued on. If a shopman, who is authorized to receive payment over the counter, receives the money elsewhere than in the shop, the payment is not good as against the master: for the master may be willing to trust the agent to receive money, in the regular course of his business in the shop, when under his own eye or the eyes of others in whom he

has confidence, or under the control of checks which he is satisfied are sufficient to regulate the shopman's fidelity; but he might not be willing to trust the agent with the receipt of money elsewhere. (*Kaye v Brett*—per Parke, B. —5 Ex. 274.) Authority to receive moneys in a particular branch of the principal's business will not imply authority to receive payments not connected with that branch. Thus a legacy to a tradesman, paid to a shopman who was in the habit of receiving daily payments, was held not sufficient payment to discharge the executor. (*Sanderson v Bell*, 2 C. and M. 313. See *Monk v Whittembury*, 2 Moo. and Ry. 81.)

The principal is entitled to sue *not only on the agent's contracts*; but he has right to recover his money or goods paid or wrongfully transferred by the agent, by an action against the third parties receiving them. He may do so though the agent has paid or transferred under a contract made in his own name, without mention of principal, when the consideration of the contract to come from the other party has failed: as, *e.g.*, if the agent has made a deposit on a contract concluded in his own name, the principal may sue for repetition of the deposit. (*D. of Norfolk v Worseley*, 1 Camp. 337; *Dalzell v Marr*, 1 Camp. 532; *Power v Butcher*, 10 B. and C. 329, Lloyd and Welby 115.) So where agent has paid through mistake of fact, or money has been illegally extorted from the agent in the course of his employment. (*Anchor v Bank of England*, Doug. 637; *Trentell v Barandon*, 8 Taunt. 100; *Sigourney v Lloyd*, 8 B. and C. 622, Dan. and Lloyd 132; *Lloyd v Sigourney*, 5 Bingh. 525; *Stevenson v Mortimer*, Cowp. 805, Roll. Abr. 98, Cro. Jac. 223, Cro. Car. 37. So where the principal's goods or money have gone, through fraud or imposition, either practised on the agent or participated in by the agent. (*Clark v Shee*, Cowp. 197; *Taylor v Plumer*, 3 M. and S. 562; *Bryson v Coles*, 6 M. and S. 14.) In the case of money or goods paid away by the agent for an illegal purpose, there will be a difference if he has done so as agent, but without authority, or has done so on his own account. In the former case the principal would be entitled to recover in any event; in the latter, only by identifying the goods as his in the receiver's hands: for any other *medium concludendi* would make him sue in the place of the agent, who, as *particeps criminis*, cannot sue. The principal cannot adopt the agent's right of repetition, but must follow his property by proceedings *in rem*, which will be successful only where the property is identifiable, unless the defendant be proved cognizant of the fact that the agent was dealing with the principal's property without authority. (Paley, Lloyd, pp. 337-9; Story, Agency, secs. 435-9.)]

¹ See above, p. 285. See also below, p. 537, and Of Compensation.

Moore v Clementson, 1809, 2 Camp. 24. It is not sufficient to alter this rule, that the factor or agent was known to act generally as an agent. Lord Ellenborough said: 'If the defendants had merely a general knowledge of this person being a factor, this, I think, would not be enough to deprive them of the privilege they derived from his actually selling these goods as a principal. A man who is in the habit of selling the goods of others, may likewise sell goods of his

made as with a factor, the principal's claim will be affected by the factor's lien for his general balance, or by the factor's right to recover from the third party under a *del credere* commission.¹

The creditors of the principal are entitled to recover from a third party to whom the agent has given over his goods, or paid his money, in the following cases: 1. Where the third party has the goods in temporary custody from the agent. But the demand will be subject to all legal liens where the name of the principal was not disclosed. 2. Where the goods have been delivered, or money paid, on such mistake, misrepresentation, concealment, or fraud, as would give the agent a remedy had he been the principal; there is *rei vindicatio* or *condictio indebiti* to the principal as the true owner. 3. Where the contract is with the agent, *factorio nomine*, but beyond the terms of his power.

[491] The estate of the principal has the full benefit of the delivery of goods to the agent, where he is not merely an intermediate agent to forward the goods, but the person in whose administration the goods are to be after delivery.²

II. CLAIMS AGAINST THE FACTOR.—The rights of the principal's estate against the factor are to recover all the property entrusted to him, and to have an account of all the proceeds, and of the result of the contracts which he has entered into, under deduction of the commission, and of any balance that may arise on the factor's transactions.

The responsibility of the agent is for ordinary diligence, according to the general rule already laid down. See above, p. 487. In applying this rule, the Court has pronounced two decisions, which may serve to illustrate it: 1. A gratuitous mandatory was found not responsible for theft, where extreme prudence and care might have prevented the loss.³ And, 2. A common mechanic was found not responsible for a short delay in effecting an insurance which he was desired to get done; whereas a broker would have been held to stand to the loss.⁴

own; and where he sells goods as a principal, with the sanction of the real owner, the purchaser, who is thus led to give him credit, shall on no account afterwards be deprived of his set-off by the intervention of any third person.'

See distinction in the case of brokers, p. 537.

¹ See as in the preceding note.

² See p. 215 et seq.

³ *Grierson v Muir*, 1802, Hume 329. This was in the case of a man who undertook gratuitously to carry a sum of money. The money, being £50, was delivered to him in Keltonhill fair, to be carried to Kirkcudbright, for the purpose of paying a bill there. Muir, who undertook it, put it in his pocket with some money of his own, and both were stolen or lost in the fair. Muir did not miss the money till he arrived at home, when he found his pocket cut. The Court held the circumstance of his having lost at the same time a sum belonging to himself, and a bill of £100, as, in all the circumstances of the case, sufficient proof of his not having been guilty of supine neglect.

⁴ *Kay v Simpson*, 16 Dec. 1801.

[As to the Claims by the Principal against the Agent.—Pothier, Mand. sec. 37, has classified the agent's duties to the principal under the threefold obligation: (1) To perform the business forming the subject of the mandate; (2) to bestow on it all the care it requires; (3) to render an account of his agency. As to responsibility of agents for neglect of duties undertaken, whether gratuitously or not, see Poth. Mand. sec. 38. Dig. Mand. l. 22, sec. 11; l. 5, sec. 1; l. 27, sec. 2. Cod. Mand. l. 11. Even a gratuitous mandatory is by the civil law responsible not only *pro his quæ gessit sed etiam pro his quæ gerenda suscepit* (Cod. *supra*). This is also the law of

England to a certain extent (*Coggs v Barnard*, 2 L. Raym. 909), on the ground that when the principal has entrusted a gratuitous agent upon his undertaking to be careful, and the undertaking has commenced, the agent puts a fraud upon the principal by being negligent. See *Wallace v Telfair*, 2 T. R. 188, note; *Wilkinson v Coverdale*, 1 Esp. 75; *Seller v Work*, N. P. 1801, Marsh. Insurance 299. In England no action will lie against a gratuitous promiser for non-performance, even though damage result from reliance on the performance promised; but if the agency be undertaken, and be begun to be proceeded in, and afterwards by negligence nothing be done, or the business be misdone, action lies. And by the custom of merchants, if an agent undertakes an order to insure, he is bound to perform it at his peril (*Livermore i. pp. 310–23*, and cases). In Scotland no such distinction is taken, as a consideration is not necessary to support an obligation. As to the degree of responsibility incumbent on gratuitous agents in England for misperformance, see *Livermore i. 337, 352*. The civil law made no distinction between gratuitous and paid agents, the rule in both cases being, *spondent diligentiam et industriam negotio gerendo parem*, and there being a difference in this respect between gratuitous agents and other gratuitous obligors. (Poth. Mand. secs. 46–9.) The laws both of England and Scotland are less exigent. *Stair i. 12. 10*; *Ersk. iii. 3. 36*; *Livermore i. 340*. An ordinary (gratuitous) mandatory is not liable to an action if he act *bona fide*, and to the best of his ability. But by both laws, where a person professes himself to be of a certain business, trade, or profession, and undertakes, though gratuitously, to perform an act which relates to his particular employment, there competent skill will be imputed to him

2. Claims against the Estate of the Principal.

The estate of the principal is liable to claims by the factor, and to claims by third parties.

on the principle *spondet peritiam artis*, and any omission to use such skill will be imputed to him as a fraud on his employer. (*Sheills v Blackburn*, 1 H. Bl. 158; *Hay v Simpson*, 16 Dec. 1801, Hume.) When a gratuitous agent makes no profession as to the subject of the agency, the only way to render him responsible is to prove that he really did possess the requisite skill, yet failed to use it. (Brodie, note to *Stair*, p. 130.) The diligence prestable by a paid agent is by our law, as we have said, beyond that required from a gratuitous agent. Where a profession is made of special skill, the agent's liability in relation to such matters is properly construed with increased rigour. *Imperitia culpæ annumeratur*. Dig. l. 17. 132. *Spondet peritiam artis*. *Spondet diligentiam gerendo negotio parem*. But this is not to be taken absolutely, but relatively to the *peritia* belonging to others of common capacity in the trade or profession—the ordinary skill possessed by people in that trade or profession. (Story, Ag. secs. 183–4.) Where particular instructions are given as to the mode of action, the agent is bound to execute them *in forma specifica*; and where no particular instructions are given, the usage of trade will form an implied instruction, and so will the regular and settled mode of dealing between the two parties. It is the primary obligation of the agent, as a general rule, to adhere to these expressed or clearly implied instructions in all cases, except those in which extreme necessity and unforeseen emergencies compel him to depart from them. Any deviation not so justified will involve responsibility for all the loss resulting, and it will be no defence to the agent that he intended a benefit to the principal. The principal knows his own mind better than the agent. And if the agent, by such deviation, obtain an advantage or make a profit, he will not be allowed to retain it, but must account to the principal for the whole, though he bore the risk of failure. (Paley iv. 5. 199; *Catlin v Bell*, 4 Camp. 184; *Russell v Palmer*, 2 Wils. 325; *Sheills v Blackburn*, *supra*; Story, Ag. secs. 193–4; 1 *Livermore* 368 et seq.) But though every excess of authority is at the risk of the agent, the principal, by taking the benefit of the act, discharges the agent and embraces the risk himself. (Paley, *ib.*) The agent's responsibility is not confined to the loss of his commission, but extends to the damage suffered by the principal either by direct injury occasioned to his own property, or by his being rendered liable to others in reparation. The damage must be real, and not supposed or probable merely. Therefore, if an agent neglect his instructions, but can show that the act, if performed, would not have entitled his principal to any legal benefit, he will not be liable, though there was a probability that the benefit to arise from the act would, though not legally exigible, have been almost certainly conceded to the principal as matter of favour, or custom, or honour. (*Webster v De Tastet*, 7 T. R. 157. But see the American case of *De Tastet v Crousillat* (note to *Condy's Marshall on Insur.* p. 301; and *Livermore* i. p. 386), with Mr. *Livermore's* observations (*ib.*)). Nor is the agent chargeable with breach of instructions, if the compliance would have been a fraud upon others. (Paley 8–10.) That is a branch of a general law that no contract between A and B to work to the fraud of C is maintainable. The agent

may, in answer to a claim of damages, set up and show any ground which would certainly have prevented the principal from receiving benefit, though the agent had performed his duty, *i.e.* which must have prevented him, and not merely might have done so. Thus, if a ship, of which the insurance has been neglected, has in the course of her voyage deviated so that an insurance, if effected, would have been void, or if the voyage to have been insured was illegal, or if the principal had no insurable interest, that will be a good defence to the agent. (*Delaney v Stoddart*, 1 T. R. 22; *Fourin v Oswell*, 3 Camp. 359, the authority of which on this point is not touched by *Glaser v Cowie*, 1 M. and S. 52; *Bryan v Lewis*, 1 Ry. and Mood. 386, overruled, but not on this point, by *Hibblewhite v M'Morine*, 6 M. and W. 202; *Alsop v Coit*, 12 Mass. Rpts. (Amer.) 40, cited 2 *Duer Ins.* 325, 2 *Phillip's Ins. No.* 1904; *Miner v Taggart* (Amer.), cited *ib.*; *Story*, Ag. 222.)

The general rule in regard to damage is *causa proxima non remota spectatur*: the damage must, in the ordinary case of contract, be the direct, immediate, and foreseen consequence of the act; but the damage chargeable against an agent for breach or neglect of duty or instructions is not measured by this rule. It forms an exception to the general rule. (Story, sec. 200, note.) Although the immediate loss be not occasioned by the agent's fault as its immediate cause, yet if the loss be such as would not have occurred but through the previous fault, the agent will be answerable for the loss. Whatever be the immediate cause of the loss, if it be shown that but for the agent's fault the principal's property would not have been in a situation where the loss which has befallen would have lighted upon it, the agent will be answerable. (*Caffrey v Darby*, 6 Vesey 496; *Davis v Garrett*, 6 Bingh. 716; *Massey v Banner*, 1 Jac. and W. 241, 4 Madd. 413; *Paley*, by Lloyd, 10, 17; *Barker v James*, 4 Camp. 112; *Dale v Hill*, 1 Wils. 281; *May v Roberts*, 12 East 89; *Harle v Ogilvie*, 1749, M. 10095; 3 *Chitty*, Comm. and Manuf. c. 3, p. 215; *Wren v Kirlen*, 11 Vesey 378; *Knight v Lord Plymouth*, 3 Atk. 480.) But there is no principle for extending the responsibility of an agent deviating from his orders, or committing a breach of duty, so far as to make him responsible thereafter for all hazards. Thus Lord Glenlee, in *Johnston and Sharp v Baillie*, 2 June 1815, F. C., says: 'I have great doubt whether, when a party has failed in an essential part of his duty, it is competent for him in any case to come forward and say that the same thing would have happened if he had done otherwise.' Certainly the agent failing to give notice to enable the principal to insure, is not entitled to say the principal would not have insured; for he cannot prove that: it is mere speculation. The receipt of the notice and the concurrence of other events might have suggested the propriety of insuring; but it is too broad to put it as a general rule, that he shall not be allowed to prove, if he can, that the same thing would have happened: that is to make him run all hazards, whether in any way connected with his fault or not. See Bankt. i. 18. 13; *Hay v Gray*, 1675, M. 10083; *Young v Finlay*, 1716, M. 10088. The supervening loss must in some way be connected with the fault, either as creating the loss as a cause, or determining the incidence of some

I. CLAIMS BY THE FACTOR.—The FACTOR or AGENT having no goods in his possession,

other cause of loss. If a principal direct an agent to pack his goods in a particular kind of case for exportation, and the vessel is captured by pirates, the agent would not be responsible because he had not packed the goods in the kind of case ordered. The use of this, or want of the other case in no way contributes to the loss, or occasions the goods coming in the enemy's way. See also Poth. Vente, No. 58; Stair i. 17. 14; i. 13. 2. 2. But in regard to the agent's liability for damage through his fault, although in charging his fault as the cause or occasion of a loss which happens he may go beyond the *causa proxima* of that loss, yet it is the immediate loss itself he is liable for, not remote or consequential loss arising out of this. (Story, sec. 221, and cases.) Except in the way above mentioned, where his fault has been the occasion of a fortuitous event or accident, or *vis major* falling on the goods, an agent is never liable for such events or casualties (Poth. Mand. No. 50, l. 13, C. Mand.; Stair i. 13. 2), unless he has—as he may do—expressly charged himself with them. (Poth. *ibid.* l. 39, D. Mand.) But, on the other hand, he may stipulate that he undertakes no responsibility for fault or negligence in the discharge of his mandate; but even such a stipulation will not protect him if he fails in good faith, for no man can stipulate *ne dolus præstetur* (l. 27, sec. 3, D. de Pact.).

Another great head of the agent's duties is that of keeping an exact account of his doings, and particularly of all pecuniary transactions (Poth. *supra*; Parsons' El. M. L. 175; Story, Agency, sec. 203). The principles of an accounting between principal and agent are detailed at some length by Pothier (Mand. Nos. 51–57). The agent is bound to *debit or charge himself* in the account with all sums and other things which have come to his hands in his agency. If by his own fault he has let any of them be lost or perish, he must charge himself in place of these with the sum at which the damage resulting from their loss may be estimated. If by his fault they have become deteriorated to such an extent that they are no longer receivable by the principal, the agent must treat them as if entirely lost by his fault, and charge the damage accordingly, reserving the things to himself on his own account. He must place to his debit not only what he has received, but what ought to have come to his hands, but through his fault has not, and also the damage to the principal accruing from the fact that such things have not come to his hands. In charging the receipt of proceeds of goods sold, he is not merely bound to charge the price received, though it be that prescribed to him; but the higher price he might have sold for, if it can be shown he could have sold for more to a responsible party: for in every mandate to buy, though for a specified price, there must be understood 'or for less if possible,' and in every mandate to sell for a certain sum, 'or for more if possible,' unless, as sometimes happens, it be agreed that the agent is to keep the more or the less to himself in room of or addition to his commission. He must charge himself with the fruits and profits which he draws from the things which have come to his hands, and even with those which he ought by ordinary diligence and in the usual way of business to have drawn, but which he has by his fault not drawn. He is also chargeable with the value of fruits and profits which he ought to have drawn from sums and goods which by his fault have failed to come to his hands, at least in so far as the

value of such fruits and profits is not comprised in the estimate of damage resulting from his fault through which these sums or things have not come to his hands. Finally, he is bound to charge himself the sum at which the deterioration, caused by faults of his own to his principal's goods, should be estimated. It has been questioned whether an agent can pretend that what he owes for loss or damage through his fault should be compensated by extraordinary advantages and profits which his care and ability have procured in other items within his agency. The Roman law decided not, in the case of *socii* (D. xvii. 2. 25 and 26), and the principle holds in agency.

Yet there may be many cases where something like an equalizing of excess and defect takes place. In *Cornwall v Wilson*, 1 Ves. jun. 509, where a factor exceeded his limited price in the purchase of hemp by a small difference, and at the same time made a greater saving in the freight by contracting at the time he did, instead of waiting for a fall in hemp, Lord Hardwicke thought that as the price of freight was rising more than the price of hemp was falling, the factor had a right to take advantage of the low freight. See, however, Livermore, i. p. 391, who refers to Poth. Mand. No. 52. There is a somewhat similar case in l. 11 D. de Usuris. On the *credit or discharge* side of the account the agent will be entitled to place all his disbursements in execution of the mandate, so far as they were proper and *à propos* of the mandate; so far as not so, they will be rejected or reduced. As to the liberality with which an agent is to be dealt with in regard to travelling and personal expenses in journeys connected with the agency, see Poth. No. 54. It is the difference between the two sides of the account, or rather the amount by which the charge exceeds the discharge, that forms the amount due to the principal. The balance only is the debt; and on the principal's bankruptcy, the balance only can be claimed by the assignees even in England: and it is held there, and *à fortiori* with us, that whatever an agent is entitled to deduct from the demand of his principal for advances or disbursements of any kind may be given in evidence in an action brought against the agent, without pleading it or giving notice of set-off. (Paley, by Lloyd, 124–6. *Dale v Sollett*, 4 Burr. 2133; Poth. Mand. Nos. 57–59.) The mandatory's *gestio* in execution of his mandate being performed for and in room and place of the mandant, all the proceeds arising in course of or from that *gestio* are received for and in room and place of the mandant; and therefore the agent is bound to render them all to the principal. *Ex mandato apud eum qui mandatum suscepit nihil remanere oportet* (L. 20 D. de Mand.). Nevertheless, since these are proceeds flowing from the agency, he is entitled to compensation and retention against these proceeds for all that he has disbursed for the agency, and he is only bound to restore the balance that remains after compensation is made. In fact, in regard to all that ought to appear on the different sides of an agent's accounts with his principal, there is an *ipso jure* compensation *quoad concurrentiam* (Poth. Mand. Nos. 57–8); and with regard to specific *corpora* which the agent has acquired in the course of his agency, he is bound to specific delivery of them to the principal (l. 8, sec. 10, D. Mand.), but only on the condition of the mandant reimbursing, before he parts with them, the expenditure and disbursements of the agency,

or money in his hands, due to his principal, for his security or indemnification, is entitled

till which the mandatory may retain *veluti quodam jure pignoris*.

All discounts, benefits, eases, etc. obtained by the agent in the course of the principal's business belong to the principal, and not to the agent; and where there was alleged a usage for agents to retain them, it was stigmatized as a usage of fraud and plunder. (Story, Agency, sec. 207; 3 Chitty, Comm. and Manuf. 216, 221; Diplock v Blackburn, 3 Camp. 43.) If a factor buy up goods for himself which he ought to buy as factor, and instead of charging commission take the profits on a resale by him to the principal, as if he were a merchant selling to his principal, it is a fraud, and he must account for the profits as belonging to the principal. Per Lord Thurlow in *East India Co. v Henchman*, 1 Ves. jun. 289. So *Massey v Davis*, 2 Vesey, p. 317, where an agent employed on a salary was held bound to account for the profit he had made by a clandestine sale of timber to his principal, on his (the agent's) own account, although a third person, who acted in the transaction and sold the timber in his own name, was copartner of the agent. It was held that even the copartner would have had to forfeit his profits if it could be shown that he knew the other to be acting in breach of his duty to his principal. An agent's failure to keep accounts is always suspicious; but irregularity in this respect is not a ground for saying that he shall make *no* demand against the principal. It will press him with difficulty in proving his claim; but if he can prove it by documents and proofs which the Court can receive, he must be paid. But his neglect to keep accounts will in equity affect his commission, according to the rule laid down by Lord Eldon, that a man standing in a relation imposing a duty to keep regular accounts cannot be permitted to make a demand for work and labour in that character, of which he has kept no account; and so a receiver who does not pass his accounts regularly is not allowed any poundage. (*White v Lady Lincoln*, 8 Ves. jun. 363; *Middle-ditch v Sharland*, 5 Ves. jun. 87; *Livermore* i. 434.)

As it is contrary to the duty of an agent not to keep the accounts of his principal's business clear and distinct; so, if he confound his principal's property with his own, the burthen of proof will be upon him to distinguish them; and he will be charged with the whole mixed mass as being the principal's, except what he can satisfactorily prove to be his own. (*Livermore* i. 443; *L. Chedworth v Edwards*, 8 Ves. jun. 46; *Lupton v Whyte*, 15 Ves. jun. 432; *Panton v Panton*, 15 Ves. jun. 440.) And on the same principle, he will be responsible for the payment of a bill or note which he takes payable to himself, unless this be authorized by the express allowance of the principal or the usage of trade (*Parsons' El. M. L. p. 141*). And if the agent deposit the principal's money in bank in his own name, and the banker fail, the agent stands the loss. (*Caffrey v Darby*, 6 Vesey 496; Story, Agency, sec. 208.) So it is the duty of the agent to keep the principal informed of his doings in the agency; and if by neglect of this the principal suffers loss through want of notice to protect himself, the agent is liable in indemnity. (*Johnston & Sharp v Baillie*, 2 June 1815, F. C.; Story, Agency, sec. 208; Paley, by Lloyd, 27.) In answer to a claim by the principal, the agent cannot as a general rule set up the adverse title of a third person to defeat the claim of the

principal against himself, nor dispute the title of his principal. An insurance broker effected a policy on ship in name of a partnership, and on a loss received the money: held answerable for it to the surviving partner, although the partnership had no legal title to the vessel, and the broker himself was, as mortgagee, sole registered owner. *Dixon v Hammond*, 2 B. and A. 310. See *Roberts v Ogilvy*, 9 Price 269; *Kieran v Sanders*, 6 Ad. and El. 515; *Nicholson v Knowles*, 5 Mad. 47; *Holl v Griffin*, 10 Bing. 246; *Harman v Anderson*, 2 Camp. 243; *Stonard v Donkin*, 2 Camp. 344; *Goslin v Birnie*, 7 Bing. 339; *White v Bartlett*, 9 Bing. 378; *Hawes v Watson*, 2 B. and C. 540; Paley, by Lloyd, 53, 80; Story on Bailments, sec. 110; Agency, 217. An agreement by an agent by a receipt granted to a third person to hold for that third person property belonging to his principal, amounts to a conversion of the property. (*Holbrook v Wight*, 24 Wendell R. (Amer.) 169; cited by Story, Agency, 217.) But the agent may found a defence of this kind on the principal's fraud or tort in getting the goods from the third person whose better title is set up. *Hardman v Wilcock*, 9 Bing. 382, note; *Taylor v Plumer*, 3 M. and S. 562; 2 Story, Equity Jurisp. sec. 317; *Sheridan v New Quay Co.*, 28 L. J. C. P. 58; *Cheesman v Exall*, 20 L. J. Ex. 209; *Biddle v Bond*, 34 L. J. Q. B. 137, where held that a bailee may set up the *jus tertii* as a defence against the bailor, where the bailment has been terminated by what is equivalent to eviction by a paramount title. Sometimes, where an agent has bought and received delivery of goods by mandate of his principal, a question may arise whether the *dominium* is thereby vested in the agent, with obligation to transmit it to the principal, or in the principal immediately. Stair (i. 12. 16) makes this question turn on whether the contract with the seller is in the agent's own name or the principal's. But see the civilians in Bachovius on Treutler, vol. ii. p. 145; de Acq. and Amitt. Possess.; and Savigny on Possession, b. ii. sec. 28; Perry's Tr. pp. 225-7.

The agent may attempt to plead against the principal's claim the illegality of the transactions in which he was engaged by mandate on behalf of the principal; but if he have actually got money for the principal, the illegality of the business of which it was the fruit does not in England affect the principal's right to recover it out of his hands. The law would not enable the principal to recover from the debtor under the illegal contract; but when that contract is at an end, the agent's liability to pay over what he has received under it is not considered as tainted with its illegality, so as to enable him to retain what he received for his principal's use. The original illegal transaction forms no part, it has been held, of the implied contract arising from the receipt of the money, which implied contract forms the ground of the principal's claim. (*Farmer v Russell*, 1 B. and P. 296, 7 Vesey 473; *Tenant v Elliot*, 1 B. and P. 3; *Bousfield v Wilson*, 16 M. and W. 185; *Nicholson v Gooch*, 5 E. and B. 999, 25 L. J. Q. B. 137, 147; *Johnson v Lausley*, 12 C. B. 468.) But if the principal's demand cannot be brought before the Court, in the simple shape of an action for money had and received to the principal's use, but must be made out through the medium of the illegal contract itself, he cannot enforce it. (*Ex parte Bulmer*, 13 Vesey 313; *Buck v Buck*, 1 Camp. 547; Paley, by Lloyd, 64.) As long as money deposited with an

to claim on his estate:¹ 1. For the balance in account between him and the principal; and,

agent for an illegal purpose remains unemployed, or if the purpose be countermanded by the principal before application, it is a debt which he may recover out of the agent's hands. (*Taylor v Lendie*, 9 East 49; *Parry v Roberts*, 3 A. and E. 118; *Fletcher v Marshall*, 15 M. and W. 755.) But the principal cannot make the agent repay the money, if it has been applied on his order to the illegal purpose, though the contrary was once held. (*Wilkinson v Kitchen*, 1 Lord Raym. 89; *Smith v Bromley*, Dougl. 696, note; *Tomkins v Barnet*, 1 Salk. 22; *Hastelow v Jackson*, 8 B. and C. 222, and cases there.)]

¹ [*Claims by the Agent*.—The claims of the agent in the principal's bankruptcy will be, (1) for commission if it was not a gratuitous agency; (2) for reimbursement and for indemnification against obligations undertaken to third parties. The claim for reimbursement or indemnification must be on the ground of the disbursements having been made and the obligations incurred *ex causa mandati* and *inculpabiliter*. (Poth. Mand. sec. 68.) Even where the agent may have a right of action against the third party, there is a direct claim against the principal without discussing the third party, unless our law should make the exception of according to 'Mandatores Pecuniæ Credendæ,' the *beneficium ordinis* given to them by the Novell. (Poth. Mand. 70, l. 7, Cod. Mand.) Where the agent has expended not money, but goods, *ex causa mandati*, their value is to be taken in a claim against the principal as at the date when he employed them for the business of the agency. *Quum mandati agetur, æstimatio ejus ad id tempus quo solutum sit, non quo agetur, referri debet.* (L. 37, D. de Mand.) Interest will be chargeable where by the course of dealing or custom of business it may be fairly presumed due. (*Story*, sec. 338; 2 *Livermore* 17; *Dig.* xvii. 1. 12. 9; *Bruce v Hunter*, 3 Camp. 467.) Losses sustained by the agent, if the business forming the object of the mandate has been the *proximate* cause, are also chargeable as sustained *ex causa mandati*. (Poth. Mand. sec. 75; *Story*, sec. 339; *Livermore* ii. 18.) But it is necessary to discriminate between losses of which the agency has been the *cause*, and those of which it has only been the *occasion*. In the latter case no indemnification is due to the agent; *nam hæc magis casui quam mandato imputari debent.* (*Dig.* Mand. l. 26, sec. 6; *Pothier*, Mand. 76; *Story*, sec. 341; *Livermore* ii. 21; *Ersk.* iii. 3. 34, 38; *Heineccius*, El. Jur. Nat. and Gentium, i. 13, sec. 349, not.) The same principle applies to a partner who has sustained loss in the course of the business of the copartnership (*Poth. ibid.*), for he is as to his management an agent for the whole concerned. The Roman jurists give cases illustrative of the difference, divided by very subtle distinctions, if they do not in some instances really contradict each other. See, for example, the cases put by *Paulus* (D. xvii. 1. 26. 6), and compare *Julian* (xvii. 2. 52. 4); and see *Pothier's* explanation conformably to the leading distinction between the agency causing the loss (as if the risk of it was one necessary to be run for the sake of the agency or partnership business, and to which the agent would not have exposed himself but for that necessity), and the agency business being merely the occasion of his being exposed to the incidence of the misfortune, as he might have been independently of the agency. There are not many cases in the books turning on this distinction; but Mr. *Livermore* (ii. 27) has detailed a very interesting

one, decided by the Supreme Court of Pennsylvania (*D'Arcy v Lyle*, 5 Binney 441), where the Court, on the authority of *Erskine* and *Heineccius*, *supra cit.*, found in favour of an agent for reimbursement of losses which befell him, and reparation of injuries done to him by *Christophe*, the tyrant of Hayti, on account of the enmity the latter bore to the principal. Another case in which the same distinction applies, is where the holder of a draft has falsified it so as to increase the amount of the sum which the drawer orders the drawee to pay. The contract between the drawer and drawee is a mandate *pecuniæ credendæ* or *solvendæ*; and the drawer's right to reimbursement against the funds of the principal in his hands, or against the principal personally, depends like that of any other mandatory on whether or not he has paid the money *ex causa mandati*. *Pothier* has applied the distinction between the case where loss is suffered by an agent *ex causa*, or *ex occasione mandati*, to the loss the drawee suffers by paying a falsified draft. (*Pothier*, Tr. du Contr. de Change, Nos. 99–104, q.v.) Again, the agent's disbursements must not only be made *ex causa mandati*, but *inculpabiliter*, i.e. that it has not been the agent's fault which has given occasion to the expenditure or loss. *Pothier* points out that the principles applicable are the same as those which regulate the case of a claim by the cautioner on the debtor for whom he has paid, as e.g. with regard to the omission to propound proper exceptions and defences that the principal might have opposed against the creditor,—the case of a cautioner's recourse on the debtor being, in fact, only a particular case of mandate. Omission by the agent to propound a defence not competent to the principal if he had been sued, but personal to the agent himself, will not bar recourse by the agent against the principal. (*Poth.* Mand. 78 et seq.; *Scott*, 9 July 1752, Elch. Caut. 24; *Watson v Bruce*, M. 5964; *Huntley v Sanderson*, 1 Cr. and Mees. 467.) Where an agent had endorsed a bill of which the principal was acceptor, and so primary debtor, and the agent paid it although he had no notice of the bill having been dishonoured, and which he was therefore under no legal obligation to pay, this was held no defence against the agent's action for relief, the principal debtor being bound at all events to the holder, and requiring no notice of his own dishonour of the bill, and the agent being, if not legally, morally bound to discharge his obligation. See, to same effect, *Dig.* xvii. 1. 29. 6; *Simpson v Penton*, 2 Cr. and M. 430; *Alexander v Vane*, 1 M. and W. 511, as explained by *Pitman*, Principal and Surety, p. 3, and p. 130, notes. Still it has been said, that if the principal had ordered the agent to state the personal defence, and the agent refused; or if, again, the agent knew that the principal refused to pay, and the agent still, though not personally liable by reason of the defence he had, should for the sake of his character, which would be affected by the discredit of the principal, choose to pay,—it has been said that in such a case the agent would not have recourse against the principal, though the principal himself might have been compelled to pay in the first instance. (*Child v Morley*, 8 T. R. 610. See *Paley*, by *Lloyd*, p. 110; but also *Poth.* Oblig. No. 434; *Dig.* Mand. l. 48 and l. 10.) So, where disbursements have been made without necessity, reimbursement will be due only *ad concurrentiam* of what it was necessary to disburse. (*D.* Mand. l. 52; *Poth.* M. 78; *Paley*, by *Lloyd*, 108–9; *Story*, sec. 336; *Howard v Tucker*,

2. For relief or indemnification from any liabilities which as factor he may have undertaken for the principal.¹

1 B. and Ad. 712; *Wolfe v Horncastle*, 1 B. and P. 323.) But the necessity is not to be judged of *ex eventu* (Poth. M. No. 79). The principal will be entitled to set off, against the agent's claims for reimbursement, all loss happening to him through the agent's fault. (Story, sec. 348; Paley, Lloyd, 116; *Capp v Topham*, 6 East 392.) Nor will the agent be entitled to recover from the principal advances made for an illegal purpose, or in prosecution of an illegal dealing, though sanctioned by or even undertaken at the request of the principal (*Josephs v Pebrer*, 3 B. and C. 639): at least this will be the case where the illegality must necessarily appear in prosecuting the claim; but the Court will not be astute to detect an illegality, or bring into notice illegality of which the ground of action is independent, to defeat an agent's claim for reimbursement by the principal (Lloyd's note to Paley, 102-3). See note, *ante*, p. 533. The moral reason of this is stated by Poth. Mand. No. 7. The courts need not be astute to find illegality in order to enable one rogue to defeat the better right of another. There are cases in which, without any fault on the part of the agent, or any illegality in the advances or in the business of the agency, the agent may be excluded from personal recourse upon the principal for advances on or disbursements about goods, though the goods do not sell for what will repay the agent; as where, either by express agreement, or usage of trade from which such agreement may be inferred, there is an exclusion of the personal responsibility of the principal, and an undertaking by the agent to rely merely on the goods, taking the risk of their yielding him what he may advance on and disburse about them. But where a factor receives goods to sell on *del credere* commission, and sells to buyers who fail, he cannot, of course, recover any advances within the amount of the price. A waiver of personal recourse by the factor may be presumed from his conduct; as, if he sell on credit, and then settle with the principal before the credit has expired, deducting his commission, and paying over the balance: for in such case, the paying over the balance may be fairly treated as an assumption of the outstanding debt by the factor. No English case seems to go this length, but there are several American cases cited by Story, Agency, secs. 343, 385.

Erskine (iii. 3. 32) lays down that *in dubio* it will be presumed that a mandatory is not intended to have a claim for compensation for his services; but wherever the services are of a kind which the agent holds himself out as making it his ordinary trade or profession to render, the presumption will be that he was meant to have the ordinary remuneration. In commercial agencies remuneration is always implied, the amount of which, in the absence of specific agreement, is regulated by the usage of trade in the business and place in which the agent is employed. (Story, sec. 326; *Eicke v Meyer*, 3 Camp. 412; *Cohen v Paget*, 4 Camp. 96; *Roberts v Jackson*, 2 Stark. 225; *Chapman v De Tastet*, 2 Stark. 294.) Where there is no usage of trade, a reasonable compensation will be modified by the Court. (Poth. Pand. 17. 1. 74; Dig. 50. 14. 3; 1 Domat. 1. 17. 2. 2; Story, *ib.*) Cases may exist where, though not intended to be gratuitous, the services are to be left to the goodwill, generosity, or sense of duty of the employer. Where an agent performed work for a committee,

under a resolution that any services of his were to be taken into consideration, and such remuneration to be made as 'shall be deemed right,' the committee were held entitled to judge whether or not any compensation was due, and the agent to have no legal claim to anything, having thrown himself entirely on the generosity of his employers. But if it were plain that he was to receive some remuneration, and the mere fixing of the amount was left to the employer, he might sue if none were fixed, or none which in a just sense, and allowing the employer all fair latitude in valuing the services, could be considered reasonable. (*Taylor v Brewer*, 1 M. and S. 290; Story, Agency, sec. 325; *Roberts v Smith*, 4 H. and N. 315, 28 L. J. Ex. 164. See *Bryant v Flight*, 5 M. and W. 114; *Parker v Ibbetson*, 27 L. J. C. P. 236.) The right of an agent to his commission depends, as a general rule, on the complete performance of the whole duty or service, as a condition precedent of his right to demand it. (Story, Agency, sec. 329; *Mestaer v Atkins*, 1 Marsh. 76; *Hammond v Holiday*, 1 Car. and Payne 384; *Reed v Rann*, 10 B. and C. 438; *Broad v Thomas*, 7 Bingh. 99.) It does not matter whether the completion of the undertaking by the agent is prevented by accident or the neglect of the agent, or by the act of the owner in otherwise effecting the business. (*Broad v Thomas*; *Dalton v Irwin*, 4 C. and P. 289; *Simpson v Lamb*, 25 L. J. C. P. 113; *Green v Mules*, 30 L. J. C. P. 343; *Moffat v Lawrie*, 24 L. J. C. P. 56; *Cutter v Powell*, 6 T. R. 320, S. C.; *Smith's L. C.* ii. 1.) With regard to the rules which regulate the right to commission on the part of shipbrokers and other agents, whose business is to introduce parties to each other with a view to a contract, see *Mestaer v Atkins*, 1 Marsh. 76; *Reed v Rann*, 10 B. and C. 438; *Broad v Thomas*, 4 C. and P. 338; *Dalton v Irwin*, 4 C. and P. 289; *Cohen v Paget*, 4 Camp. 96; *Brown v Nairne*, 9 C. and P. 204; *Winter v Mair*, 3 Taunt. 531; *Haines v Busk*, 5 Taunt. 521; *Roberts v Jackson*, 2 Stark. 225; *Eicke v Meyer*, 3 Camp. 412; *Wilkinson v Martin*, 8 C. and P. 1; *Alder v Boyle*, 16 L. J. C. P. 232; *Burnett v Bouch*, 9 C. and P. 620; *Smith v Boucher*, 1 C. and K. 573; *Hill v Ketching*, 15 L. J. C. P. 251; *Antrobus v Wickens*, 4 F. and F. 291; *Green v Bartlett*, 32 L. J. C. P. 261; *Cousins v Hutcheson*, 3 F. and F. 236; *Gibson v Crick*, 2 F. and F. 766; *Lockwood v Levick*, 8 C. B. N. S. 603. If an agent bargains to give his whole time to the business of the principal, he will not be permitted to derive compensation for services rendered to other persons. (*Thompson v Havelock*, 1 Camp. 527; *Gardner v M'Hutcheon*, 4 Beav. 534.) These services will be dealt with as done for the principal's behoof (Paley, by Lloyd, 106). If an agent depart from his character of agent for his employer, and act adversely to him in any part of the transaction, his right to commission will be forfeited: as where, having bought for his principal at a month's credit, he was induced to delay the delivery of the goods till the expiration of the credit, and then to tender them on payment, he was considered not only to have forfeited his commission, but to have precluded himself from recovering the money he had paid for the price and duties (*Hurst v Holding*, 3 Taunt. 32).

¹ For his right to retain or claim lien on the goods of the principal, see below, Of Retention or Lien.

II. CLAIMS BY THIRD PARTIES.—THIRD PARTIES, who have dealt with the factor, have a claim against the estate of the principal as if they had dealt with himself.

1. The agent's contract entered into as factor for a known principal, forms a good ground of action or claim against the principal, provided the power is proved and the limits duly observed.¹ And there will be no action against the factor unless the principal is abroad.² Such is the case of a rider to a manufacturing house. In taking an order in the name of the house, he binds the house to furnish the article.³

In such cases, 1. If the claim is against the principal, as the buyer of goods, for the price, it is merely for a dividend, even although the goods be still with the agent or factor distinguishable.⁴ 2. If the claim is against the principal, as seller of the goods, for delivery or for damages, it is also in this case merely personal. But if the agent act in a neutral capacity, as a general commission agent, uniting the business of a custodier with that of a [492] broker acting for both parties, the property may in such situations be held as transferred, to the effect of vesting a real right in the buyer.⁵

2. Where the contract is not in the principal's name, but generally as with a factor, the election will be with the third party, to hold to the credit of the factor, or to seek his remedy against the principal.⁶ And the remedy against the principal will not be hurt, either, *first*, By any private agreement between the principal and the factor, that the factor alone shall be responsible;⁷ or, *secondly*, Where the principal has paid the price to his agent, who has squandered it,⁸ unless the day of payment has been allowed to pass, and the principal has been led to believe that the agent alone was relied on;⁹ or, *thirdly*, By the circumstance of the factor failing with a large balance due to the principal.¹⁰

3. Where notice is given of the principal, and the third party chooses to rely on the factor, he will be entitled so to do, but will not also have his claim against the principal.¹¹

4. Even where the factor contracts in his own name, the principal is bound to the third

¹ [Hence the liability of the principal is not discharged by his putting his agent in funds to make the payment; and the fact of the agent having made partial payments out of funds so furnished, is no defence to an action against the principal for the balance. *Williams & Co. v Newlands & Co.*, 1860, 23 D. 1355.]

² Where the principal is abroad, the factor will be liable directly. *De Gaillon v L'Aigle*, 1 Bos. and Pull. 368; Pothier, Contr. de Mandat. No. 87, vol. ii. 188; Sm. Merc. L. 164. It is otherwise with a shipmaster. See Of Maritime Contracts, p. 545. [It has since been held that there is no absolute presumption that an agent, transacting *factorio nomine* for a [foreign house, is personally liable. *Miller v Mitchell*, 22 D. 833; *Heald v Kenworthy*, 24 L. J. Ex. 76. *Infra*, p. 543, note.]

³ *Mill v Harris & Co.*, 1803, M. 8493, where the Court held it 'as a general rule, that a rider or travelling agent who receives an order comes under an obligation for the merchant by whom he is accredited.'

⁴ See above, p. 216 et seq.

⁵ See above, p. 198.

⁶ *Waring v Favenck*, 1807, 1 Camp. 85, where coffee was sold to a broker, but the principal's name not mentioned. The broker failed, and an action was brought against the principal. Lord Ellenborough held, that as the purchase had been made for the defendants by their agent, it was the same as if made directly by the defendants themselves, and that this was therefore the common case of goods sold and delivered. [*Ferrier v Dodds*, 1865, 3 Macph. 561.]

⁷ *Rich v Coe*, Cowper 636. This rests on the principle of the *actio utilis institoria*. See Pauli Sentent. xi. 8. 2.

⁸ *Kymer v Suwercrop*, 1807, 1 Camp. 109, where coffee was sold by auction to a broker, the principal not disclosed. There was no delay in asking payment, so as to lead the principal to believe the broker had got credit, and so to induce him to pay the broker. The question was, Whether a payment by the principal to the broker in that case discharged the claim against the principal? Lord Ellenborough said: A person selling goods is not confined to the credit of a broker who buys them, but may resort to the principal, on whose account they are bought; and he is no more affected by the state of accounts between the two, than I should be were I to deliver goods to a man's servant, pursuant to his order, by the consideration of whether the servant was indebted to the master or the master to the servant. If he lets the day of payment go by, he may lead the principal into a supposition that he relies solely on the broker; and if, in that case, the price of the goods has been paid to the broker, on account of this deception, the principal shall be discharged. But here payment was demanded of the defender on the several days it became due, etc.

⁹ See below, p. 537, note 3.

¹⁰ See preceding note.

¹¹ Lord Mansfield says in *Rich v Coe*, Cowp. 639: 'If it appeared that a tradesman had notice of a contract, by which the shipmaster was to keep the ship in repair, and in consequence of it gave credit to the captain individually, as the responsible person; particular circumstances of this sort might afford a ground to say he meant to absolve the owners, and to look singly to the personal security of the master.'

party, on his name and interest being disclosed.¹ But this is to be taken under these limitations: 1. That if he knowingly have elected the agent as his debtor, he will not have his remedy against the principal;² and, 2. That where the principal is induced to settle with [493] the factor by means of documents, etc., furnished to the agent, the principal will be discharged.³ Where the principal is made liable, he and the factor will reciprocally have the benefit of their private stipulations as to responsibility, and of their correlative rights in respect to the state of the balance in account between them. The third party is entitled to hold the factor as the principal, so that a purchaser of goods from a factor may resist a demand for the price by the principal, on the ground of compensation or set-off.⁴ An exception is admitted to this rule in England in the case of a broker, who is so far different from a factor, that a factor is trusted with possession of the goods, and persons dealing with him cannot know whether he is proprietor or not; whereas a broker is not so trusted, and the employer is entitled to rely on his not selling in his own name, while third parties can be deceived only through their own neglect.⁵

¹ 'The law (says Lord Ellenborough) has been settled by a variety of cases, that an unknown principal, when discovered, is liable on the contracts which his agent makes for him.' 15 East 68. [See the leading modern case, *Thomson v Davenport*, 9 B. and C. 78.]

² *Paterson v Gandasequi*, 1812, 15 East 62. Here Gandasequi, a Spanish merchant, being in London, employed Larrazabat & Co. to purchase for him goods for the foreign market. They bought from Paterson, Gandasequi being present and examining the goods. They were invoiced to Larrazabat & Co. as on their credit, and Larrazabat & Co. debited Gandasequi with the amount. Larrazabat & Co. failed before the credit expired, and the sellers brought an action against Gandasequi. Lord Ellenborough directed a nonsuit, and this was confirmed by the Court. Lord Ellenborough said: The Court have not the least doubt, that if it distinctly appeared the defendant was the person for whose use and on whose account the goods were bought, and that the plaintiff knew that fact at the time of the sale, there would not be the least pretence for charging the defendant in this action. And the Court being clear that the jury did right in finding the election to have been made in knowledge of that fact, the rule was made absolute.

See *Addison v Gandasequi*, 1812, 4 Taunt. 574. This was a case in Common Pleas, almost precisely like that in the King's Bench, and decided in the same way.

Hood v Sir A. J. Cochrane, 16 Jan. 1816, Fac. Coll. This Scottish case was very similar to the above English case. Here goods were furnished for Sir A. J. Cochrane's estates in Trinidad, on the order and credit of Scott Moncrieff & Robertson, his agents in Scotland. Scott Moncrieff & Robertson became bankrupt, and Sir A. Cochrane settled accounts with them. The furnisher of the goods made a demand for the price of the goods. But the Court held that he had elected the agents as his debtors, in the knowledge of the principal. The Court had the English case before them, and decided conformably. [But see note 5, *infra*.]

[*Stevenson v Campbell*, 1836, 14 S. 562; *Carswell v Scott*, 1829, 1 D. 1215.]

³ *Wyat v M. of Hertford*, 3 East 147. [*Thomson v Davenport*, 9 B. and C. 78.]

⁴ *Babone v Williams*, *supra*, p. 285, note 5. [*George v Clagett*, 7 T. R. 359.]

⁵ *Baring v Corrie*, 1818, 2 Barn. and Ald. 137.

[Where an agent is sought to be charged on a contract

made as for him by a person professing to be his agent, the *onus* of proving that he was agent, and had authority to bind the principal by such terms, or otherwise of proving such conduct on the principal's part as shall estop him from denying the agency, lies with the creditor. (*Pole v Leask*, 33 L. J. Ch. 155.) Where the agent is the actual party to the contract, and primarily liable to be sued, the right of the creditor afterwards, on discovery of the principal, to charge him, is subject to the conditions stated in the text. See, besides the cases there referred to, *Thomson v Davenport*, 9 B. and C. 78, 86, 88; *Smyth v Anderson*, 7 C. B. 21, 36; *Smethurst v Mitchell*, 28 L. J. Q. B. 241, 246. But see *Bottomley v Nuttall*, 5 C. B. N. S. 122. It is sometimes laid down, that where a person purchases goods, through the medium of an agent, from a seller ignorant that he is dealing with an agent, the seller cannot recover against the principal if the principal has paid the agent, or if the state of accounts between them is so altered between the purchase and the claim that it would make it unjust that the principal should be called on to pay. That statement of the conditions limiting the creditor's right to claim against the principal is too loose and inexact. The principal will not be discharged from the seller's claim by a payment to his agent, or a set-off arising against him, unless the seller have, by his words, or writing, or conduct, *authorized* the principal to pay the money to the agent, or have thereby *induced* the principal to alter his condition or position as regards accounts towards the agent. The rule is, that if a man order an agent to buy goods, he is bound to see that the agent pays them; and the giving of money to his agent for that purpose does not amount to implement of that obligation towards the creditor, unless the money be actually so applied. If, however, the seller have by word or conduct authorized the principal to pay, or have induced him to pay the agent or accredit him further, on the supposition that the agent has settled with the seller, then the principal would be discharged, for the seller has induced him to alter his position. (See Parke, B., in *Heald v Kenworthy*, 10 Ex. 739, 24 L. J. Ex. 76, 77; *Kymer v Suwercrop*, *supra*; *Campbell v Hicks*; *Macfarlane v Giannocopulo*, 28 L. J. Ex. 72; *Horsfall v Fauntleroy*, 10 B. and C. 755.) In *Smyth v Anderson* it was held, that where goods are sold to an agent for the real buyer, and the seller takes the bills of the agent in payment, he thereby makes it the duty of, and so authorizes, the principal to remit funds to the agent to meet the bills; and he cannot, after giving such implied authority to remit to the

5. A *del credere* commission affects the settlement only between the principal and factor, relative to money to be recovered from third parties;¹ as a factor with a *del credere* is responsible that the buyer shall pay the price. But although the factor will, on the buyer's failure (himself being solvent), have right to claim on the buyer's estate in satisfaction of his obligation to guarantee, he is not so much a creditor as, on the one hand, to deprive the buyer of the benefit of retention or compensation against the principal; nor, on the other, to give to his own creditors the benefit of the claim against the buyer, while they pay only a dividend to the principal. In the former case, compensation or retention against the principal will discharge the guarantee, and so be a good answer to the factor's claim; in the latter, the principal will have his claim against the buyer in the bankruptcy, and also against the factor on his guarantee.

6. Claims may sometimes be available to third parties against the estate of the principal, in consequence of the acts of the agent, though unauthorized by the principal. Thus, 1. Representations by the agent, in the strict course of the contract, will be taken to form a part of the contract with the principal; and the concealment or misrepresentation of the agent will also affect the principal.² 2. On the same principle, notice to a factor or agent will be held as notice to the principal, provided such factor has power to treat and negotiate the contract.³ And, 3. The principal is liable civilly for the neglect or fraud of his agent, committed in execution of the authority given to him.

agent, turn round and seek to render the principal liable after he has remitted, even though the bills may be dishonoured. In *Smethurst v Mitchell*, where the seller, after discovery of the real principal, and after the day of payment had passed, delayed for a long time to make any claim against the principal, and thereby induced him to suppose that the agent only was treated as liable, and to give the agent bills for the amount of the debt which were negotiated, and where he subsequently dealt with the agent on the supposition that the latter only was liable, the seller was held to be precluded from charging the principal. But it is not enough that the creditor's conduct *might* have induced, it is necessary that it *did* induce, the principal to alter his position to his prejudice. The creditor's claim against the principal will not be barred if it appear that his dealing with the principal, however fitted to prejudice, has not in point of fact prejudiced the principal; as, *e.g.*, if he had not placed funds in the hands of the agent, or the like. *Tapley v Martens*, 8 T. R. 451; *Marsh v Pedder*, 4 Camp. 257; *Everett v Collins*, 2 Camp. 515; *Robinson v Read*, 9 B. and C. 449. In the last case, although the creditor took the agent's bill, and renewed it twice afterwards, deducting discount for the first, which was the usual period of credit, and adding interest in the other two cases; and although during all that time the principal had a balance due to him in the agent's hands down to the date of the agent's failure, yet Lord Tenterden, and Parke, J., held the principal still liable, on the ground that the fact of the balance being due him by the agent was not known to him, he never having inspected the agent's accounts, and that he did not appear to have been induced to forbear to his own prejudice *by the conduct of the creditor*, as, from his neglect to inquire into the agent's accounts, or how the agent was using his funds, it seemed that the indulgence given by him to the agent was not the consequence of any supposition that the agent had used the funds in paying the creditor. And so a *receipt* given by the creditor to the agent for the debt, does not necessarily of itself discharge the principal; nor will it, unless it appear to have induced him to deal differently with the agent on the faith of

the debt being paid, as by passing it in his accounts, and allowing him further credit thereafter. (*Wyatt v M. of Hertford*, 2 East 147.) If the creditor voluntarily and for his own convenience take the agent's bill, without insisting upon payment in cash when he might have had cash, this will operate as absolute payment in a question between creditor and principal, although the bill have been dishonoured; but not if the creditor took the bill because he could not get payment in cash, or if he take it as payment only conditionally on its being paid, and not as absolute payment. The acceptance of the bill, in satisfaction and discharge of the debt, so as to operate an absolute and not merely as a conditional payment, extinguishes the original debt at the time; and therefore it will, without any question as to whether the principal's position is afterwards prejudiced or not, discharge the principal; and the question whether the bill is so accepted of by the creditor depends on the intention shown by the parties in the transaction, and is one of fact. (*Sard v Rhodes*, 1 M. and W. 153; *Lewis v Lyster*, 2 C. M. and R. 704; *Goldshede v Cottrel*, 2 M. and W. 20; *Maillard v D. of Argyle*, 6 M. and G. 40; *Kemp v Watt*, 15 M. and W. 672; *Anderson v Hillus*, 12 C. B. 499; *Marsh v Pedder*; *Smith v Ferrand*, *supra*.) If the creditor take the agent's bill, and give him a receipt as for cash, that would be evidence of an intention to take the bill as absolute payment, and would extinguish the original debt, and leave the agent, as the only party liable upon the bill, the sole debtor, for the subsequent dishonour of the bill would not revive the original debt. In these cases the question is not whether the principal is prejudiced, but whether the debt due by him was innovated and discharged. In *Priestley v Fernie*, 3 H. and C. 977, it was held that if the creditor sue and attain judgment against the agent, he cannot afterwards bring a second action against the principal.]

¹ See above, p. 394.

² *Fitzherbert v Mather*, 1 Term. Rep. 12; *Stewart v Dunlop*, 8 April 1785, 3 Pat. 14.

³ [In *Dresser v Norwood*, the plaintiffs placed goods in the hands of a person to sell in his own name, and the defendants

II.—CLAIMS ON THE BANKRUPTCY OF THE FACTOR OR AGENT.

The claims which may thus arise are either, 1. By the estate of the factor against the principal or third party; or, 2. By the principal or third party against the estate of the factor.

1. *Claims by the Factor or Agent.*

The agent's estate may have a claim against third parties, or against the principal.

1. CLAIMS AGAINST THIRD PARTIES.—Against third parties the agent's estate has a right of action, to the effect of preserving any lien or other security for indemnity against [494] the principal.¹

2. CLAIMS AGAINST THE PRINCIPAL.—Where the factor has made special advances on goods consigned to him, his creditors will be entitled to have the goods sold for repayment of the advances; as the factor himself might have insisted on proceeding with the sales, unless indemnified.² There may, however, be a difference in this respect, that if the factor be solvent, he cannot be deprived of his commission, on the faith of which he may have made his advances; whereas his bankruptcy, putting an end to his character as a trader, may perhaps entitle the principal to withdraw his goods, on merely indemnifying the factor for his advances.

2. *Claims against the Agent's Estate.*

The claims against the bankrupt estate of the factor or agent may be by third parties, or by the principal.

1. CLAIMS BY THIRD PARTIES.—It is a general rule, that (unless in the case of ship-masters) agents properly authorized, contracting for a known principal, are not personally responsible on such contracts.³ Therefore, where both the principal and the agent have failed, there is a claim only against the estate of the principal, not against that of the agent, unless the credit of the agent has been specially relied on, or the name of the principal has been concealed,⁴ or the principal is abroad.⁵

bought them of that person through their broker. The defendants did not know that the goods belonged to the plaintiffs, but the broker did, from having been previously in the employment of the person employed to sell, but not from anything which was communicated to him while acting as the defendant's broker in the transaction. Held that the defendants were affected by such knowledge of their broker, and were therefore not entitled to set off a debt due to them from the person employed to sell against the plaintiff's claim for the price of the goods. *Dresser v Norwood*, 32 L. J. C. P. 201, 34 L. J. C. P. 48, Ex. Ch. See *Brown v Savage*, 4 Drew 635; *ex parte Nutting*, 2 M. D. and De G. 302; *ex parte Bolton*, 26 L. J. Bank. 450; *Edwards v Martin*, L. R., 1 Eq. 121; *Peruvian Ry. Co. v Thames, etc. Insurance Co.*, L. R., 2 Ch. App. 617. The question as to notice to an official of an incorporated company, is not, as the cases show, quite on all fours with notice to the agent of an individual or a private company. In *Wyllie v Pollen* (32 L. J. Ch. 782) it was laid down by the Lord Chancellor, that in order to affect a principal with constructive notice of facts within the knowledge of an agent, it is necessary not only that the knowledge should be derived from the same transaction; but it must be a knowledge of facts which are material to that transaction, and which it was the duty of the agent to communicate. The doctrine of constructive notice is very large; but see the cases

collected in Kerr on Fraud and Mistake, pp. 172–204; and see *Parsons' Contr.* i. 74–77; *Story, Agency*, secs. 140, 451.

As to the principal's liability for the fraudulent misrepresentations of his agent, see *ante*, p. 468, note, and p. 514, note.]

¹ See, however, *Stirling & Sons v Duncan & Co.*, 1 Sh. App. Ca. 389.

² This doctrine laid down broadly by Lord Mansfield in *Drinkwater v Godwin*, Cowp. 2556. See also *Houghton v Matthews*, 3 Bos. and Pull. 488, Buller's N. P. p. 130; *Atkyns v Amber*, 2 Espin. 493; *Banfill v Leigh*, 8 Term. Rep. 571.

³ *Brown v M'Dougal & Co.*, 13 Fac. Coll. 146, M. App. Factor, No. 1, where the opinion of English counsel was taken.

⁴ See above, p. 530. 'Wherever (says Lord Kenyon) an order is given by one person for another, and he informs the tradesman who that person is for whose use the goods are ordered, he thereby declares himself to be merely an agent, and there is no foundation for holding him to be liable.' *Owen v Gooch*, 2 Espin. Cases 567. See in the same case the exceptions pointed out.

⁵ Buller's Nisi Prius, 130. England not a foreign country in this question. See *Brown's case*, *supra*, note 3. Nor Ireland. *Levit v Wilson*, 27 May 1818, Sess. Papers. [See *Woodside v Cuthbertson*, 1848, 10 D. 604.]

But where the agent specially engages his personal credit, or where he exceeds his instructions, or where he is guilty of any fraud, or misrepresentation, or negligence (whether the principal may be bound by such conduct or not), a claim will lie against his estate by the third party. [*Note on Personal Responsibility of Agents, infra.*¹]

¹ [An agent may contract in his own name, without disclosing to the third party the fact of his having any principal, as if he were himself the principal; or he may contract as agent of a principal whose name is disclosed; or he may contract in the character of agent for a principal whose name is not disclosed. Again, in contracting, even in the case where he avows his character of agent, and even where he discloses the name of his principal, he may, by the form or terms of the contract, either limit his responsibility to that of a mere instrument or minister for the principal, or he may incur a personal obligation which shall bind himself and his heirs and estate, though on account of the principal. Where an agent contracts in his own name without mentioning his character of agent at all, he makes himself personally responsible; for in such a case the other party necessarily relies on his credit as having no other person to look to. And although the unknown principal, on being discovered, shall also be held liable, still this will not relieve the agent of the personal responsibility incurred at the time of the contract: he will still continue liable, to the effect of the creditor's being entitled to sue him, if he please, in preference to the principal. (Per Lord Denman in *Jones v Littledale*, 6 Ad. and Ellis 490; *Story, Agency*, sec. 160 (a), 266.) Where, at the time of the contract, the agent acts for a principal whose name is disclosed, and in the character of agent, the general rule is, that no personal responsibility is incurred by the agent. In such a case, it is not the agent who is party to the contract, but the principal who contracts through his agency or ministry; and it is the principal, and not the agent, who is bound by the contract so made. (*Owen v Gooch*, *supra*; *Pothier, Oblig.* secs. 53 to 84, secs. 447-8; *Mand. secs.* 87, 88; *Emerigon, Assur. c.* 5, sec. 3; *De Grosse, Avent. c.* 4, sec. 2; *Story*, sec. 261; 2 *Kent Lect.* 41.) Still this general rule is to be guarded by several observations. It is perfectly competent for an agent avowing his principal, voluntarily to incur a personal responsibility in the contract made for the principal's behoof, and to pledge his personal faith and credit for its fulfilment. (*Story*, sec. 269; *Paley*, by *Lloyd*, 378-9.) The question whether the agent or the principal is the actual party to the contract, as direct personal obligant therein, is, in the case of written contracts, a question of construction; in the case of unwritten contracts, a matter of inference from the circumstances of the contract. See *Williamson v Barten*, 7 H. and N. 899, 31 L. J. Ex. 170. In the case of written contracts, the question who is the party to, or personal obligant directly bound by the contract, is determined by the writing, which cannot be contradicted or varied by extrinsic evidence. The general presumption is, that the party executing the contract intends a personal liability, unless it appear expressly on the face of the contract that he does not contract personally; and words of description merely, denoting his character of agent, and not exclusive of personal liability, are insufficient for this purpose. (*Cooke v Wilson*, *Parker v Winlow*, and cases *infra*.) Where an agent contracts in writing in such a way as by the form of the writing to make himself personally liable, he cannot relieve himself from liability by evidence that he contracted as agent

for a principal, or even that the other party knew he was acting as agent at the time of contracting, for such evidence would tend to contradict the written agreement. (*Jones v Littledale*, *supra*; *Magee v Atkinson*, 2 M. and W. 440; *Higgins v Senior*, 8 M. and W. 834; *Wake v Harrop*, 30 L. J. Ex. 273, *ibid.* 31, 451; *Read v Dreaper*, 30 L. J. Ex. 268.) The unnamed principal's liability, under a contract made by his agent in the agent's own name, is not, according to the principles of civil law, an obligation upon the contract made by the agent: it is of the nature of an accessory obligation thereto; the principal, as *Pothier* expresses it (*Oblig. sec.* 447), being considered as having, by the commission which he has given the agent, consented in advance to all the engagements which the agent shall contract in all matters within the scope of the agency, and as having rendered himself responsible for them. In order that this accessory obligation of the principal shall take place, it is necessary that the agent contract in his own name, though on account of the principal's business; for when the agent contracts expressly in his quality of factor, and per procuration of his principal, it is not the agent who contracts: it is the principal alone who contracts by his ministry a principal and not an accessory obligation. (*Poth. Oblig. secs.* 447, 74.) This is a plain reason why it should be competent, notwithstanding the obligation of the agent as direct party to a written contract, to show by parole that there was another obligation accessory thereto, undertaken by some one else *par advance* as principal. It is not contradicting the agent's written obligation, nor taking from or adding to it, but establishing a separate obligation accessory thereto. We have not been able to discover what the precise theory of the unnamed principal's liability is according to the English law. No difficulty is felt regarding it in the light of the Statute of Frauds; yet in America the question has been raised: How, if the agent's obligation is his own, the unwritten obligation of the principal can escape the statute? (See *Pars. El. M. L. h. t.*) We do not know whether the English doctrine of election, afterwards discussed, turns on the possibility of regarding the agent's signature as either his principal's or his own, but not both. There appears to be in England this peculiarity in regard to bills and notes, and to contracts under seal, signed by an agent in such form as to bind himself personally thereby, that the obligation is exclusively the agent's. An agent signing a bill or promissory note will be personally liable, even though his representative capacity and his principal are known to the creditor, unless he sign *per procurationem* or on behalf of the principal. *Beckham v Drake*—per *Parke*, B.—9 M. and W. 79, 96; *Siffkin v Walker*, 2 Camp. 308; *Emly v Lee*, 15 East 7; *Bottomley v Fisher*, 31 L. J. Ex. 417; *Leadbitter v Farrow*, 5 M. and S. 345; *Sowerby v Butcher*, 2 C. and M. 368. See *Webster v M'Calman*, 10 D. 1133; *Woodside v Cuthbertson*, 10 D. 604; *Thomson on Bills*, pp. 218-9, ed. 1837, pp. 152, 181, ed. 1865. And where the agent renders himself personally liable by signing a bill or note otherwise than *per procurationem*, the principal will not be chargeable at the suit of the creditor (*Beckham v Drake*, and cases, *supra*). The same rule holds in England as to

2. CLAIMS BY THE PRINCIPAL.—1. The estate of the factor or agent will be responsible to the principal, wherever he has so conducted himself as to bind the principal to third parties beyond the limits of his instructions. Thus, on the one hand, if an agent sell goods on credit, where he was authorized only to sell them for ready money, or where, by the

contracts under seal (*Appleton v Burks*, 5 East 148). In cases of ordinary written contracts (not bills or deeds), where the agent's representative capacity is clearly disclosed in the body of the writing, but where he has not signed distinctly per procuration only, the courts in England have gone to great niceties on the question of construction, whether he undertakes thereby a personal responsibility or not. See *Deslandes v Gregory*, 2 El. and El. 602, Ex. Ch.; *Williamson v Barton*, 31 L. J. Ex. 170; *Read v Dreaper*, 6 H. and N. 813, 30 L. J. Ex. 208; *Fairlee v Fenton*, 39 L. J. Ex. 107; *Paice v Walker*, *ibid.* 109. In the last case, where a sale-note ran, 'Sold A 200 quarters wheat (as agents for J. S. & Co. of Dantzic),' etc. (signed without any qualification), 'W. & A.,' the Court of Exchequer held the agents personally liable on the contract, on the ground that where a person signs a contract in his own name without qualification, he is *prima facie* to be deemed to be a person contracting personally; and in order to prevent this liability on the contract from attaching, it must be *apparent* from the other portions of the instrument that he did not intend to bind himself, and they held the words 'as agents for J. S. & Co.' not sufficient clearly to negative that intention. See also *Lennard v Robinson*, 24 L. J. Q. B. 275; *Tanner v Christian*, *ibid.* 91; *Cooke v Wilson*, 26 L. J. C. P. 15; *Parker v Winlow*, 27 L. J. Q. B. 49. In *Fairlee v Fenton*, *supra*, decided by the same judges who decided *Paice v Walker*, the sale-note ran, 'I have this day sold you on account of J. T., 100 bales cotton, (signed) E. F., broker,' it was held that the description of himself, not as agent, but as broker—as a mere middleman or negotiator—and the qualification of the signature, made it clear that no personal liability was intended. In *Paice v Walker* much importance was attached to the want of any qualification to the signature, though the capacity was stated in the body of the note. See *Norton v Herring*, 1 C. and P. 648; *Wake v Harrop*, 30 L. J. Ex. 273, 31 L. J. Ex. 451; *Mahoney v Kekule*, 23 L. J. C. P. 54; *Bowen v Morris*, 2 Taunt. 374. Compare *Short v Spackman*, 2 B. and Ad. 962, with *Fawkes v Lamb*, 31 L. J. Q. B. 98. As to insurance brokers, see *Grove v Dubois*, 1 T. R. 112; *Koster v Easson*, 2 M. and S. 112; *Parker v Beasley*, 2 M. and S. 423; *Baker v Langhorn*, 4 Camp. 396; *Lee v Bullen*, 27 L. J. Q. B. 161; compared with *Baker v Langhorn*, *supra*. As to solicitors, *Burrell v Jones*, 3 B. and Ald. 47; *Hall v Ashurst*, 1 C. and M. 714; *Harper v Williams*, 4 Q. B. 219; compared with *Downman v Williams*, 7 Q. B. 103, and *Lewis v Nicholson*, 21 L. J. Q. B. 311; and again, compare the latter with *Paice v Walker*, *supra*. So, although a person sell goods notoriously as the agent of a certain person, but make out the memorandum of sale and invoice of the goods as bought of himself, he will be personally liable for fulfilment of the contract. (*Jones v Littledale*, 6 Ad. and Ellis 486; *Higgins v Senior*, 8 M. and W. 834.) And evidence of a custom of a particular place to send in brokers' notes without disclosing the principal, was held inadmissible to relieve the broker from liability. (*Magee v Atkinson*, *supra*.) Where the contract is not written, the question of the agent's liability as the direct obligant depends on the facts and circumstances. In order that the agent be

free from liability, and the principal alone chargeable, it must be shown that the principal was disclosed so as to make the contract effected through the ministry of the agent the direct obligation of the principal. (Poth. Oblig. sec. 448.) The creditor must have the name of the principal before he can have the opportunity of contracting with him directly instead of with the agent; otherwise the unavoidable presumption is, that he credits the agent primarily, and not the principal. (See *Addison v Gandasequi*, 2 Smith L. C. 5th ed. 302; *Thomson v Davenport*, *supra*.) But the same result may follow though the agent has disclosed his character as agent, and the name of his principal, at the time of the contract. The whole circumstances may evidence that credit has not been given to the principal alone, or to the principal at all, and may show either that the third party has contracted on the credit of the agent alone, or on the credit of the principal alone, or, as it should seem, on the joint credit of both agent and principal. The question is one for a jury: To whom was the credit given? The case of *Paterson v Gandasequi*, 15 East 62, was one in which the circumstances were held to indicate, that although the seller knew at the time that the buyer, while dealing with him in his own name, was in truth the agent of another, who was present and selected the goods and cheapened the prices, yet he had nevertheless relied on the agent's credit in selling; and the cases of *Addison v Gandasequi* in England (4 Taunt. 573), and perhaps that of *Hood v Cochrane* in Scotland (F. C., 16 Jan. 1816), were of the same kind. Where the principal is known at the time of the contract, and yet the agent is credited, it is held in England, that, having chosen to elect the agent as his debtor, the third party will have no claim against the principal. The presumption is, that the credit given to the agent under such circumstances is an exclusive credit. (Text, p. 537; Story, sec. 291; *Paterson v Gandasequi*, *supra*.) 'If,' says Lord Tenterden in *Thomson v Davenport* (9 B. and C. 78, 86, 2 Smith L. C. 309), 'if at the time of the sale the seller knows, not only that the person who is nominally dealing with him is not principal, but agent, and also knows who the principal really is, and, notwithstanding all that knowledge, chooses to make the agent his debtor, dealing with him, and him alone, then, according to the cases of *Addison v Gandasequi* and *Paterson v Gandasequi*, the seller cannot afterwards, on the failure of the agent, turn round and charge the principal, having once made his election at the time when he had the power of choosing between the one and the other.' And see Bayley, J., and Littledale, J. (*ib.*), and also Ellenborough, C. J., and Bayley, J., in *Paterson v Gandasequi*, all of whom lay down that the creditor who, knowing the principal, debits the agent, is to be considered as consenting to look to the agent only, and is precluded from looking to the principal. In reference to this doctrine, it is certainly intelligible that, if the facts go to disclose an election, or choice between the agent and principal, and a preference of the one and an abandonment of the other, this election should, if once made, be irrevocable. But it is difficult to understand why—apart from facts indicating a deliberate intention not merely to charge the agent, but to discharge the principal—the credi-

course of trade, they ought to have been sold for money only, and the buyer fails, the principal will have a claim against the agent's estate; or, on the other hand, if the agent buy with such authority as will bind the principal to a third party, but beyond the limitation as between themselves, the principal paying the price will have a claim for indemnification.

tor should be put to an election at all, or why there should be a presumption from charging the agent that he exonerated the principal altogether. It is one thing to say, that where the principal is known, the presumption is that the agent does not mean to be bound personally; for that presumption is founded on reason, in so far as the agent is not the party interested. It is quite a different thing to say that, because the agent is bound, the party really interested is not bound, i.e. as neither having meant to be bound nor having been held bound by the creditor. Surely he may be bound as accessory, although the agent be bound as principal obligant. The fact of the principal being known or unknown at the time of the contract, may influence the question of construction of the facts as evidence of the agent's intention to be bound; but assuming that it is clear the agent has bound himself in his own name, why should the principal be released where the creditor knows him, and be bound where the creditor only discovers him afterwards, unless in cases where the creditor, knowing him to be liable, positively renounces his liability, and exonerates him? It appears to be very doubtful indeed, whether the doctrine of election as laid down by Lord Tenterden and others (*supra*), whatever authority it may have in England, is not altogether repugnant to the principles of the law of Scotland. The principal is, by the civil law, as it rather appears, always liable, either as the direct obligant or as the accessory obligant, according to Pothier's doctrine (*supra*). See St. i. 12. 18 and 19. There appears to be no doubt (though, from the mode in which the author has treated the subject of agency, both *ante*, sec. 3, sec. 1, art. 2, and in his Principles, sec. 231, he has rather avoided the point) that the law of Scotland has adopted not only the *actio exercitoria* and the *actio institoria* in the special cases of shipmasters and shopmen, etc., to which these particular actions applied, but also the *actio utilis institoria*, which generalized their application to contracts made by any one commissioned to act for another in any sort of business or affair whatever. (Poth. Oblig. sec. 82.) If so, can the doctrine of the creditor's election between the agent and the principal—as laid down in *Thomson v Davenport*—be law in Scotland at all, notwithstanding that the author has countenanced the notion (*supra*, p. 537)? Is there any authority (other than the ambiguous case of *Hood v Cochrane*) for saying that the English doctrine on this point is the doctrine of the law of Scotland? To return: We have spoken of agents' liability by the law of England in cases where the principal is unknown at the time of sale, and also in cases where his name is known; but there is still the intermediate case, where the agent is known to act for a principal, but the name of the principal is not given or known. In this case, of course, the agent must be primarily liable, for the same reasons as where he acts as if himself the principal; and there seems to be very much the same reason in this case as in that other for holding the liability an exclusive one: for though there is no election possible at first,—which implies a comparison and preference of one credit to the other that cannot take place where the person of the principal is unknown,—yet, as the creditor might know by simply asking the agent, the omission

to make the inquiry might reasonably be held to be decisive evidence of a deliberate preference of the agent. But though this was argued in *Thomson v Davenport*—the case where the question first arose—it was decided that the agent's liability, though it alone exists at first, is not in this case an exclusive one. The principal will be liable when discovered, and the creditor will then have his election between him and the agent. The decision was not considered very satisfactory, and among the dissentients from it are Mr. Justice Parke and Mr. Lloyd (Paley, by Lloyd, p. 249); but it appears to be generally received as fixing the English law on the point. The doctrine of the continental jurisprudence, founded on the civil law, is different. 'It is,' says Emerigon (Ass. c. 5, sec. 3), 'the rule, that he who acts *pour compte d'autrui*; or for a person to be named, is not personally bound, and acquires nothing for himself, from the time he names the person for whom he has declared himself to act. This nomination has a retroactive effect back to the period of the contract, which is considered as if it had been passed by the person named.' (Casareg. Disc. 5, n. 5, 22 and 85; Disc. 31, n. 17; Disc. 139, n. 1 et seq. Mantica, de tacitis, lib. 14, tit. 28, n. 22.) According to these principles, it seems that he who insures, or causes himself to be insured, expressly *pour compte d'autrui*, is not obliged personally. (Guidon, de la Mer, ch. 2, art. 6.) Such, he says, is the theory of the civil law; but he observes that in certain cases the usage of commerce has introduced exceptions in maritime affairs; and he quotes two decisions by the Parliament of Aix, holding that an agent chartering a vessel *pour compte et risque* of a principal named—a foreign principal, however—was personally bound for implement of the contract. See also secs. 4 and 5, *ibid.* Whether in such a case the law of Scotland would hold the agent bound only conditionally in the event of his not naming his principal, or whether it would follow the English doctrine of an absolute liability on the part of the agent from the first, appears not to be certain, any more than the question whether, when the principal is named, the creditor has or has not the election between principal and agent then accorded to him by the English law. There are, however, even in England, particular cases where, from usage of trade, which has passed into intendment of law, a personal liability on the part of the agent is always presumed, even though the principal be known, unless such liability be very clearly excluded by the terms of the contract. Thus, it is an established rule of maritime law, that upon all contracts made by the master of a ship, for the employment, repairs, and supplies of the ship, the master is always personally bound, unless he takes care by express terms to confine the credit to the owners; but when it is made by the owners themselves, or under circumstances which show that the credit was given to them alone, there is no right of action upon it against the master. (*Rich v Coe*, 2 Cowp. 636; *Hussey v Christie*, 9 East 426, 432; *Farmer v Davies*, 1 T. R. 108; *Hoskins v Glayton*, Temp. Hardwicke 376.) In this case the remedy is twofold, against the master or the owner, though the latter is known at the time of contract, unless indeed there be special circumstances

It may be questioned whether the claim of the principal may not in some cases stand excluded by the ranking of another creditor. Thus, 1. Where the agent discounts bills of his principal in his hands, a claim will be entered by the endorsee on the factor's estate in consequence of his endorsation: Can the principal also enter a claim in consequence of the

to show an intention to absolve either. (Story, Ag. sec. 294, and cases there; Paley, by Lloyd, 245, 388.) But if either be sued, and judgment obtained against him, the other cannot be sued, though nothing be recovered under the judgment (*Priestley v Fernie*, 34 L. J. Ex. 173.) Story (sec. 295) lays down the English law differently; and he also holds that the Roman law was the same as that which he says is *not* English law, but which the decision just mentioned establishes to be so. Emerigon (Ass. c. 4, sec. 10) understands the civil law differently; but Vinnius (Not. ad Peck. Comm. de Re Naut. p. 149, ed. 1647) takes Story's view. The case where an agent avowedly acts for a foreign principal, whether individually known or not, is one with respect to which it has been repeatedly laid down, that the presumption of the law is, that the agent undertakes a personal liability, and is not only liable, but exclusively liable, to the exoneration of the principal, unless from the terms of the contract it is clear that the agent meant to contract upon the credit of the principal exclusively. (Story, sec. 268; Paley, by Lloyd, p. 248; Livermore ii. 249.) But although this may be the understanding of merchants, it is not a rule of law, but merely a presumption of fact, arising from the improbability that credit should be given to the foreigner. (*Mahoney v Kekule*, 14 C. B. 390; *Green v Kopke*, 25 L. J. C. P. 297; *Wilson v Zulueta*, 19 L. J. Q. B. 49; *Risbourg v Bruckner*, 27 L. J. C. P. 90; *Thomson v Davenport*, *supra*, per Parke, B.; *Heald v Kenworthy*, 10 Ex. 739, 743; per Maule, J., in *Smyth v Anderson*, 7 C. B. 21, 33; *Millar v Mitchell*, 1860, 22 D. 833.)

Where a person professes to contract as an agent for another, without being so, or having authority so to contract, he may become liable upon various media for fulfilment of the contract. If he contract expressly as agent for another, *without naming* any principal, and is in fact himself the real and only principal, he may in general be charged with the liability as a direct party to the contract, just as if he had a real but unnamed principal behind him. (*Carr v Jackson*, 7 Ex. 382; *Schmalz v Avery*, 20 L. J. Q. B. 228, 35 L. J. Ex. 211.) And even where the contract contains limitations of the agent's responsibility, he will in such a case still be responsible to the full extent of the stipulations intended to bind the supposed principal (*Schmalz v Avery*, *supra*). Where a person makes a contract in writing expressly as agent for another person named as principal, but is himself the real principal, since, by the form of the contract, he is set forth as neither acquiring right nor undertaking obligation, and as being no party to the contract personally, he cannot be allowed to contradict the writing, by showing that he is the real principal, for the purpose of suing in his own name on it. (*Bickerton v Burrell*, 5 M. and S. 383; *Rayner v Grote*, 15 M. and W. 359; *Boulton v Jones*, 27 L. J. Ex. 117.) Where a person contracts as agent for a *named* principal, without authority to do so, but does not intend to be himself the real principal, it is now settled that he cannot be charged upon the contract, either as a party to it or as real principal. The cases on the different grounds of the agent's liability in cases

of this complexion furnish an interesting illustration of the development of a legal principle.

In *Smout v Ilbery* (10 M. and W. 1), where a husband went abroad leaving his wife with authority to order goods on his credit for the use of herself and her family, and died during his absence, whereby the authority ceased, and the wife, until she received notice of his death, continued to order goods as before, it was held that she was not liable for the goods supplied after her husband's death, but before notice of it, because she never meant to pledge her own credit; nor (*Blades v Free*, 9 B. and C. 167) could the executor of the husband be charged for the goods, because the authority to order them was revoked by his death. The latter portion of the doctrine may well be doubted upon the principles of our law. But in this case there was clearly no ground of liability on the part of the wife. There was no fraud, for she had got the authority, and did not know of its revocation. In supposing it to continue, she and the creditor were *in pari casu*, the creditor as well as she virtually contracting upon the condition that she had received authority, and that, so far as she knew, it was not withdrawn. She could not be understood to warrant or affirm more than that; and so there appears to be no possible ground of liability on her part, either on fraud or on implied warranty of her authority continuing. This, however, is quite a different case from even a *bona fide* mistake, on the part of a person representing himself to be an agent, as to the genuineness of his mandate, as if he has been deceived by a forged mandate. There the third party, dealing with him on the faith of its being genuine, is not in the same position as he is; nor can he know the grounds on which the agent asserts his authority to be sufficient. The agent might have avoided the mistake by greater care: he is bound to know whether his authority is genuine. The other party is obliged to rely merely on the agent's correctness, without having means of judging equally with him. And such a case as *Smout v Ilbery* is still more clearly distinguishable from the case where, without any morally fraudulent intent, an agent assumes and holds himself out as having authority which he has not, however he hopes to have his assumption of it confirmed. In *Pechell v Walter* (3 B. and Ad. 114), where the defendant had accepted a bill of exchange in name of the drawee, purporting to do so *per procuracionem*, knowing that in fact he had no such authority, but fully believing that the acceptance would be sanctioned and the bill paid by the drawee, and the drawee repudiated the acceptance, the jury negatived any fraudulent intention in fact; but the Court held that the defendant had committed a fraud in law, by making a representation which he knew to be untrue, and which he intended others to act upon (see per Parke, B., *Murray v Mann*, 2 Ex. 538, 541); and they held him liable, not upon the contract, but to an action of damages for false and fraudulent representation. In *Jenkins v Hutchinson*, 13 Q. B. 744, where the defendant made a charter-party in the name of another, without authority to do so, and knowing that he had no authority, and the supposed principal repudiated the contract, it was held that the de-

[495] loss suffered by the fraud of the agent, without being exposed to the objection of double ranking?

2. The estate of a factor acting under a *del credere* commission is liable to the principal, where the buyer or debtor has failed without paying the price.¹

fendant could not be charged personally, in an action on the contract, as a party to it or as principal; and so also in *Lewis v Nicholson*, 18 Q. B. 503, 21 L. J. Q. B. 311. But in *Randell v Trimen*, 18 C. B. 786, 25 L. J. C. P. 307; *Simons v Patchett*, 7 E. and B. 586, 26 L. J. Q. B. 195; *Collen v Wright*, 7 E. and B. 301, 27 L. J. Q. B. 215, 8 E. and B. 647, Cam. Scacc.; *Pow v Davis*, 1 E. B. and S. 220, 30 L. J. Q. B. 257; *Hughes v Graeme*, 33 L. J. Q. B. 335, it was held that even where there is no fraud, but where the party making the contract *bona fide* believes through some misapprehension that he has authority, still, by assuming to contract for another as his agent, he impliedly warrants to the other contracting party that he in fact possesses the authority which he assumes to exercise; and if he does not possess the authority assumed, is liable to an action, not for fraudulent misrepresentation, unless there be legal fraud, but for the breach of such implied warranty. See *Warlow v Harrison*, 29 L. J. Q. B. 14; and *Cherry v Colonial Bank*, 38 L. J. C. P. 49. If the want of authority is *known* to the other party, the agent's assertion of authority without having it will not render him liable (*Jones v Downman*, 4 Q. B. 235, note (a)); and probably the same thing would be held in cases where the agent discloses all his grounds of belief as to his authority, and leaves the other party to judge whether he have authority sufficient or not. *Smout v Ilbery*, *supra*; *Jones v Downman*, Story, Agency, sec. 265. An agent may have authority to bind the principal by a contract to a certain amount; and yet by binding him to a greater amount than the authority warranted, he may become liable not only for the excess, but for the whole amount of the contract. Thus, in *Baines v Euing* (35 L. J. Ex. 194), where an insurance broker, with authority to underwrite policies on his principal's account to a certain fixed limit, underwrote a policy on a ship to a greater amount, it was held that the whole obligation to insure, being indivisible, was void as between the underwriter and the shipowner; and that the owner could not recover even to the extent of the agent's limit of authority. In this case the agent would be liable for the whole amount. See American case of *Fleeter v Heath*, 11 Wendell 485, cited in Parsons' El. M. L. p. 148, note, for the general proposition, that if the agent exceeds his authority, he is liable on the whole contract, although a part of it is within his authority. See, on the subject of separable and inseparable excesses of authority, *Livermore* i. 98 et seq.; Story, Agency, sec. 166 et seq.; *Bostock v Jardine*, 34 L. J. Ex. 142. An agent contracting in his own name, but avowedly as agent for a disclosed principal who is not capable of binding himself, will ordinarily be taken to bind himself by a personal responsibility, since in no other way could the contract possess any validity, and it is not to be supposed that parties meant a nugatory transaction. Story, Agency, sec. 280; and see *Harris v Huntbach*, 1 Burr. 373, and cases *ante*, p. 510, note 5; Dig. 14. 1. 15. 1. Lastly, although an agent may not be originally liable in his own person as a party to the contract, he may by his subsequent acts in relation to that contract undertake personal liability for its fulfilment, though he acts in the character of agent. Thus, under a bill of lading

which makes goods deliverable to 'A B, the shipper, or his assignees, he or they paying freight against delivery,' the person to whom A B assigns the bill of lading is liable for the freight, as the condition on which he takes the goods from the master. But a bill of lading is often assigned to an agent of the shipper to enable him to receive the goods. If such an agent, endorsee of a bill of lading, is not known to be an agent, he is undoubtedly responsible to the master for the freight of goods delivered to him. (*Wilson v Kymer*, 1 M. and S. 157; *Bell v Kymer*, 5 Taunt. 477; *Douglas v Kemble*, 1 Bingham 383.) But there seems to be some doubt whether an agent who is made endorsee for the mere purpose of receiving cargo, and is known to the master as such, is personally liable for the freight by acceptance of the goods. Mr. Mac-lachlan (Shipping, p. 427) and Story (Agency, sec. 274) interpret the cases differently. (*Amos v Temperley*, 8 M. and W. 798; *Ward v Felton*, 1 East 507; see *Tobin v Crawford*, 5 M. and W. 235, 9 M. and W. 716.) The better opinion seems to be, that the agent is not liable. See Parsons' Maritime Law, vol. i. p. 200, and cases. It is not the mere endorsement, but the receipt of the goods, which creates liability for the freight and raises a new contract to pay it (*Smurthwaite v Wilkins*, 31 L. J. C. P. 214; per Parke, B., in *Moller v Young*, 25 L. J. Q. B. 94, 96). There is therefore no difficulty about contradicting any written obligation of the endorsee, even where his character as agent does not appear in the endorsement; and it is competent to show by parole what the circumstances and terms of the new contract were. Where the captain knows the receiver of the goods to be a mere agent for a known principal, the ordinary rule as to any promise implied in the transaction being a promise meant to bind his principal, and not himself, should *prima facie* apply (per Parke, B., in *Amos v Temperley*, *supra*). But if he obtain the goods under bill of lading, so as to be personally liable for the freight, he will continue liable although he have delivered over the goods or their proceeds to his principal, without deducting the freight (*Bell v Kymer*, 5 Taunt. 477, 3 Camp. 545). So personal liability may afterwards emerge, where he has as agent received money under his principal's contract for his principal's behoof, and for the purpose of being paid over to him, but under circumstances where the third party paying is entitled to countermand the payment over to the principal. There will be personal liability on the agent to repeat, if the countermand be received by the agent before payment over (Story, sec. 300). But where he has paid over the money before the countermand, or has incurred fresh liability for his principal on the faith of having it, the agent will have a defence. See Paley, by Lloyd, 386-95; and see *Holland v Russel*, 30 L. J. Q. B. 30.]

¹ The principal will, in such a case (under the 24th section of the 54 Geo. III. c. 137), be obliged to value and deduct the claim against the debtor, in voting as a creditor on the factor's estate; but he will be entitled to rank on both estates, to the effect of drawing a full dividend from each, provided he does not, on the whole, draw more than the debt.

3. To ground a claim against the factor's estate for negligence, there must be either a breach of orders, gross negligence, or fraud.

First, Not only where the agent commits a direct breach of his orders, in exceeding his limits, etc., but where he does *not* act as directed, he may be liable to an action; and so his bankrupt estate to a claim for the consequences of the neglect. The most frequent example of this is on occasion of orders to insure. The late Mr. Justice Buller has well distinguished these cases:¹ 'It is now settled as clear law, that there are three instances in which such an order to insure must be obeyed. *First*, Where a merchant abroad has effects in the hands of his correspondent here, he has a right to expect that he will obey an order to insure, because he is entitled to call his money out of the other's hands, when and in what manner he pleases. The *second* class of cases is where the merchant has no effects in the hands of his correspondent; yet if the course of dealing between them be such, that the one has been used to send orders for insurance, and the other to comply with them, the former has a right to expect that his orders for insurance will still be obeyed, unless the latter give him notice to discontinue that course of dealing. *Thirdly*, If the merchant abroad send bills of lading to his correspondent here, he may engraft on them an order to insure, as the implied condition on which the bills of lading shall be accepted, which the other must obey if he accept them, for it is one entire transaction. It is true, as it has been observed, that unless something has been held out by the person here to induce the other to think that he will procure insurance, he shall not be compelled to insure. But if the commission from the merchant abroad consist of two parts, the one to accept the bill of lading, the other to cause an insurance to be made, the correspondent here cannot accept it in part, and reject it as to the rest.' If in such cases he entirely neglect to insure, he becomes responsible. If he endeavour to procure insurance, but limit the broker to a premium so small that the insurance cannot be effected, he will be liable.² But it is sufficient if he do what is usual in order to get the insurance made.³

Secondly, Gross negligence will ground a claim against the agent; as, where one undertakes to get a policy of fire insurance renewed in name of the purchaser of his premises, and applies for the renewal, but neglects to have the policy transferred from himself by the proper endorsement at the office, it is held that he is responsible.⁴ So concealment by one broker, who employed another to get the insurance done, of material information for [496] procuring the insurance, will be a ground of responsibility against the first broker.⁵

Thirdly, Such fraud in the agent for the consignor, as will subject the principal for its consequences, will ground a claim against the agent's estate.

The consequence of the agent making himself responsible for the risk is, that he becomes the insurer himself, and he may avail himself of every defence which the underwriter would have had if the insurance had been effected.⁶

¹ *Smith v Lascelles*, 2 Term. Rep. 187. [Add. on Cont. 6th ed. 582.]

² *Wallace v Telfair*, cor. Buller, J., 2 Term. Rep. 188, in note.

³ Mr. Justice Buller, in *Smith v Cologan*, told the jury, that 'if a person to whom such orders are sent do what is usual to get the insurance made, that is sufficient; because he is no insurer, and is not obliged to get insurance at all events.' It must always be a question for the jury, whether what is usual has been done. In the case in which the above direction was given to the jury, the agent sent his broker to

Lloyd's to get the insurance effected; but he could not get it done at any premium, on account of the ship's not being registered in Lloyd's. And the inclination of the judge's opinion seems to have been, that if the agent had gone no further, this would have been enough. 2 Term. Rep. 188, note.

⁴ So held in *Wilkinson v Coverdale*, 1 Espinasse's Cases 74. In that case, the proof of an undertaking to have the policy renewed failed; and so the action was unsuccessful. [Add. on Cont. 6th ed. 414.]

⁵ *Seller v Work*, Marshall on Ins. p. 299.

⁶ Marshall, p. 301.

CHAPTER IV.

OF MARITIME CONTRACTS.

INTRODUCTORY VIEW OF MARITIME LAW.

IN the great department of national jurisprudence relative to maritime affairs, there is a great deficiency in the works of the institutional writers of Scotland.

One treatise exists in manuscript, professedly written on this subject, about the close of the sixteenth century, but of no very signal merit;¹ and amidst those preparations which appear to have been made, under the direction of Sir James Balfour, for completing a digest of the law of Scotland, in consequence of the legislative appointment of a commission for that purpose in the sixteenth century, there were collected some notes of sea laws, which are published in the book entitled BALFOUR'S PRACTICES.² But besides these we have nothing but occasional passages in our institutional writers, and the determinations of the Admiralty and of the Supreme Court, to compose our national digest of maritime law.

The little which is to be found in Lord STAIR'S Institutions³ leaves room for sincere regret that this important subject had not received more attention from one so eminently qualified to illustrate it.

Lord BANKTON, with less pretension to respect as an authority in Scottish jurisprudence, has more fully entered on some of the points of maritime law, as they stood connected with the subjects which, in the course of his work, he had occasion to consider.⁴

ERSKINE, our latest institutional writer, has with his usual clearness and conciseness touched the points of maritime law which came in his way; but so slightly, that the important subjects of affreightment, bottomry, and insurance are all discussed in a single paragraph; and this, with other two paragraphs on the subject of exercitors, is the whole of maritime jurisprudence that is to be found in that standard work on Scottish law.⁵

The Scottish Court of Admiralty is so far different from that of England,⁶ that to this tribunal belongs the decision of 'all maritime and seafaring causes,' relative to charter-parties, freights, salvages, wrecks, collision of ships, bottomry, and policies of sea insurance, without any regard to the place of the contract, as executed on sea or at land; while in all mercantile questions also this Court has jurisdiction, subject in the common way to an easy appeal to the Court of Session.⁷ It had also, till lately, a jurisdiction in prize causes to

¹ 'Tractatus Legum et Consuetudinum Navalium quæ apud omnes fere gentes in usu habentur, etc., auctore ALEXANDRO REGIO; in suprema Edinburgi curia advocato ac Amarantis delegati jurisdictionem in Scotia exercente.' MS. in Advocates' Library.

Mr. Alexander King appears to have been admitted of the Faculty of Advocates, 20th December 1580; and Francis Stewart, Earl of Bothwell, to whom, as Admiral of Scotland, his work is inscribed, held that office from 1587 to 1592.

² 'The Sea-Lawis collectit furth of the Actis of Parliament, the Practiques and the Lawis of Oleron, and the Lawis of Wisbieg, and the Constitutionis of Francois king of France, anno 1543-1557.' There is no good authority for ascribing this book to Sir James Balfour, or for holding that it received his sanction, or was anything more than the preparatory collections made for the use of him and the other commissioners for revising the laws.

³ The second chapter of Book ii. of Lord Stair's Institutions is a very valuable tract on Prize Law. But nothing more is to be found in that excellent work except a few scattered notices in the course of his systematical review of our juris-

prudence. Thus, in treating of mandate, he bestows a single paragraph on exercitors (i. 12. 18).

⁴ B. i. tit. 18, sec. 2; and B. i. tit. 19, sec. 2.

⁵ Ersk. iii. 3. 17; Ersk. iii. 3. 43, 44.

⁶ The Admiralty in England cannot 'meddle of anything done within the realm, but only of a thing done upon the sea.' 13 Rich. II. st. 1, c. 5; 15 Rich. II. c. 3; Abbot 458.

⁷ Formerly the Admiral's jurisdiction in MARITIME causes was cumulative with that of the Court of Session. By 1681, c. 16, the jurisdiction is enlarged, and vested solely in the Court of Admiralty, with power to the Court of Session to review the sentences of this Court only by suspension and reduction; that is to say, only to suspend execution on cause shown, and to try the cause again as by a writ of error in England, not by the ordinary writ of appeal by which causes are *advocated* to the Court of Session from the ordinary civil courts. The Court retains a jurisdiction (though not exclusive nor supreme) in all MERCANTILE causes.

This tribunal, having thus a jurisdiction in maritime and mercantile causes, may properly be called the MARITIME and MERCANTILE COURT OF SCOTLAND, and seems capable of pro-

adjudge captures from the enemy; wherein it remarkably differs from the Admiralty of England.¹ The judgments of this Court have never been reported.² But the most important of the cases which have there been decided have been brought before the Court of Session, and some of them appear in the printed reports.

Lord Stair's reports of the decisions in prize questions in his time have been deservedly eulogized by those who know their value. But it is much to be regretted that so little attention has been paid to decisions of this description in Scotland; many very valuable determinations in maritime law not having been published in the collections.

The maritime law, however, partakes more of the character of international law than any other branch of jurisprudence; and in all the discussions on this subject in our courts, the Continental collections and treatises on this subject, and the English books of reports, have been received as authority by our judges, where not unfitted for our adoption by [498] any peculiarity which our practice does not recognise. Of these authorities it may not be entirely useless to make a slight enumeration.

I. The first authorities in order and in weight are the ORDONNANCES and CUSTOMS of MARITIME STATES, wherever they have been admitted to rank as part of the maritime law of Europe.

1. The RHODIAN LAWS are confessedly the most ancient maritime laws in Europe. They are supposed to be nearly of the age of Solomon, and were held as the law of nations among the islanders of the Ægean Sea. They were adopted by the Romans in the time, it is said, of the first Punic War. The high authority of those laws appears from the celebrated answer of Antoninus, as recorded by Volusius Mæcianus, '*Ego quidem mundi dominus, LEX autem maris.*'³ The essence of those laws has been embodied in several titles of the Corpus Juris, on which a very learned professor of law in the University of Louvain has published a commentary. This work has been republished by the acute and learned Vinnius, with notes, which (like everything that Vinnius has done) combine with the greatest conciseness the most admirable perspicuity and comprehension of the subject.⁴

2. The navigation of the Mediterranean by the ships of Venice, Genoa, and the other small commercial republics which rose after the fall of the empire, led to a digest or com-

ducing the most beneficial effects in maturing this important branch of the law of the country. It is much to be wished that due attention were paid to this object; that so valuable an opportunity should not be lost while the maritime and mercantile law of Scotland is still in its progress; and that it should be recollected how much may be done by a consistent and uniform course of determinations, grounded on comprehensive views of the whole system of mercantile jurisprudence: what actually was accomplished by Lord Mansfield in systematizing the mercantile law of England, and what is now accomplishing in the department of international law by the determinations of that eminent person who presides in the High Court of Admiralty of England.

¹ The Court of Admiralty of England cannot proceed to condemn prizes in war without a special warrant from the king. But the Scottish Court of Admiralty always exercised that power as part of its inherent functions, proceeding alone on the king's proclamation of war and reprisals. This power in jurisdiction, however, has now been abolished by 6 Geo. iv. c. 120, sec. 57.

² The late Judge-Admiral Cay devoted his particular attention to the reformation of this Court during the few years in which he sat there, and, had he survived, would have succeeded in greatly augmenting its importance and usefulness. He bestowed exemplary care in deliberating on the

cases which came before him, and, above all, seems ever to have had in his mind that most salutary of all judicial maxims, to preserve, as far as just principle would permit, uniform consistency, not only with former determinations in his own Court and in the Court of Session, but with those of England and of other European states. He has left many volumes of notes on cases discussed before him, which show at once the importance of the tribunal, and the knowledge and care with which he administered his office. [The Scottish Admiralty Court was abolished by 1 W. iv. c. 69.]

³ Dig. lib. 14, tit. 2, l. 9, de Lege Rhodia; Pothier, Pand. Justin. vol. i. p. 367.

⁴ Petri Peckii Commentaria in omnes pene Juris Civilis titulos ad rem nauticam pertinentes: published originally at Louvain, 1603; at Amsterdam, 1668; and, with his whole works, at Antwerp, 1679.

Republished, *cum notis*, Arnold. Vinnii, J. C., Lugd. Batav. 1647. In this last edition the pretended Greek text of the Rhodian Laws is published with a Latin translation, but it is held to be spurious. The titles commented on are these: Nautæ, Caupones, etc.; De Exercitoria Actione; Ad legem Rhodiam; De Incendio, Ruina, etc. Rate, Nave, expugnata; De naviculariis sive naucleriis publicas species transportantibus; De navibus non excusandis; De naufragiis. Republished, with notes, by J. Laurentius, J. C., Amstel. 1668.

pilation of rules for regulating that navigation; and which appears to have been universally adopted on the Continent, as the Code of Maritime Law, in the course of the eleventh, twelfth, and thirteenth centuries.¹ This digest is called *IL CONSOLATO DEL MARE*. It was compiled by order of the ancient kings of Arragon, and was originally published in the dialect of Catalonia. It comprised the ancient ordonnances of the Greek and Roman emperors, and of the kings of France and Spain, and the laws of the Mediterranean islands, and of Venice and Genoa. It has been translated into every language of Europe. VALIN announces (what, I fear, never was completed) a translation of it with notes by the celebrated EMERIGON. We have, however, the benefit of M. Valin's perusal of that work in his commentary on the French marine ordonnance of 1681.² BOUCHER has lately published a translation from the Catalan.³ When CASAREGIS⁴ was about to give to the world his admirable Discourses on Mercantile Law, he was induced to publish along with them a clear and concise explanation of the Consolato, and to accompany this with an unadulterated copy of the Italian text then extant. An edition has recently been published in Spain by ANTONIO DE CAPMANY.⁵

3. Next in the order of time stand the laws of OLERON, and those of WISBUY, the capital of the isle of Gothland.⁶ I shall not enter into the controversy in which the publisher, CLEIRAC, the English SELDEN, and VALIN, have engaged, relative to the origin and date of the respective LAWS of OLERON and of WISBUY. In general, they may be taken to be of the thirteenth century, and to have been adopted as authority in the Baltic as well as in the Mediterranean.⁷ We have seen that they were used as materials by BALFOUR in making his collection of Sea Laws observed in Scotland.

4. The ORDONNANCES OF THE HANSEATIC TOWNS were first published in German at Lubec in 1597. They were afterwards, on 23d May 1614, in an assembly of deputies from the several towns held at Lubec, revised and enlarged. The text of this digest, and a Latin translation, are published with a commentary by KURICKE;⁸ and a French translation is given by CLEIRAC in his publication above referred to.

¹ See in Casaregis a chronological list of the adoptions of this code, vol. iii. p. 99.

² It is delightful to see the warmth of Valin's acknowledgments to Emerigon. After telling us that he had long resisted Emerigon's offer of a communication of his collection (which occupation at the bar prevented Emerigon from finishing), lest he should anticipate so excellent a work, he says; 'Il m'en a donc fait passer une copie, dont j'ai fait un tel usage que presque tout ce que l'on trouvera de bon dans ce commentaire, quant à la partie de la jurisprudence, est en quelque sorte autant son ouvrage que le mien.'

³ *Consulat de la Mer*, etc., par P. B. Boucher, Professeur de Droit Commercial, etc. Paris, 1808, 2 vols. 8vo.

⁴ After speaking of the extent and variety of important matters to be studied in mercantile and maritime jurisprudence, and the rarity of authors, especially in Italy, who have treated of the subject, he says: 'Mi cadde tosto in pensiero di unire a miei discorsi di commercio una chiara e puntuale non meno che succinta spiegazione del celebre consolato del mare.' 'Alla mia spiegazione ho creduto ben fatto che andasse ancora congiunto il testo,' etc.

Joseph Laurentius Maria de Casaregis was born in Genoa in 1670. He studied law at Pisa, and, after his return to Genoa, was the first professor of civil law after the institution of that university. He practised at the bar with great reputation, and afterwards went to Florence at the desire of Cosmo III., where for twenty years he performed the functions of a judge with universal approbation. During this time he pub-

lished his *Discursus Legales de Commercio*, and other works, which were held as standard authorities in mercantile law, and which still enjoy the highest reputation in Europe. About the age of 63, a life of severe and unrelenting study terminated in settled melancholy, which after four years put an end to his life in the year 1737.

His work *De Commercio* was first published at Florence in 1719, and afterwards his whole works, in three volumes folio, at Venice, 1740.

⁵ *Codigo de las Costumbres Maritimas de Barcelona*, Madr. 1791. I have not seen this edition, which is by the author of *Memorias Historicas sobre la Marina, Comercio, y Artes*, de Barcelona.

⁶ *Us et Coutumes de la Mer*, par Cleirac, 1661; *Jugem. d'Oleron*, pp. 1-174; *Ord. de Wisbuy*, 165-185.

⁷ I fear there is some degree of English prejudice in ascribing the laws of Oleron to Richard Cœur de Lion. Valin is angry with this as connected with our maritime claims (Pref. p. ix.). Boucher hopes he has demonstrated the absurdity of it (vol. i. p. 108).

⁸ *Jus Maritimum Hanseaticum*, olim Germanico tantum idiomate editum, nunc vero etiam in Latinam translatum, et ad singulos titulos, etc., commentariis et dissertationibus juridicis politicis historicisque illustratum; studio Reinoldi Kuricke. Hamb. 1667, 4to.

This work is also published along with the works of Styppannus and Loccenius, by Heineccius. *Scriptorum de jure nautico et maritimo fasciculus*. Halæ Magdeburgicæ, 1740.

5. *LE GUIDON DE LA MER* was originally composed at Rouen in Normandy, and in 1671 included by M. *CLEIRAC* in his collection. He could not discover the name of the author, nor is the date of the work ascertained; but though a private treatise, it is composed from the several ordonnances and codes in observance at that time in Europe, including those of Amsterdam in 1598, and Antwerp in 1593, and has been received as almost equal in authority to one of the ancient codes of maritime law.

6. Later in the order of time, but above all the others in comprehensiveness and in authority, comes the celebrated *ORDONNANCE DE LA MARINE* OF *LOUIS XIV.* This was the accomplishment of what had been projected by Henry iv., and partly carried into execution under the administration of Cardinal Richelieu, but which was brought to maturity only in the ministry of M. Colbert; when, after the peace of Nimeguen in 1678, a great combination was formed of juridical and mercantile talents for the noble purpose of forming a systematic code of maritime law. The project was happily accomplished by a patient and careful digest of all that was fixed in the usage and customs of maritime nations, or expressed in the ancient codes of this department of jurisprudence; and by settling with a wise and comprehensive spirit of legislation, looking to the general jurisprudence of Europe, those ambiguous points of maritime law, in which either the customs of nations were at variance, or on which no prevailing usage or certain rule was to be found.¹ The [500] ordonnance was published 1st August 1681; but the only commentary previous to *VALIN*'s appeared in the shape of Notes in 1714, the author of which seems to have been utterly incapable of the task; and it is to the disgust which his ignorance occasioned to Valin that we owe the valuable commentary of that author. *VALIN*'s work is undoubtedly one of the best books on maritime jurisprudence of which modern Europe has to boast.²

7. The last code which deserves notice is the *CODE DE COMMERCE*; of which the second book corresponds with the Marine Ordonnance of 1681. This modern code is valuable, as a careful and concise digest of the edicts of 1675 and 1681, and of the jurisprudence of Pothier, Valin, and Emerigon.³

II. Next in authority are the *DETERMINATIONS* of maritime and mercantile courts. Of these there are many valuable collections in the several countries of modern Europe. I shall mention only a few of those which are most relied on in our courts.

1. The decisions of the mercantile court of *GENOA* are of high authority. The collection contains 215 decisions, on a great variety of questions in mercantile affairs.⁴

2. The decisions of the supreme civil courts of *FRIESLAND*, as published by one of the judges of the court, are also of great authority, and are frequently quoted in mercantile causes in Scotland.⁵

3. The only other collection of foreign decisions which I recollect, as an authority to

¹ M. Valin, in studying the subject of this ordonnance, in the course of composing his Commentary, found, in the library of the Duke of Penthièvre, 'une savante, curieuse, et vaste compilation des loix anciennes maritimes; c'est à dire, des loix Rhodiennes et Romaines, du consulat, et des us et coutumes de la mer, des ordonnances de Charles v. et de Philippe II. Roy d'Espagne, des jugemens d'Oleron, des ordonnances de Wisbuy et de la Hanse Teutonique, des assurances d'Anvers et d'Amsterdam, du Guidon de la mer, des projets d'edits et reglements dressés par ordre de Cardinal de Richelieu, enfin de nos ordonnances jusqu'à 1660; le tout conferé ensemble avec l'avis de plusieurs auteurs, et distribué en differens titres' (Pref. p. 5).

² Nouveau Commentaire sur l'Ordonnance de la Marine, du mois d'Aout 1681, par M. René Josué Valin, Avocat et Procureur au siege de l'Amirauté de la Rochelle. La Rochelle, 1760, 2 vols. 4to.

Valin was an advocate of France, and procureur du Roi in the Court of Admiralty of Rochelle. He published (besides his great work) a Commentary on the Customs of Rochelle, in three volumes 4to, and a Treatise on the Law of Prize, in two volumes 8vo. He died in 1765, about five years after the publication of his Commentary on the Marine Ordonnance.

³ In Magens on Insurance, vol. ii., will be found translations of many of the foreign ordinances.

⁴ *Rotæ Genuæ de Mercatura et rebus ad eam pertinentibus Decisiones*, Francofurti 1612; also an edition in 1652, 4to.

Casaregis says of this collection, that 'in causis mercantili-bus maximæ est auctoritatis.' Dig. 36, sec. 3.

⁵ *Decisiones Frisicæ sive Rerum in Suprema Frisiorum Curia Judicatarum*; auct. Joanne a Sande ejusd. Curie senatore 1663, 4to.

which reference is made in our courts, is that of NEOSTADIUS, of the decisions of the courts of Holland; in which there is much valuable matter relative to mercantile jurisprudence.¹

4. But the decisions of greatest authority are those of the High Court of Admiralty of England. The jurisdiction of this court does not comprehend every question on maritime law, and it includes not mercantile contracts. It is confined to contracts made at sea, and so does not even extend to charter-party or insurance. But it is the great tribunal of maritime and international law, and as such a court of the law of nations; and most happily for the credit of Great Britain, the functions of this high court have, during the whole of an unexampled period of difficulty since the commencement of the revolutionary war with France, been performed by a person the most eminently qualified to sustain the character of an international judge. Lord Stowell's determinations, both in this department and in the more strictly municipal questions which come under his consideration, furnish models of correct and powerful reasoning, expressed in the most perspicuous and elegant language, adorned with various learning, and, above all, distinguished by the soundest and most [501] comprehensive judicial wisdom.² Wherever those decisions touch any question discussed in our courts, their authority is received with profound respect.

III. To enumerate those works of foreign authors in maritime law which are relied on in our courts, would require more time, and occupy more space, than can well be spared on the present occasion. But I may mention that, after the works of the older lawyers, CUJACIUS, MOLINÆUS, PECKIUS, VINNIUS, and VOET; and those of STYPMANNUS,³ of LOCCENIUS,⁴ and of VAN LEEWIN;⁵ the works the most esteemed, and which will grow in reputation and authority in proportion as they are known, are the *Notabilia* of ROCCUS;⁶ the *Discursus de Commercio* already referred to, and *Il Cambisto Istruito* of CASAREGIS; the *Discourses* of ANSALDUS, *De Commercio*;⁷ the *Commentary* of VALIN; the *Treatises on Contracts* of the admirable POTHIER;⁸ the work of EMERIGON on *Insurance and Bottomry*;⁹ and TARGA'S *Considerations on Maritime Contracts*.¹⁰

Of the works of English lawyers on maritime law, there are, besides Maline,¹¹

¹ *Neostadii Curiae Hollandiæ, Zeelandiæ, et Westfriesiæ Decisiones*, Lugd. Bat. 1627, et Hag. 1665, 4to.

² The series of judgments of this eminent person in Admiralty have been reported in these collections:—

1. Reports of cases argued and determined in the High Court of Admiralty, commencing with the judgments of the Right Hon. Sir William Scott, 1798–1808, by Chr. Robinson, LL.D., advocate, 5 vols. 8vo.

2. Reports, etc., by Thomas Edwards, LL.D., 1808–1811.

3. Reports, etc., by J. Dodson, LL.D., 1811–1813.

4. Reports, etc., by J. Haggard, LL.D., beginning with 1822, and continued periodically.

³ Jo. Fran. Stypmanni *Jus Maritimum et Nauticum*, edited by Heineccius, 1740.

⁴ Joannis Loccenii, J. C. *De Jure Maritimo et Navali*, libri tres: first published in 1651, afterwards republished in 1652, and also included in the *Fasciculus* of Heineccius along with Stypmannus in 1740.

⁵ *Censura Forensis Theoretico-Practica, id est totius juris civilis Romani ubique recepti, et practici, methodica collatio*, auct. Simone Van Leeuin, J. C. Batav. 1662.

⁶ Franciscus Roccus, a Neapolitan advocate and judge, published in the middle of the seventeenth century two treatises: 1. *De Navibus et Nauto Notabilia*; and, 2. *De Assurationibus Notabilia*. Besides these tracts, he published a collection of consultations, *Responsarum Legalium centurii duo*; and of these there has been published along with the above tracts, a selection of such as relate to the same subjects.

The first edition of the *Notabilia* was in 1655. The edition which I use is that of Amsterdam, 1708.

⁷ Ansaldi de Ansaldi, J. U. C. Patricii Florentini et Sacre Rotæ Romanæ Auditoris, *Discursus Legales de Commercio et Mercatura*, 1752.

I may remark of this work, and of that of Casaregi, that each *discursus* contains the discussion and determination of a case occurring in actual practice, not, as we should imagine from the title, a discourse or disquisition on an abstract subject or question in law. The case is related, the arguments detailed, and the prevailing *rationes decidendi* delivered at great length, with all the authorities fully quoted, and the subject often treated very satisfactorily in a learned and careful discussion.

Ansaldus seems, like Casaregi, to have been under the patronage of Cosmo III. Duke of Etruria.

⁸ *Traité sur différentes matières de Droit Civil appliqués à l'usage du Barreau et de Jurisprudence Française*, 1781, in 4 vols. 4to.

This eminent man was a judge in the court of Orleans, and also professor of the French law in that university. He was born in 1699, and died in 1772.

⁹ *Traité des Assurances et des Contrats à la grosse*, par M. B. M. Emerigon, avocat au parlement de Provence, ancien conseiller au siège de l'Amirauté de Marseille, 1783.

¹⁰ *Ponderazioni sopra la Contrattazione Marittima dal Carl. Targa, Giureconsulto Genovese*. Geneva, 1787.

¹¹ *Consuetudo vel Lex Mercatoria*, or the Ancient Law-Merchant, by Gerard Malynes, 1636.

Molloy,¹ and Beawes,² three in modern times of great and deserved authority. The first is the Treatise on the Law relative to Merchant Ships and Seamen, by Lord Chief Justice Abbot, while at the bar.³ The other two are confined to the contract of insurance: one of them published by Mr. Justice Park while at the bar, in 1786, and of which he has recently [502] given to the public a seventh edition;⁴ the other by Mr. Serjeant Marshall, published in 1802, a second edition in 1808, and a third edition by the author's son, Charles Marshall, Esq.⁵

The work on maritime jurisprudence by Mr. Holt, which was expected when the preceding edition of this work was published, has since appeared, and has not disappointed the hopes of the profession.⁶

In arranging the subjects which require to be considered under the title of Maritime Contracts, I shall follow the course of the ship's employment from the first fitting out to the termination of the voyage.

SECTION I.

OF CONTRACTS RELATIVE TO THE EQUIPMENT OF THE VESSEL.

Referring for what relates to the PROPERTY of the ship itself to a former part of this volume, this section will comprehend: 1. The employment of the ship. 2. The appointment of a shipshusband. 3. Contracts between the owners and the master. 4. Contracts with seamen. 5. Contracts with strangers for stores, furniture, and repairs, for the use of the ship.

SUBSECTION I.—EMPLOYMENT OF THE SHIP.

There has been occasion already to state the rules of the statute relative to shares of ships; and under Partnership will be considered some of the effects of joint-ownership. Here it is proper to consider what is to be the result of dissension among the owners relative to the employment of the ship; for where she does enter on the expedition, there must be unanimity and effect given to all the acts of those who have the care of it.

The rights of the several part-owners are of the nature of *pro indiviso* rights, for the subject is indivisible. The difficulty in the joint management arising from this circumstance, appears capable of being resolved only by the exercise of a power to compel a sale, or at least by requiring reasonable security to be given to the party dissatisfied. In England the former of these methods is rejected, the latter followed. The majority in value rules the employment; but the minority may arrest the ship till security be given, or, if they are satisfied with the credit of the owners, they may protest against them that they shall be responsible for every loss. In either of these cases the minority will be entitled to recover the value of their shares if the ship be lost; and while they reap none of the benefit, will be liable to no part of the expense.⁷

¹ De Jure Maritimo et Navali, or a Treatise of Affairs Maritime and of Commerce, 1676.

² Lex Mercatoria Rediviva, or a Complete Guide to all Men in Business. By Wyndham Beawes, Esq., His Britannic Majesty's Consul at Seville and St. Lucar. Republished by Mortimer, 1783, fol.; and recently, with notes and improvements, by Tomlins, 2 vols. 4to.

³ This work was first published in 1802; afterwards in 1804, in 1808, and in 1812; and now (1827) a fifth edition by J. H. Abbot, son of the author.

⁴ A System of the Law of Marine Insurance, with three chapters on Bottomry, on Insurances on Lives, and on Insur-

ances against Fire. By James Allan Park, one of His Majesty's counsel, now one of the judges of His Majesty's Court of Common Pleas, 1817.

⁵ A Treatise on the Law of Insurance, in four books. 1. Of Marine Insurance; 2. Of Bottomry and Respondentia; 3. Of Insurances upon Lives; and, 4. Of Insurances against Fire. By Samuel Marshall, Serjeant-at-Law, 1802 and 1808; by C. Marshall, 1823.

⁶ A System of the Shipping and Navigation Laws of Great Britain, and of the Laws relative to Merchant Ships and Seamen. By F. L. Holt, of the Middle Temple, Barrister-at-Law.

⁷ Ouston v Hebden, 1 Wilson 101, in which Chief Justice

[503] If no arrest be used or protest taken, the minority will be held to assent; or at least they will not be entitled to damage for such use, by a *pro indiviso* owner, in the fair course of the employment of the subject, as they might by the legal method have prevented; and they will also be entitled to part of the profit, and suffer in the loss.¹

If the majority destroy the ship, they are liable to the others.²

In Scotland the remedy has been by sale. Not only in the case of equality, but even where the minority opposed the employment, the dissentient owners, minority or equal, have in Admiralty been entitled to insist either for a sale, or that, at a price put on the shares, the other owners shall purchase their share, or be obliged to part with their own.³ This doctrine was grounded on the consideration that part-owners, though not properly copartners, frequently suffer by the contracts or delinquencies of shipmasters, perhaps not of their own choosing; for which they are answerable, at least to the value of their own share.⁴ And the same doctrine, though not supported by such considerations of hazard, was in modern times applied to the case of a brewery held in common.⁵

Which of these rules ought now to prevail in this united country, it might be presumptuous to say. But it may be necessary to reconcile them in some future case, in which the property comes to be mixed, and persons of both countries concerned in the same vessel. Perhaps the course followed in England may be followed on the same principles of equity which have recommended it to adoption by the Court of Chancery in England, as a measure of less harshness, and less attended with peril, than the remedy which we have long used.

SUBSECTION II.—OF THE APPOINTMENT OF A SHIPSHUSBAND.

The difficulty of administering with unanimity the affairs of a ship belonging to many owners, leads to the appointment of some person, in whom they all have confidence, as SHIPSHUSBAND. Sometimes the shipshusband is merely an agent for conducting the necessary measures on the return of the ship to port: as making the proper entries at the custom-house from the master's manifest; superintending the landing of the goods; checking the measurements; procuring the proper surveys of damages, to avoid disputes; seeing the freight settled before the lien is quitted, and so forth. But there is an appointment of more importance, extending to a more general agency, for conducting the affairs of the vessel in place of the owners. The person so appointed is empowered to enter into contracts for furnishings; to appoint the master and seamen; to enter into charter-parties; and, generally, to act as the sole representative of the owners.

The shipshusband may either be a part-owner or a stranger; and the authority may be conferred either by express deed or commission; or, even without a written commission, by verbal appointment, or by permitting him to exercise the function of shipshusband, so as to give him the character of accredited agent of the owners.

1. Where he is appointed by written commission, that commission must be executed by [504] all the joint-owners. It may refer generally to the customary powers and duties of the shipshusband, and, where special, should empower the agent to regulate the appointment of the master and the hire of seamen; to make contracts of furnishing and affreightment;

Lee said: 'I have no doubt but the Admiralty has a power in this case to compel a security; and this jurisdiction has been allowed to this court for the public good.' See Abbot 74. The Court of Chancery exercises this sort of equitable jurisdiction in cases where the Admiralty cannot; as, where the shares are not ascertained, the Court of Chancery will issue an injunction, and refer to the Master to inquire into the value and settle the security. *Haly v Goodson*, 2 Merivale 77.

¹ *Strelly v Winson*, 1 Vernon 297. Here one of three owners refused to fit the ship for a voyage. She was lost,

and he was found liable, as he had not expressly dissented, and notified that dissent. This is sanctioned by the high authority of Lord Chief Justice Abbot, 71.

² Abbot, 11th ed. 74. *Barnardison v Chapman*, quoted from Sir P. King's ms. Cases, 4 East 121.

³ Stair i. 16. 4; Ersk. iii. 3. 56.

⁴ *Carnegie v Napier*, 1672, M. 9349-51; *M'Givan v Blackburn*, 1725, 2 Dict. 381 (14672).

⁵ *Miligan v Barnhill*, 1782, M. 2486. This was solemnly determined on a hearing in presence.

to levy freights; pay wages; make the necessary disbursements on account of the ship; and, generally, to act discretionally for all the owners.

2. It is chiefly in the case of one of the joint-owners taking the management, that the powers of shipshusband are constituted without written authority. But both in that case, and even where a stranger acts in the capacity of shipshusband, the owners will be bound to reimburse and to recompense him; and his contracts in the proper line of a shipshusband's duty will bind them, provided the nomination or the accrediting of the shipshusband be clearly proved.¹

The DUTIES of the shipshusband are: 1. To see to the proper outfit of the vessel, the repairs adequate to the voyage, and the tackle and furniture necessary for a seaworthy ship. 2. To have a proper master, mate, and crew for the ship, so that in this respect it shall be seaworthy. 3. To see to the due furnishing of provisions and stores according to the necessities of the voyage. 4. To see to the regularity of all the clearances from the custom-house, and the regularity of the registry. 5. To settle the contracts, and provide for the payment of the furnishings which are requisite in the performance of those duties. 6. To enter into proper charter-parties, or to engage the vessel for general freight, under the usual conditions; and to settle for freight and adjust averages with the merchant. And, 7. To preserve the proper certificates, surveys, and documents, in case of future disputes with insurers or freighters; and to keep regular books of the ship.

His POWERS, where not expressly limited, may be described generally as those requisite to the performance of the duties now enumerated. It may be observed, however,—

1. That without special powers he cannot borrow money generally for the use of the ship, though he may settle the accounts of creditors for furnishings, or grant bills for them, which will form debts against the concern, whether he has funds in his hands or not, with which he might have paid them.

2. That although he may, in the general case, levy the freight, which is by the bill of lading payable on the delivery of the goods, it would seem that he will not have, and is not to be relied on as possessing, power to take bills for the freight, and give up the possession and lien over the cargo, unless it has been so settled by charter-party, or unless he has special authority to give such indulgence.

3. That, under general authority as shipshusband, he has no power to insure, or to bind the owners for premiums; this requiring a special authority.²

4. That as the power of the master to enter into contracts of affreightment is superseded in the port of the owners, so is it by the presence of the shipshusband, or the knowledge of the contracting parties that a shipshusband has been appointed.

5. That he has not, as managing owner or shipshusband, authority to pledge his owners to the expense of a lawsuit.³

6. That the common rule of mandate applies,—namely, the shipshusband cannot [505] delegate his powers.⁴

CLAIMS ON BANKRUPTCY OF THE OWNERS.

1. The shipshusband will be entitled on the failure of the owners to demand the balance of his advances and commission, to claim relief from bills and engagements in his own name

¹ See Ersk. iii. 3. 33; *supra*, pp. 424 and 508.

² *French v Backhouse*, 5 Burrow 2727. French was by deed empowered by two joint-owners of a ship to do and act as husband of the ship, as is customary, and to advance, lend, etc.; and for all payments on account of the ship to retain, etc. He insured the ship, and brought an action for reimbursement of the premiums. The Court of King's Bench held, 'That a shipshusband has no right to insure for any part-owner without his particular direction, nor for all the owners

in general without their general direction, or something equivalent to it.'

Bell v Humphries, 2 Starkie 345. Ruled by Lord Ellenborough, that a managing owner has no power to insure the ship to the effect of binding a part-owner. [Abbot, 11th ed. 80. But see *contra*, *Hooper v Lusby*, 4 Camp. 66; *Hunt v Royal Exchange Assurance Co.*, 5 M. and S. 47.]

³ *Campbell v Stein*, 5 June 1818, 6 Dow 134.

⁴ *Forbes v Milne, Philip, & Co.*, 1822, 2 S. 87, N. E. 78.

for the price of repairs, furnishings, etc., and to hold a lien for his security and indemnification over the documents and warrants of the ship, and over the freight recovered, or which he has been empowered to recover.

2. Those who have entered into contracts with the shipshusband, or who have made furnishings to the ship of repairs, ropes, sails, etc., or who have supplied provisions for the voyage, although the shipshusband shall have been furnished with money which he has applied to his own purposes, will have their claims against the owners.

CLAIMS ON THE SHIPSHUSBAND'S BANKRUPTCY.

The owners will have their claim on the estate of the shipshusband for whatever balance he is due to them.

They will be entitled to vindicate against the general creditors of the shipshusband, whatever can be identified as the property of the owners; *ex. gr.* bills granted for freights or for average.

They will have their claim as creditors for indemnification and reimbursement of whatever the shipshusband may in their name have engaged for, or done improperly, or beyond the limits of his powers, for which they have been made, or may be made responsible, in so far as not *lucrati* by such act.

SUBSECTION III.—OF THE SHIPMASTER OR CAPTAIN.

The MASTER, as he is universally called in this country, or the Captain or Patron of the ship, as he is sometimes denominated in foreign ordinances and books, is the person to whose care the navigation and management of the ship is entrusted by the owners or employers.¹

1. The master must be a British subject.²

2. It appears that of old the master was in almost every instance a part-owner of the ship. He frequently, or perhaps generally, is not so now; and he may or may not be a part-owner.

3. There seems to be no restriction (except that above stated) on the discretionary power of the owners in appointing a master, as to the description of persons, or the skill, [506] honesty, or qualifications required. Their own interest and their responsibility for damage will in general secure a fair appointment, as a ship with an unskilful master is not seaworthy.³

Appointment of the Master.—The contract with the master is properly *locatio conductio operarum*. But the power which in his representative capacity he possesses is so great, that everything relative to his appointment and dismissal is important.

1. If the ship belong to a single owner, he has the sole power of naming the master; and having named him, he may instantly dismiss him from his employment without control, leaving him to his remedy at law if unjustly dismissed.⁴

2. If the ship belong to several owners, the majority will be entitled to appoint a master;

¹ The owner, or *dominus navis*, may either be, strictly speaking, the owner and proprietor, or only the freighter, of the ship: 'Exercitorem autem eum dicimus, ad quem obventiones et reditus omnes perveniunt; sive is dominus sit, sive a domino navem per aversionem conduxit, vel ad tempus, vel in perpetuum.' Dig. lib. 14, tit. 1; De Exercit. Actione, l. 1, sec. 15.

² 6 Geo. iv. c. 109, secs. 12 and 16. [Formerly the master behaved to be a British subject. See 3 and 4 Will. iv. c. 54, sec. 16; and 8 and 9 Vict. c. 88, sec. 13. But there is no longer any such restriction, and the provisions of the above-mentioned statutes are repealed by 16 and 17 Vict. c. 129,

sec. 31. It is, however, required, in order to be qualified to act as such, that the master must have obtained from a local marine board either a certificate of service, if he has served as master of a British ship prior to Jan. 1, 1851; or if not, a certificate of competency. See sec. 131, and secs. 240–2 et seq., as to removal.]

³ Questions have arisen in England, under the 49 Geo. III. c. 126, secs. 1, 3, 4, as to the purchase of an appointment as captain of our India ships. See *Blackford v Preston*, 8 Term. Rep. 89; *Card v Hope*, 2 Barn. and Cress. 661; *Richardson v Mellish*, 2 Bingham 229.

⁴ *Infra*, p. 557.

and there seems to be no other redress to the minority not satisfied with the safety of the appointment, than either a sale of their shares, or the adoption of that remedy which the law gives in the case of a voyage of which some of the owners disapprove.¹

3. The appointment of master requires no written warrant of authority or peculiar solemnity. It is a contract with the owners, or with the shipshusband for them, and may be entered into by verbal agreement. The mere employment of master, with possession, is sufficient to impose on him all the duties, and to vest him with all the legitimate and customary powers, of master.

4. A master appointed by consignees abroad as a measure of necessity (on the desertion of the master, for example), may be entitled to the privileges, and competent to discharge the functions, of a master appointed in the most regular manner, especially if ratified by any confirmation or recognition on the part of the owners.²

5. The master may delegate his power during the voyage, by naming another master; and in questions with third parties, the master so named will, even where the exercitors have prohibited the master from delegating, be vested by the possession of the ship, and exercise of the office, with all the powers of master.³

Power and Authority of Master.—The master has the sole direction of the course and conduct of the ship, and all the powers which are necessary for accomplishing the voyage in which the ship is engaged.

1. In employing the ship the master's powers vary. In a *home* port, his authority to freight the ship by charter-party is held to be superseded by that of the owners themselves, so as to require either an express or a tacit authority to entitle him to make contracts.⁴ In a *foreign* port, the master has full authority to make a charter-party, binding the ship and owners.⁵

2. The master has full authority to bind the owners by receiving goods where the [507] ship is on *general* freight; on the principle that this is within his powers as regulating the ship in its usual employment.⁶ And on the same principle, it has even been held that where the master was authorized to advertise for general freight, the owners were bound by conditions inserted without their authority.⁷

3. In fitting out the vessel, these points are settled: 1. That the master is the pre-

¹ See above, p. 429.

² Such an appointment by consignees was held good to sustain a bottomry bond for money advanced by them for repairs and outfit, the necessity and honesty of the transactions being fully made out, and a recognition of the appointment by an order for part of the freight, describing this man as master. The *Alexander*, Tait, 1813, 1 Dodson's Adm. Rep. 278.

³ *Magister navis à domino navis electus et nominatus potest alium magistrum substituere et nominare, etiam si hoc fuerit ei à domino navis prohibitum.* Roccus, not. 5, p. 3.

It is different in the case of shipshusband. See above, p. 553.

⁴ *Ordon. de la Marine*, liv. 3, tit. 1; *De Charte-Parties*, art. 2; 1 Valin 587; Pothier, *Charte-Partie*, No. 48, vol. ii. pp. 385, 386. Observe that the law of the Pandects, generally quoted to prove the binding effect of such contracts, 'omnia facta magistri debet præstare qui eum præposuit' (*Dig. lib. 14, tit. 1; De Exercit. Act. l. 1, sec. 5*), speaks merely by reference to the extent of the *præpositura*. In England, the doctrine of the text is law. Abbot 91 et seq. The master himself is bound.

⁵ Every authority in maritime law will furnish a text for this, from Cleirac to Abbot.

⁶ *Ellis v Turner*, 8 Term. Rep. 531. The English cases are thus summed up in Abbot: 'It may be observed, that in each of the above cases the contract upon which the action was brought was made by the master without the particular knowledge of the owners. In the first, it was made in the course of the usual employment of the vessel; and therefore the Court held the owners to be bound to the performance as a general rule, although they thought the particular suit improperly brought. In the second, the contract was not made, or at least did not appear to have been made, in the course of the usual employment of the ship; and therefore the owner was not bound by it. In the last, the contract was made in the course of the usual employment of the ship, and therefore it was considered to be a contract made in substance by the owners.' Abbot 97.

⁷ *Rinquist v Ditchel*, Abbot, 11th ed. 105. Here a broker in London had been employed by the master to advertise the ship as a general ship bound to Hamburg; and in the papers the broker had inserted a clause purporting that the ship was to sail with convoy from the place of rendezvous. This had not been complied with, and the action was upon the warranty. Lord Kenyon directed the jury, that as the broker was authorized to advertise the ship, the owners were answerable to strangers for his acts, although he had exceeded his

sumed and accredited agent in fitting out, victualling, and manning the ship abroad; and that for his engagements in those respects, or even for money borrowed for the purpose of furnishing *necessaries* for the ship, the owners will be bound, provided the loan appears to be fairly supported by evidence of existing necessities. 2. That even in a home port the master's presumed power as agent for the owners will bind them; unless it shall be shown that the owners themselves, or a shipshusband, managed the concern, and that the party contracting with the master was aware of this. 3. That his authority will be effectual to bind the owners for necessities, although they have furnished the master with money sufficient for all his occasions; since of this the public cannot be aware, while the office and trust in the master raises a general credit.¹ 4. That the master has authority to hypothecate the ship for *necessaries* in a foreign port; but no such authority to hypothecate the ship in a home port.² 5. That the master's negligence or fault will bind the owners; but with this limitation, that their responsibility shall extend no further than to the value of the ship.³ The master himself will be liable to the full extent.⁴

[508] The master is personally answerable for furnishings and repairs received for the ship under a contract with him, unless care is taken in the bargain to stipulate otherwise. This is contrary to the ordinary rule, by which one appearing as an agent binds only his principal;⁵ but it is a very just and expedient exception, considering the extent of discretionary power vested in the master. The master is not liable, however, where the contract for furnishings is with the owners themselves before the master's appointment.⁶

The master is liable for damage done by himself, or by his orders, or by the crew under his command. And it will not discharge him of this responsibility, that the act has been done under the direction of a pilot, who by statute supersedes him for the time in the government of the ship.⁷

authority, and must seek their remedy against him; and verdict went accordingly.

¹ See *Cary v White*, 1 Brown's Parl. Cases. Here the owner of a ship lying at Bristol, being resident at Dublin, authorized his master to take a freight for the West Indies, and to take up money on bottomry for fitting out the ship. The master entered into a charter-party with Cary, the owner agreeing to pay wages and provide all necessities. For this the master borrowed £200 on bottomry of Cary, and had a letter of credit on Jamaica for what he might want abroad. At Jamaica, the master, by Cary's letter of credit, took up £789, and on the return the ship was lost. In the Court of Chancery of Ireland it was held that Cary was not entitled to relief. On appeal to the British House of Lords, the owner was held responsible, if Cary's allegations as to the necessity of the expenditure were true; and the Lords directed a trial in Common Pleas to ascertain what had been laid out on Cary's order for the necessary repairs and use of the ship during the voyage, and decreed such sums to be paid to Cary. In two several trials (one at bar), verdicts were given that nothing was *necessarily* laid out. And so Cary's suit was dismissed. Another appeal was taken, but not prosecuted.

See Abbot's report of the case, 11th ed. 111.

² See below, Of Hypothec for Repairs of Ship.

³ It was otherwise in the civil law, the owner being liable to the full extent of the loss. Dig. lib. 14, tit. 1, l. 1, sec. 5; De Exercit. Act. But that has been altered in all the modern codes. See the French Ord. de la Marine, liv. ii. tit. 8, art. 2; 1 Valin 535. A determination according to the old rule produced a great sensation among shipowners in England, and led to petitions to Parliament, and to the statutes 7 Geo. II. c. 15, and 26 Geo. III. c. 86. See below, Of Charter-party.

⁴ See the above-mentioned statutes.

⁵ See above, p. 540.

⁶ *Farmer v Davies*, 1786, 1 Term. Rep. 108. Here furnishings were ordered for the ship by the owners before the master's appointment, and partly delivered before, partly after, his assuming the command. Lord Mansfield said: There is not a shadow of colour to charge the captain for any part of those goods.

⁷ *Bowcher v Noidstrom*, 1809, 1 Taunt. 568. A vessel in the Thames got entangled with the defendant's ship, the jib-boom of which went through his mainsail. The defendant's ship was then under the care of a pilot, who directed one of the crew to cut away; and the man cut five or six clews of the plaintiff's mainsail, and part of his boom. The defendant's ship was in no danger, and by a little patience would have probably been extricated. The master was in his bed asleep. Mansfield, Ch. J., held that, although there was a pilot on board, the pilot did not represent the ship, and that the master was still answerable for every trespass. [Abbot, 11th ed. 338.]

An important distinction is to be marked in the case of a king's ship. *Nicholson v Mounsey and Simes*, 1812, 15 East 384. Here a collision happened while a sloop of war, commanded by Captain Mounsey, was under the orders of the lieutenant, Captain Mounsey being asleep in bed. The captain was held not answerable.

[There seems also to be room for a distinction as to liability to third parties and to owners. In *Petrie's Exrs. v Aitchison & Co.*, 6 Feb. 1841, 16 F. C. 492, the master was held not to be liable for damage to cargo arising from the negligence of the mate. The subject has recently attracted the attention of the mercantile profession, from the hardship and apparent

The master must carefully keep the certificate of registry, and produce it when required.¹ It may be renewed if lost, under certain precautions. If the master refuse to deliver it, he might, even at common law, have been compelled by the Court of Admiralty to deliver it.² But this power is superseded by statute, which more effectually, rapidly, and cheaply accomplishes the purpose, in authorizing a complaint to a justice of peace to have the master brought before him for examination; and giving power, if it shall appear that the certificate is not mislaid, but withheld wilfully, to convict the master, fine him in £100, and commit him to prison till it be paid.³ Under the former Act to the same effect, an application on the common law to Admiralty was refused, reserving to follow out the directions of the Act.⁴

Dismissal.—In all situations of exuberant trust, there seems to exist a necessity for a power of instantly breaking up the connection, lest the ruin of the party desiring to resile may be the consequence.⁵ Accordingly, it is held in our Court of Admiralty, that ship-owners may dismiss the master without cause assigned; and that the majority may even dismiss a joint-owner who is employed as master, without giving their reasons. I do not know that this has been decided or questioned in the Supreme Court.

OF CLAIMS ON THE BANKRUPTCY OF THE OWNERS.

1. The master has a claim on the estate of the owner for his wages, with a lien or [509] set-off upon the freight which he has levied, but no hypothec on the ship.⁶
2. He has a claim for reimbursement of what he has advanced, and for indemnification of any engagements which he may have undertaken for the owners, with a similar lien or set-off.

CLAIMS ON THE MASTER'S BANKRUPTCY.

1. The owners have a claim for the balance of freights levied by the master, deducting his salary and the amount of his disbursements and engagements.
2. Although the master, acting in the ordinary line of the employment and outfitting of the ship, may bind the owners, they will be entitled out of his estate to relief of obligations in which he has exceeded his power, or to which he has bound them, although furnished with the necessary provision of money to save the necessity of such obligations.
3. The owners are liable for damages for breach of contract, and for the consequences of the neglect, fault, or fraud of the master, to the extent of the value of the ship, but they will be entitled to claim indemnification against the master's estate.

SUBSECTION IV.—OF THE HIRING OF MATE AND SEAMEN.

Within the term MARINERS or SEAMEN, the mate and every other officer under the master is comprehended. In England this is of importance in giving the mate and other officers admission to a suit in Admiralty.⁷ In Scotland it is of importance, in so

inconsistency of the decisions. See the recent cases collected in the Digest to the English Law Reports, *voce* Compulsory Pilotage.]

¹ 6 Geo. iv. c. 110, secs. 21, 22, 23. [See 18 and 19 Vict. c. 104, sec. 50.]

² 4 Robinson's Adm. Rep. 1.

³ 6 Geo. iv. c. 110, sec. 27.

⁴ *Kay v Blair*, in Admiralty, 24 Jan. 1806, Judge Cay's ms.

⁵ I find it laid down in the French Code de Commerce that the owner may so dismiss the shipmaster. Code de Commerce, liv. ii. tit. 3, sec. 218. And a recent commentator on that

Code has delivered the doctrine, that although strictly the contract can be discharged only for such causes as may justify a breach of any other contract of service for a time certain, 'the master may be superseded before the ship's departure, or during the voyage, without notice assigned, or any necessity of previously justifying the dismissal judicially.' Pardessus, Cours de Droit Commercial, vol. ii. p. 35.

⁶ The master is presumed, in his contract with the owners, to trust to their personal credit. Abbot 476. This, in England, deprives him of his remedy in Admiralty.

⁷ In the case of the *Favourite*, 2 Rob. Adm. Rep. 232, the

far as it gives them the remedy against the ship and the master, as well as against the owners.

The contract for the hiring of mariners is an instrument, expressing the engagement of the parties, with respect to the description of the voyage on the one hand, and to the rate of wages on the other, for which the seaman has engaged his services; the particulars falling under these reciprocal obligations being settled by the general law. The Legislature, for the protection of a set of men proverbially reckless and improvident, and requiring protection, interfered about a century ago to require shipowners on all occasions to give to their seamen the benefit of a distinct written contract. At first it was not carried further than to settle thus, by undeniable evidence, the two great points of the contract mentioned above (2 Geo. II. c. 36). But to these by subsequent Acts many particulars have been added, and many penalties.¹ By these Acts, 1. There must be a special agreement with the seamen or mariners before proceeding on any voyage, both in the foreign and coasting trade, under a penalty for the benefit of Greenwich Hospital. 2. Such agreement must be in writing, declaring what wages each is to receive during the whole voyage, or for the time they ship themselves for, and what is the voyage. 3. This agreement is to be signed by each mariner, within three days after entering himself; and when signed, is 'conclusive and binding on all parties.' 4. The master is bound to produce the articles, and want of them is no bar to [510] the seaman's action. 5. The agreement need not be stamped where it relates to a coasting vessel. 6. No seaman is to be hired who shall, to the master's knowledge, have deserted from any other ship, under a penalty of £100.² 7. No seaman is to be hired in the West India colonies or plantations, at a greater hire than double the monthly wages contracted with other persons engaged at the ship's departure from Great Britain in the same capacity, unless by special authority of the governor, collector, or comptroller of the port, in writing under his hand. 8. These rules are not to extend to contracts entered into with seamen in the West Indies, who shall produce a regular discharge under the hand of the master or commander under whom they last served, signed in presence of witnesses; nor are they to hold with regard to contracts with seamen to serve on board any ship which, on account of very hazardous service or extraordinary duty, required such contract and hire, provided the necessity be proved on oath before the chief magistrate or principal officer of the port, and provided that the seaman shall *de facto* not have deserted; the wages being restricted to double the monthly wages.³ 9. By the articles of agreement annexed to the Act of 37 Geo. III. in order to prevent desertion in the West India voyages, the seamen are not to have their wages till the arrival of the ship at the port of delivery, which is to be understood of the final port at the close of the voyage; and it is a point of reasonable policy for all parties, and so authorized in almost all maritime codes, and adopted in the articles of agreement used by most nations, that a certain restraint should be laid on the right to demand wages, while the ship is abroad on her voyage.⁴ 10. Wages finally earned are to be paid, in the case of a foreign voyage, within thirty days after the ship's arrival in Great Britain, and entry in the custom-house, or at the time of discharge, which

mate succeeding to the office of master, by capture of the former master, was allowed to sue in Admiralty.

¹ Seamen in ships trading to parts beyond seas, by 2 Geo. II. c. 36, 2 Geo. III. c. 31.

The coasting trade in vessels of 100 tons or upwards going to open sea (31 Geo. III. c. 39, sec. 37).

Regulations of seamen in ships trading to the colonies and plantations in West Indies (37 Geo. III. c. 73). [See the Merchant Shipping Act, 17 and 18 Vict. c. 104.]

² This, though contained in the statute of 37 Geo. III., relating to West India voyages, may, it is thought, have an universal operation. Abbot 436.

³ It is very justly remarked, that there is extreme obscurity in this regulation, and that if it was intended to allow more than double wages without a magistrate's authority, where a discharge was produced, or where, in cases of extreme necessity, the seaman had not deserted, the latter part of the clause restricting the wages is ineffectual; and if, on the other hand, it was intended to allow the power only in cases of necessity, and to mariners who have not deserted, then the first part of the regulation as to a discharge is ineffectual. Abbot 439 (11th ed. p. 467).

⁴ Pothier, Louage des Matelots, No. 211, vol. ii. p. 449; Abbot 455.

shall first happen; and in the case of a coasting voyage, within four days after entry at the custom-house, or delivery of the cargo, unless in these cases a special agreement shall have altered the rule.¹

¹ 2 Geo. II. c. 36, sec. 7, and 31 Geo. III. c. 39, sec. 6.

[By the Merchant Shipping Act, 17 and 18 Vict. c. 104, sec. 149, it is enacted that the master of every ship shall enter into an agreement with every seaman whom he carries to sea from any port in the United Kingdom as one of his crew, which shall be in a form sanctioned by the Board of Trade, be dated at the first signature thereof, be signed by the master before any seaman signs the same, and specify the nature, and, as far as practicable, the duration of the voyage or engagement, the number and description of the crew, and how many are engaged as sailors, the time at which each seaman is to be on board or to begin work, the capacity in which each is to serve, the amount of wages which each is to receive, a scale of the provisions which are to be furnished to each seaman; any regulations as to conduct on board, and as to fines, short allowance of provisions, or other lawful punishments for misconduct which have been sanctioned by the Board of Trade as regulations proper to be adopted, and which the parties agree to adopt: And it shall be so framed as to admit of stipulations, to be adopted at the will of the master and seaman in each case, as to advance and allotment of wages, and may contain any other stipulations which are not contrary to law.

Foreign Ships.—In the case of foreign-going ships (sec. 150), every agreement made in the United Kingdom shall be signed by each seaman in the presence of a shipping-master, who shall cause the agreement to be read over and explained to him, or otherwise ascertain that he understands it before he signs it, and shall attest each signature; and when the crew is first engaged, it shall be signed in duplicate, of which one part shall be retained by the shipping-master, and the other part (which shall contain a place for the descriptions and signatures of substitutes or persons engaged subsequently to the first departure of the ship) shall be delivered to the master. Where foreign-going ships make voyages averaging less than six months, running agreements may be made to extend over two or more voyages, provided that the agreement shall not extend beyond the next following 30th of June or 31st of December, or the first arrival of the ship at her port of destination in the United Kingdom after such date, or the discharge of cargo consequent upon such arrival (sec. 151): Further, the master of every foreign-going ship (sec. 161) must, on signing the agreement, produce to the shipping-master the certificates of competency or service of himself and his mates, and thereupon the shipping-master shall sign and give to the master a certificate to that effect, which the master must, before proceeding to sea, produce to the collector or comptroller of customs, without which the ship shall not be allowed to go to sea; and within forty-eight hours after the ship's arrival at her final port of destination in the United Kingdom, or upon the discharge of the crew, whichever first happens, the master must deliver the agreement to a shipping-master at the place, who shall thereupon give to the master a certificate of such delivery, and no officer of customs shall clear any foreign-going ship inwards without the production of such certificate.

Home-trade Ships.—Single seamen or crews may also

(sec. 155), in the case of home-trade ships, if the master thinks fit, be engaged before a shipping-master; and where the engagement is not so made, the master shall, before the ship puts to sea, if practicable, and if not, as soon afterwards as possible, cause the agreement to be read over and explained to each seaman, and the seaman shall thereupon sign the same in the presence of a witness, who shall attest his signature.

But it is provided (sec. 162), that where home-trade ships are of more than eighty tons burden, no agreement shall extend beyond the next following 30th of June or 31st of December, or the first arrival of the ship at her final port of destination in the United Kingdom after such date, or the discharge of cargo consequent upon such arrival; that the master or owner shall, within twenty-one days after the 30th of June and the 31st of December in every year, transmit or deliver to some shipping-master every agreement made within the six calendar months next preceding, and shall, in the case of home-trade passenger ships, produce to the shipping-master the certificates of competency or service which he and his mate are required to possess, whereupon the shipping-master shall give to the master or owner a certificate thereof, and no officer of customs shall grant a clearance or transire without the production of such certificate, and allow the ship to ply or go to sea.

Right to Wages.—A seaman's right to his wages and provisions shall commence either at the time at which he commences work, or at the time specified in the agreement for his commencement of work or presence on board, whichever first happens (sec. 181).

No seaman shall by any agreement forfeit his lien upon the ship, or be deprived of any remedy for the recovery of his wages, to which he would otherwise have been entitled; and every stipulation by which any seaman consents to abandon his right to wages in the case of the loss of the ship, or to abandon any right which he may have or obtain in the nature of salvage, shall be inoperative (sec. 182).

The right to wages shall not be dependent on the earning of freight, and every seaman and apprentice who would be entitled to recover wages if the ship had earned freight shall, subject to all other rules of law and conditions applicable to the case, be entitled to recover the same, notwithstanding that freight has not been earned; but in all cases of wreck or loss of the ship, proof that he has not exerted himself to the utmost to save the ship, cargo, and stores, shall bar his claim (sec. 183).

And where his service terminates before the period contemplated in the agreement, by wreck or loss of the ship, and also where it terminates before such period, by his being left on shore at any place abroad under a certificate of his unfitness or inability to proceed on the voyage, he shall be entitled to wages for the time of service prior to such termination, but not for any further period (sec. 185).

But no seaman shall be entitled to wages for any period during which he unlawfully refuses or neglects to work when required, whether before or after the time fixed by the agreement for his beginning work, nor (unless the Court hearing the case otherwise directs) for any period during which he is lawfully imprisoned for any offence committed by him (sec. 186).]

It is the object of these Acts to render the agreement with seamen as distinct and definite as possible; to prevent any part of it from resting on parole testimony or vague conversation, which is at all times so difficult to be ascertained in a court of justice, and in no cases more so than in such as relate to this class of persons; to avoid, in such instruments, expressions so vague and arbitrary as to place the seamen at the discretion of their employers respecting the extent and direction of the voyage; and to exclude a variety and complication of minute stipulations, unfit for the comprehension of this improvident set of men, ready at all times to sign anything.

On these principles, it seems, 1. That there can be no demand, as under a custom, for additional wages or rights which are not mentioned in the articles, or made matter of special agreement.¹ 2. That no parole agreement can effectually be made for any additional wages, where there are articles signed.² 3. That the description of the voyage, one main object of [511] the contract, shall be as precise as it is possible in the circumstances to make it. This particularly applies to an expression which, on a pretended commercial necessity, has been introduced into such contracts after the description of the leading object of the voyage, by the words 'or elsewhere.' The introduction of such words, which contain no description of a voyage, but have well been called 'an unlimited description of the navigable globe, an universal *alibi* for the whole world, including the most remote and even pestilential shores,' is quite inconsistent with the spirit of the Act. That Act directed those contracts to be reduced to a distinct and intelligible statement of the reciprocal engagements of the parties, with a view chiefly to the interest of the seamen, whose ignorance makes them objects of protection for the law. When words so vague are used, they are at least subject to great limitation. The construction must vary with the situation of the primary port of destination: larger, where it is remote from neighbouring settlements; narrower, if surrounded by many adjacent ports fit for the purposes of the voyage. And it must at least present a fair indication of some particular destination, conformable to the general routine of the commerce, and presumed to be commonly known.³ And, 4. That in the construction of these contracts, an indulgent spirit of equity is applied to protect seamen against the consequence of their imbecility and improvidence.⁴

An agreement to give an extra sum to a mariner as an inducement to extraordinary exertion while the ship is in distress, is null, on the principle that he is already engaged to exert himself to the utmost.⁵ But this would not seem to apply where the inducement were to incur extraordinary danger to life.

The duty of producing the articles is laid entirely on the master or owners; and the statute declares, that the want of the articles shall be no bar to the action of the seamen.⁶ This seems to apply to the case where articles have been made, but are withheld; but it appears to be held as law in England,⁷ and has been adjudged in Admiralty here,⁸ that

¹ The *Isabella*, Brand master, 22 Nov. 1799, 2 Rob. Adm. Rep. 241. [Abbot, 11th ed. 477.]

² *Elsworth v Woolmore*, 1803, cor. Lord Alvanley, 5 Esp. N. P. Cases 84. See also the *Isabella*, in the preceding note.

³ See the principles of this contract, and the limitations of expressions so vague, illustrated in the cases of the *Eliza*, Ireland, 1823, 1 Haggard's Adm. Rep. 182; the *Countess of Harcourt*, 1824, *ib.* 248; the *Minerva*, 1825, *ib.* 347; the *George Home*, 1825, *ib.* 370.

⁴ See the observations of Lord Stowell, 1 Haggard's Adm. Rep. 357 et seq.

⁵ *Harris v Watson*, Peake's Cases 72. [Abbot, 11th ed. 477.]

⁶ 2 Geo. II. c. 36, sec. 8.

⁷ 'The statute does not render a verbal agreement for wages absolutely void.' Abbot 440, sec. 7.

⁸ *Burnet v Hardie*, 15 May 1800, Judge Cay's ms. vol. A, p. 305. Burnet engaged, in 1798, at London, with Hardie, master of the brig Lord Dundas, for £4, 10s., and to mess with him in the cabin. The voyage was to Riga, with liberty, if frozen in, to leave the ship and return. There was no writing; and as Burnet did not choose to leave the matter to the master's oath, he made his demand for the common rate of wages of a seaman. The Judge-Admiral considering the 8th section of the Act, and that no man can take advantage of his own unlawful act, held, that as the master had not produced articles, which he is by law required to possess, the pursuer was entitled to the usual rate of wages from the Thames to the Baltic in September 1798.

Afterwards, the number of cases was found so great, that the judge says: 'Every week's experience convinces me of the necessity of enforcing, to the utmost of my power, the salutary

though the only agreement for wages has been verbal, action will lie for the wages agreed for, or for the usual rate of wages.

The seaman's demand for wages is a personal claim against the master, in the first place, or against the owners; with a preference by lien or privilege against the ship itself. The difficulties relating to the form of the demand, which seem to arise in England [512] from the peculiar jurisdiction of Admiralty, are unknown to the practice of Scotland. The Admiralty in Scotland having a jurisdiction in 'all maritime and seafaring causes,' and there being depute-admirals at every principal port, the seamen have all the remedies that can judicially be given against the owners, the master, and the ship, in the ordinary course of Admiralty proceedings.

This difference in the facilities afforded in England and in Scotland has led to the adoption of a new and more easy course of proceeding in England, by a recent statute¹ empowering seamen to apply to justices of the peace, while it seemed unnecessary to extend any such remedy to Scotland; and the Act is expressly restricted accordingly (sec. 5).²

CLAIMS ON THE BANKRUPTCY OF THE OWNERS.

The agreement for wages is for the voyage, or on time, or for a share of the profit, as in fishing voyages. They are exigible only on the successful termination of the voyage, entitling the owners to freight, inasmuch that it is commonly said that 'freight is the mother of wages.' This is a quaint way of expressing a general rule, grounded on wise views of public policy (in which the laws of Britain coincide with those of other commercial states), by which the successful issue of the voyage is made the great object of all employed, and the zeal and attention of mariners stimulated, by the direct prospect of their own immediate interest, to the due performance of very perilous and laborious service. But metaphorical expressions in law are dangerous, and apt to mislead. The true parents of the wages are the contract, and the services performed; while the maxim does not hold true in all cases, that where freight is lost there are no wages. Where the ship, for example, is disappointed of her cargo, where the voyage is lost by the fault of the owners or master, where the ship is detained for debt, or seized for having on board contraband goods, the mariners are still entitled to their wages.³

I. WHERE THE VOYAGE HAS BEEN COMPLETED.—The seaman's claim, where the voyage has been completed, and the ship has earned her freight, is for the whole wages; and for this he has a threefold remedy: a preference over the ship and freight; a demand against the master; and a demand against the owners.

Seaman's Preference.—By the oldest maritime laws of Europe, seamen have preference on the ship for the wages of the last voyage,⁴ and it is a preference which has been continued to them almost universally.⁵

statutes which provide that ship's articles shall be signed and executed previous to the commencement of every foreign voyage, and of every coasting voyage in a vessel of above 100 tons burden.' *Herd v Beveridge*, 21 Dec. 1804, vol. D, p. 328.

N.B.—I find a practice in the ports of Fife to sign no articles for ships bound to the Baltic. This ought to be corrected, and shipmasters are clearly liable to the penalties.

¹ 59 Geo. III. c. 58, continued by 7 Geo. IV. c. 59.

² By the late Judicature Act of 6 Geo. IV. c. 120, sec. 28, actions for the wages of masters and mariners of ships and vessels are declared to be appropriated to the Jury Court. It may be doubted whether this ought not to be changed, or greatly qualified. It is against the policy which has dictated the Act of 59 Geo. III. and 7 Geo. IV. respecting actions for seamen's wages in England.

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³ The *Neptune*, 1824, 1 Haggard's Adm. Rep. 232. [By the Merchant Shipping Act, 17 and 18 Vict. c. 104, sec. 183, it is provided that the right to wages shall not be dependent on the earning of freight, and that every seaman and apprentice who would be entitled to recover wages if the ship had earned freight, shall, subject to all other rules of law and conditions applicable to the case, be entitled to recover the same, notwithstanding that freight has not been earned; but in all cases of wreck or loss of the ship, proof that he has not exerted himself to the utmost to save the ship, cargo, and stores, shall bar his claim.]

⁴ Consolato del Mare, c. 33, 105, 135, 136. Nay, it is laid down: 'Se non si restasse se non un solo chiodo debbe essere per pagar li salari alli marinari.' The same rule is laid down in the laws of Oleron, and in those of the Hanseatic Code.

⁵ By the ordonnance of Louis XIV., 'les loyers des matelots

In England the remedy is in Admiralty, by attaching the ship, and applying to have [513] it sold, and the proceeds applied in the first place to payment of wages; and to this privilege the seaman is held entitled above all other charges, on the same principle upon which the last bottomry bond is preferred to those of earlier date.¹

In Scotland the remedy is against the freight by hypothec, and against the ship itself by lien or *jus retinendi et insistendi*. There is a case in the seventeenth century which denies to the seamen 'a hypothecation upon the ship for their wages of the last voyage;' but finds them entitled to a right of retention of the ship, of which even a purchaser cannot deprive them.² Where the freight has been paid, and the ship is brought to sale by the creditors of the owner on the termination of the voyage, it would seem that a preference will be given on the price of the ship for the seamen's wages; or the seamen will be entitled to arrest the ship, and apply to Admiralty for a sale. Such preference being sanctioned by the universal practice and laws of other maritime states, and especially by those of England, the high expediency of a uniform rule throughout Great Britain would undoubtedly, in the event of such a trial, establish a lien on the vessel for the wages of the last voyage. In this question, too, it deserves particular attention that, as already stated, the payment of seamen's wages is made to depend partly on the successful termination of the voyage; while on similar grounds of policy they are not permitted to insure wages to be earned.

Claim for Wages.—The personal demand for wages may, in Scotland, be made either by a claim in bankruptcy or by an action in the Court of Admiralty.

In England the claim for seamen's wages is limited to six years, by a provision in the Act of Queen Anne for the 'amendment of the law and the better advancement of justice.'³ This Act preceded the Union, and does not apply to Scotland. This would appear to be a sort of debt which should fall under the triennial prescription of the Scottish law; the obvious inconvenience of a claim which may possibly affect a ship after transference to a third party,⁴ naturally pointing to the adoption of that prescription as peculiarly fit for this particular case. But perhaps the consideration that no rule has been specifically laid down in Scotland, and that seamen will naturally conclude the same rule to apply universally, may lead to a doubt whether action for seamen's wages in Scotland would be held to fall by the elapse of three years, or whether the English limitation of six years would not be allowed.

When freight has been earned, but the individual mariner has not contributed to that result, distinctions must be made. And,

1. If the seaman be hired by the voyage, he is entitled to his full wages, although by sickness in the course of the voyage, or by disability from hurts received in the course of his duty, he has been prevented from completing his engagement. This is established in all [514] the maritime codes,⁵ and is laid down as law, and has been proceeded on as a ground

employés au dernier voyage seront payés par preference à tous creanciers.' De la Saise de Vaisseaux, art. 16. And Valin, in commenting on this article, lays it down that they have a right of preference over the freight as well as over the cargo, though this right is restricted to a year after the wages are earned (t. i. pp. 362, 363, and p. 313). Emerigon, t. ii. 569, 585. See also Pothier, t. ii. p. 454.

¹ See the case of the *Favourite*, De Jersey, 2 Rob. Rep. in Admiralty 232. See also *Madonna D'Ibra Papaghica*, Dod. Rep. 40. [Abbot, 11th ed. 517.]

² *Seamen of the Golden Star v Miln*, 4 Jan. 1682, M. 6259; Sir P. Home, ms. No. 246. The judgment was, 'that the seamen had *jus retinendi* of the ship for their wages; and that being violently put out, they were in the case as if they had been in full possession of the ship;' and therefore the purchaser was ordered to pay their wages.

The only other reported case touching this question is in 1708, in which 'the Lords were clear that the seamen's wages were no debt of bottomry, affecting either the keel of the ship or the cargo, but found the freight liable for the said wages.' *Sands, etc. v Scott*, 1708, M. 6261. It may be observed, that the negative part of this latter judgment can be considered only as opinion; for the action before the Court was by mariners against the owners of the cargo, who had not yet paid the freight; and the only point which the Court was called upon to decide was, Whether there was a hypothec on the freight? Accordingly, Mr. Erskine lays it down as the doctrine of this case, that mariners have 'a tacit hypothec for security of their wages upon the freight which is due by the merchant.' Ersk. iii. 2. 34.

³ 4 Anne, c. 16, secs. 17, 18, and 19.

⁴ See Abbot, p. 492, note f.

⁵ Balfour, Sea Laws, c. 6; Il Cons. del Mare, c. 125; .

of judgment in England.¹ If he die during the voyage, his wages are due to his heirs. Probably this would be regulated by the maritime law, as appearing in the standard books of that law, which seem to give the outward wages if he die during the outward voyage; the whole, if he die during the homeward voyage. Balfour has the rule in general terms.² Where the hire is by the month, it rather seems that wages will be due only to the time of death. A special contract is not unusual in the hiring of seamen, by means of a note signed by the master, for a certain amount of wages on the ship's arrival, provided the seaman continues and does his duty in the ship till her arrival. And it has been found in England: 1. That there is no certain usage regulating the obligation under such a note; and, 2. That at law, where such a note has passed, no wages can be claimed either on the note or on a *quantum meruit*, unless the condition be fulfilled.³

2. Where the seaman is, during a voyage, discharged in violation of the contract with the master or owners, he will be entitled to his wages up to the prosperous termination of the voyage.⁴ But in equity there must be a deduction of such sum as he has earned in another vessel during the voyage.⁵

Where the ship does not proceed on her voyage, wages may be claimed for the time the seamen have been employed on board; and for damage on account of the breach of contract.⁶

3. A seaman quitting the ship before the termination of the agreement, forfeits all his wages.⁷ The termination of the engagement is the delivery of the cargo. The voyage is not completed by the mere fact of arrival. The act of mooring is to be done by the crew, and their duty extends to the time of unlivery of the cargo; and indeed there is no period at which the cargo is more exposed to hazard than in the act of being transferred from the ship to the shore.⁸ But, 1. It is not desertion if a seaman enter into His Majesty's service, either voluntarily or by impress. He is in either case entitled to his wages up to the period of his entry to the king's service, provided the ship which he has left has arrived at her port in safety.⁹ 2. Neither is it desertion if the master, by inhuman treatment, compel a seaman to quit the ship.¹⁰

Laws of Oleron, art. 6 and 7; Ord. de la Marine, liv. 3, tit. 4, art. 11; 1 Valin 686; Abbot 450.

¹ *Chandler v Grieves*, 2 H. Blackst. 606, note (a), where a seaman was disabled by a piece of timber falling on him while the ship was in the Bay of Honduras. He was put on shore at Philadelphia, and his wages till then paid up. In an action for wages to England, the Court of Common Pleas, after an inquiry into the practice of Admiralty, held 'that a seaman disabled in the course of his duty is entitled to wages for the whole voyage, though he had not performed the whole.' [Abbot, 11th ed. 480.]

² Balfour 615.

³ *Cutter v Powell*, 6 Term. Rep. 320.

⁴ *Salarium nautæ debetur quando navis magister ante tempus conventionis completum licentiam ei dederit aut cum in terram reliquerit et per eum servire non staterit. Roccus, Notab. 43.*

This doctrine applied by Lord Stowell in *Robinet v the Exeter*. Here the mate was discharged on a groundless charge of incapacity and drunkenness. 2 Rob. 261. Confirmed in the case of the *Beaver*, Grierson, an African ship. 3 Rob. 92.

⁵ Abbot 443.

⁶ Abbot 450; Comyn on Cont. vol. i. p. 372.

⁷ 11 and 12 Will. III. c. 7, sec. 17; 2 Geo. II. c. 36, sec. 3; 37 Geo. III. c. 73; Abbot, 11th ed. 503. [See the exceptions introduced by 17 and 18 Vict. c. 104, secs. 204-218.]

⁸ The *Baltic Merchant*, 1809. Wheldon, a seaman, after

having served in a West India voyage, left the ship in the Thames, within half a mile of the West India Docks. The defence against an action for wages was, forfeiture on the general maritime law, and on the statutes. Lord Stowell held the voyage not terminated till the vessel arrived in the West India Docks, and that the wages were forfeited by desertion. 1 Edwards 86. [*Macdonald v Jopling*, 4 M. and W. 285; Abbot, 11th ed. 508.]

⁹ 2 Geo. II. c. 36, sec. 13. Before this Act it was held he had right to wages to the time of impressing. *Wiggins v Ingleton*, 2 Lord Raymond 1211. And since it has been found that he is entitled to no more. *Clements v Mayborn*, Abbot 444. See 2 Camp. 320, note.

¹⁰ *Limland v Stephens*, 3 Espinasse Rep. 269, where Lord Kenyon said: 'Desertion is a forfeiture of wages; but if the captain conduct himself in such a way as puts the sailor into a situation that he cannot, without danger to his personal safety, continue in his service, human nature speaks the language: A servant is justified in providing for that safety.' 'In this case, the act of the captain has made the dissolution of the contract necessary, and in my opinion justifiable on the part of the sailor; and I think that he is entitled to a verdict.' So it was accordingly found.

It may be doubted whether the doctrine would be restricted to the case of damage to 'personal safety.' Cruel, inhuman usage, though it do not actually endanger life, seems to be a justification of desertion. At the same time, there is much

[515] II. WHERE THE VOYAGE HAS NOT BEEN COMPLETED.—The general rule as already stated is, that no wages are due where no freight is earned. But,

1. The arrival and delivery of a cargo outward entitles the seamen in the common case to their wages of *that* voyage, freight being earned, although they will not be entitled to wages for the outward voyage if in ballast.

2. The outward and homeward voyages may be so consolidated in the agreement with the mariners, that they shall have no right to wages till the arrival at the final port of delivery; and, in general, such a stipulation is made a part of the agreement, in order to prevent the desertion of the seamen in foreign ports.¹

3. So it is if the ship be captured, it being fully settled that capture defeats all rights and interests.² Wages may revive, however, on recapture. See below, p. 565 (5).

4. If the voyage be not a single run, which by the wreck or capture is utterly defeated, but of the nature of a trading voyage, the seamen will have right to wages *pro rata itineris*.³ But this may be altered by special contract, and the seamen's right to wages may be made to depend entirely on the arrival of the ship at her ultimate port. This, however, is commonly in the case of an agreement to pay a general sum for the voyage; and it would require a very strong stipulation to produce this effect in the ordinary case of wages on time. It is not deemed sufficient to stipulate that no wages shall be demanded, or that the crew shall not be entitled to wages till the arrival of the ship. This is held only as a suspension of the demand, not a limitation of the right.⁴

danger in departing from lines so obvious as to relax the discipline of this peculiar service. The admirable balancing of distress and necessity in such cases, in the judgments of Lord Stowell, are full of instruction, and deserve to be continually kept in view. See, for example, such cases as the *Favourite*, 2 Rob. 232, quoted p. 562, note 1.

¹ *Appleby v Dods*, 8 East 299. In a voyage to Madeira, the West Indies, and home, freight was earned by delivery of cargoes at Madeira and Jamaica; but the ship was lost in her voyage home. Lord Ellenborough and Sir S. Lawrence held wages not to be due *pro rata*. [Abbot, 11th ed. 486.]

² Nothing can be better settled, says Lord Stowell, than that 'capture defeats all rights and interests.' *The Friends*, Bell, 4 Rob. Adm. Rep. 144.

³ *Ross v Glassford*, 1771, M. 9177, 1 Hailes 406. Ross and others sailed with the *Ingram* from Clyde on a voyage to Newfoundland, and thence to Spain or Portugal, and then home. At Newfoundland she discharged three hhds. of tobacco, and took in a cargo of fish. These she sold at Lisbon, took in a cargo for Clyde, and was captured by a French privateer, who landed the crew in Ireland. The seamen brought their action in Admiralty for wages due at Lisbon, and they prevailed. The case was then brought under review of the Court of Session. Lord Kames first held 'the mariners entitled in equity to their wages *pro rata itineris* during the time the owners received the freight and profits of the vessel.' He afterwards held, 'That there being but one agreement and one voyage, the seamen who did not accomplish the voyage had no claim at common law for wages, though the failure was not occasioned by their fault, but by the fate of war; and that they had no claim in equity *pro rata itineris*, seeing the owners were not *locupletiores*, but lost considerably by the voyage.' After a learned argument at the bar, the Lords were of opinion that the first judgment of Lord Kames was right.

Morrison v Hamilton, 1778, M. 3004. A similar decision

was pronounced in the case of shipwreck. The voyage was from Greenock to the Lewes; thence to Philadelphia; thence to the Bay of Honduras; and so back to Greenock. It was stipulated that no wages should be demanded 'until the discharge at Greenock.' The ship took in her fourth cargo at Honduras, after which she was totally wrecked. On their return the seamen demanded wages till the time of the wreck. The Admiral awarded them wages till their finally unloading in the Bay of Honduras. And this was affirmed in the Court of Session.

See the English cases. *Anonymous*, 1 Lord Raymond 639; *Edwards v Child*, 2 Vernon 727; *Abbot* 448.

⁴ So held in the above case of *Morrison v Hamilton* (see preceding note), where the agreement was in the usual terms, that 'no officer or seaman in the said ship shall demand or be entitled to his wages, or any part thereof, until the arrival of the said ship at the above-mentioned port of discharge at Greenock.' And 'no wages to be paid till the vessel arrives at Greenock.'

The same rule was followed in England by Holt, Ch. J., in *Edwards v Child*; and also in Admiralty, *Buck v Rawlinson*, 1 Brown's Cases 102. But this is said to have been disapproved of in the House of Lords; and Lord Chief Justice Abbot has said that he is at a loss to find any principle to justify it. [Abbot, 11th ed. 485.] In *Appleby v Dods*, 1807, the Court of King's Bench held, that though the ship earned freight on the delivery of an outward-bound cargo at Madeira, and another delivered in the West Indies, yet, being lost in her passage home by a storm, the seamen could not recover wages *pro rata*, by reason of the express terms of the stipulation respecting their wages. This, however, was only the usual stipulation. 8 East 300.

In Scotland, the decision proceeds on the construction of the agreement. If a case were to occur on an agreement so clearly expressed as that alluded to in the above work as beginning to prevail of late years (*viz.* that the seamen

5. The claim for wages which is lost by capture (p. 564 (3)) will revive on recapture [516] and the ship earning her freight, if the seamen have not been separated from the ship on the capture; the seamen's interest and right to wages being subject, however, to salvage.¹ But if he be separated from the ship, and have not rejoined during the voyage, however unfortunate to him the accident, it is an evil of war, to which, as a British subject employed in navigation, he is subject; and he has no right to revival of his wages.² The principle on which this matter has been grounded, viz. that the contract is defeated, subject to revival, seems to deprive a seaman of all claim to intermediate wages previous to his resuming his functions. A difference of principle gives a different result in the case of embargo. See below (7).

6. If part of the cargo be saved from shipwreck, and freight earned by it, the seaman is held by foreign laws entitled to a proportional part of his wages.³ Lord Chief Justice Abbot, in his former edition, while he approved of this rule, knew of no English authority for holding it as law.⁴ There has been no case of the sort decided in Scotland of which I am aware. But recently a case was tried before Lord Stowell, in which that eminent judge gave effect to the rule to a still greater extent; having decided that where part of a vessel had been saved by the exertions of the crew, they were entitled to the payment of their wages, as far as the fragments of the materials would form a fund, although there [517] was no freight earned by the owners.⁵ And he has accompanied the decision with some very important observations on the principles on which the decision in such cases ought to rest. He is of opinion, 1. That seamen are fairly entitled to a reward for their meritorious exertions in this difficult and dangerous part of their duty. 2. That they cannot be considered as salvors, and so rewarded; nor is it expedient that they should. 3. That to reward them according to the *quantum meruit*, would be equally dangerous and inexpedient. And, finally, That the only safe rule is, to give those wages which are the reward of faithful service, and beyond which they should not be tempted to form an expectation, as the best and safest inducement to a seaman to cling to the last plank of his ship for satisfaction of his wages, or part of them.

7. An embargo laid on in the course of the voyage is different from capture. It is not a conversion of the property, but a mere restraint imposed by authority for legitimate political purposes. It has been stated as analogous to detention by calms in a southern or

should have nothing but the share of impress money, unless the ship returned to and arrived at the port), I have no doubt that it would in Scotland be held effectual.

A custom to the above effect was founded on in *Ross v Glassford* (see preceding note); but the Court, while they found no evidence of it, said, 'that if such practice did exist, it was highly to be disapproved of, as fraught with inhumanity, and destructive to trade, and that it was high time it should be corrected.'

¹ *Bergstrom v Mills*, 1800, 3 Espin. Cases 36. Bergstrom, a Swede, was a sailor in the *Brazilla*, a Government transport bound to Martinique. She was captured by a French privateer, and afterwards retaken by the *Alfred*, and carried into Martinique with her cargo. In assumpsit for wages, Lord Eldon said: 'I am of opinion that the voyage has been sufficiently performed as to the seamen, to entitle the plaintiff to recover. It is in evidence that the ship ultimately arrived at Martinique, the port of her destination. She was, on her arrival, entitled to freight; freight is the mother of wages. Salvage was due to the king's ship by which she was recaptured; but with that deduction, she was entitled to receive her freight, and probably has received it.' The same doctrine seems to be deducible, Arg. ex. the *Friends*, next note. [Abbot, 11th ed. 500.]

² The *Friends*, Bell, 1801, 4 Rob. Adm. Rep. 143, where a seaman had sailed from Newcastle, the ship was captured, and he was sent to France as a prisoner. The ship was afterwards recaptured, and carried on to her port of destination. The seaman, after his liberation, came against the owners for his wages. Lord Stowell held him not entitled: 'Unfortunately there is a circumstance in this case which makes a material distinction, viz. that the claimant was not on board at the recapture, but had been sent a prisoner to France, while the owner was obliged to hire another in his place to work the vessel on the return voyage. I am of opinion that this interest (two days' wages before capture)—too small, perhaps, to be the object of a litigation—is not legally revived in favour of this individual by a recapture, which in no degree restored him to his connection with the vessel, although the misfortune of the captivity will entitle him to the kind consideration of his owner.'

³ Ord. de la Marine, liv. 3, tit. 4, art. 9; 1 Valin 68 Pothier, Louage des Matelots, Nos. 185, 186.

⁴ Abbot, 3d ed. 437.

⁵ The *Neptune*, 1824, 1 Haggard's Adm. Rep. 227. [Abbot, 11th ed. 491.]

by frosts in a northern climate: as the inactivity of a moral, as the other is that of a physical detention. It has no effect in putting an end to contracts of affreightment;¹ and as to wages, the master and crew being during its continuance in possession, and the owners having all the benefit of their service, which in the circumstances may be necessary, wages are demandable during the detention.²

A case occurred which gave rise to great doubts, being neither an embargo nor a capture, but a hostile seizure and detention of British ships in the Russian ports by the Emperor Paul in 1800. On 5th November of that year, while many ships, both from England and Scotland, were in Russia, the Emperor commanded an embargo to be laid on all British ships in his ports, till a supposed convention should be fulfilled. At first guards were stationed along the shore to prevent the crews from quitting their ships: then they were taken from their ships, and marched into the interior of the country, and treated as prisoners of war. The embargo was removed 22d May 1801, but the crews had rejoined their ships in April on the death of the Emperor Paul. On arrival in Britain, claims were made by the seamen for wages during the whole time of detention.

The first of these cases which appears to have been tried occurred in Scotland, and the Judge-Admiral held the detention to have no effect in discharging the contract. He therefore decided, 1. That the owners were liable for subsistence given to the crew during the embargo;³ and, 2. That they were bound to pay wages.⁴ The same question afterwards [518] came to be tried in England, first in the Court of Common Pleas, then in King's Bench; and the judgment finally was, that the contract of service was to be considered as having continued in force from the time of executing the articles up to and at the period of the ship's arrival at her port of discharge, and the final termination of her voyage there; and that the seamen were to be considered as entitled to their wages during the same time.⁵

Another case having afterwards occurred in Scotland, the Judge-Admiral decided conformably to his first decision.⁶

¹ *Hadley v Clark*, 8 Term. Rep. 259. See below, Of Affreightment or Charter-party.

² The foreign merchants give only a half of wages on time. 1 Valin 456.

³ *Hepburn v Kinnear*, 19 June 1801. An action against the owners on the master's bill for the value of provisions to the men while detained under the embargo. The judge held: That money advanced for the sustenance of the crew while in a foreign port, is money advanced for the use of the vessel. That after the embargo, as well as before, the ship remained, though under detention, the property of the defender, who was bound to find support and (as he will probably soon find) to pay wages to the crew; and although removed from the vessels, these men were still the crews of the vessels they belonged to; and a claim against the owners lies for their food, maintenance, and wages, while the property is with the owners. And so the defence was repelled. Judge Cay's ms. vol. A, p. 337.

⁴ *Stewart v Weatherly*. Stewart entered as mate of the *Ranger*, Weatherly master, on 12th September 1800, arrived off Cronstadt 23d October. The embargo was laid on 5th November, but Stewart continued to be employed till 12th November, the ship having grounded. He was then sent up the country. He returned on board 7th April 1801. The action was for wages during the embargo. The defence was, that this embargo was similar to capture, and that no such wages had been paid by other masters or owners. The Judge-Admiral held: 'That an embargo is not similar to capture,

but a mere temporary restraint, which does not dissolve the contract between freighter and owner, as capture does; and whatever does not, in its own nature, dissolve the contract of affreightment, must leave the obligation to pay wages, which accompanies freight, in full force.' 15 Aug. 1801, 15 April 1803, Judge Cay's ms. vol. B, p. 270; vol. C, p. 201.

⁵ *Beale v Thomson and Johnston v Broderick*. These were two cases tried in the Court of Common Pleas, the plaintiff in the one being a British, in the other a foreign seaman. The cases came on a special verdict found before Lord Alvanley. The wages were all paid, except for the time of detention, and that made the point of the case. The judges were equally divided in opinion, and their sentiments are fully reported. 3 Bos. and Pull. 405-434.

Judgment having gone against the seamen (by assent of one of the judges to the opposite opinion, in order to give an opportunity for a writ of error), the cases came in that way before the King's Bench, when Lord Ellenborough delivered the judgment of the Court in favour of the seamen. 1804, 4 East 546-566. [Abbot, 11th ed. 501.]

⁶ *Thomson v Reddie and others*, 8 June 1804, Judge Cay's ms. vol. C, p. 169. This case was afterwards brought under review of the Court of Session, when 'the Court considered, that although the proceedings of the Russian Court were attended with greater acts of hostility than usual, yet, upon the whole, they bore more the appearance of an embargo than a capture, and consequently that they did not void the contract by which the sailors were entitled to receive their

8. If an embargo be laid on, or a prohibition of that trade proclaimed, before the commencement of the voyage, to the effect of losing the voyage, it is held by the foreign authorities that the seamen will have a claim only for wages while employed.

9. Where the ship is not seaworthy, and so unable to perform the voyage or earn freight, the seamen are entitled to damages from the owners for the breach of contract.¹

10. It is a good answer to the claim of wages, that the seaman refused his aid in defending the ship,² or was guilty of disobedience of orders, or habitual drunkenness, or was absent without leave;³ and loss occasioned by the negligence or fraud of the seamen forms a fit article of deduction from the wages, for relief of the owners.⁴

11. A claim for mariner's work done by a female is not absolutely illegal, although not entitled to much encouragement. Lord Stowell has supported such a claim.⁵

12. Seamen engaged to receive part of the gain (as in Greenland ships) are by foreign authors said to be a sort of partners in the voyage.⁶ But it is not so held in the law of this country, where this forms rather an exception from what is certainly the rule of common law. So it was found in England.⁷

SUBSECTION V.—CONTRACTS FOR REPAIRS AND FURNISHINGS TO SHIPS.

GENERAL PRINCIPLES OF THESE CONTRACTS.

Contracts and obligations for equipment may relate to naval stores, anchors, [519] cables, sails, masts, etc.; repairs of ship and rigging; sea-stores or provisions; subsistence to the crew, either abroad or on shore; necessary accommodation for passengers, etc., according to the object of the voyage; money for defraying the requisite expenses, either in paying for any of those furnishings, or duties, customs, etc.

Such contracts may be entered into, either with the owners or shipshusband, or with the master.

I.—CONTRACTS WITH THE OWNERS FOR REPAIRS, AND WHO IS LIABLE AS SUCH.

Where the owners themselves enter into a contract for repairs or furnishings, it has been contended that the master is liable on two grounds: that he receives the goods into his possession; and that he receives the freight. But it is settled that a master can be held liable only in respect of his own contract. 'Where a captain contracts for the use of the ship,' says Lord Mansfield, 'the credit is given to him in respect of his contract: it is given to the owners, because the contract is on their account; and the tradesman has likewise a specific lien on the ship itself. Therefore, in general, the tradesman who gives that credit debits both the captain and the owners. But where the captain makes no contract

wages during the period of the voyage.' The judgment of the Court of Admiralty was therefore affirmed. *Thomson v Millie*, 28 May 1806, M. App. Mut. Cont. No. 4.

¹ *Eaken v Thom*, 1803, before Lord Ellenborough, 5 Esp. Cases 6, where a seaman having brought an action of assumpsit for wages, the owner had a verdict, on the ground that the action should have been for damage, no freight being earned, and no wages due.

We should not in Scotland oppose such a difficulty to a seaman's demand. His action would be laid in Admiralty alternatively for wages or damage.

² 22 and 23 Charles II. c. 11, sec. 7.

³ See the admirable system of principles adopted by Lord Stowell, for discriminating the degree of those offences fit for the cognizance of a court of justice. *Robinet v the ship*

Exeter, 1799, 2 Rob. Adm. Rep. 261; *Bulmer*, Brown, June 1823, 1 Hag. Adm. Rep. 163; *George*, Bainfor, Dec. 1823, *ibid.* 168, note; *Eliza*, Ireland, July 1823, *ibid.* 182; *New Phoenix*, Leuthwaite, Nov. 1823, *ibid.* 198.

⁴ *Thomson v Collins*, 1 Bos. and Pull. New Rep. 347. [Abbot, 11th ed. 509.]

⁵ *Jane v Matilda*, 1823, 1 Hag. Adm. Rep. 187.

⁶ Pothier, *Louage des Matelots*, No. 161.

⁷ *Wilkinson v Frasier*, 4 Esp. 182, where Lord Alvanley held the share in the nature of wages unliquidated at the time, but capable of being reduced to a certainty, and that the seamen were not as partners, but entitled to wages to the extent of their proportion in the produce of the voyage. [Abbot, 11th ed. 467.]

personally, but the owners contract for their ship, the credit is given to them only, and there is not a shadow of colour to charge the captain.¹

Where there are several acknowledged owners, and an order is given by those in the apparent management of the ship, or by the shipshusband, all will be bound, though one of them should have given directions to the others not to act as managers, nor to pledge his credit.²

Where owners take upon themselves the management of the ship, and the repairs or furnishings are made on the credit of a contract directly with them, they are liable only *pro rata*, each for his own share.³ In England, if a part-owner be called upon alone, or if all are not sued to answer for the debt, a plea in abatement may be entered, which has the effect of preventing judgment against the defender in that action, leaving it to the plaintiff to bring a new action against the whole. But this limited responsibility cannot be pleaded where the defendant has ordered the articles on his own credit, without disclosing that he [520] has copart-owners. The tradesman, ignorant of the other part-owners, is in such a case entitled to action against the owner who gives the order.⁴

Where the furnishings are on the order of the shipshusband or of the master, under his exercitorial power, all the owners are in Scotland liable *singuli in solidum*, as they are all bound by his act.

As to the persons who, either on special contract or on the implied responsibility, are to be held liable for repairs and furnishings, it may be observed,—

1. That in the ordinary case, where the owners are in possession, and their titles on the statutes clear, the owners (and also the vessel itself in a foreign port) are liable for furnishings and repairs made on the order either of themselves or any of them, or of the shipshusband, or of the master acting within the limits already laid down;⁵ and the master's responsibility is added where the order is given by him.⁶

2. The mere legal title of the ship will not attach to the person holding it the responsibility for repairs or furnishings made on the special employment of other persons acting as owners of the ship. It may raise a presumption, or furnish evidence of the repairs having been made on the order or credit of the apparent owner; but if in truth they were made on other credit, or the order of another, the legal owner will not be answerable.⁷ And so, 1. Where a purchaser orders the ship to be taken to a shipwright for repair, the seller will not be liable, although he continues on the registry to appear as the owner.⁸ And 2. On

¹ *Farmer v Davies*, 1 Term. Rep. 108. Here the goods were ordered by the owners before the captain was appointed to the ship. Some of the goods were delivered before he was appointed, and a cable and other cordage were delivered afterwards. The question was, Whether the defendant (the master) is liable for the payment of all the goods furnished, or of the goods delivered after he was appointed? If the Court should be of opinion that he is liable for the whole demand, or for the cable and cordage after he was appointed, then a verdict to be entered for the plaintiffs; but if he be liable for none, then a nonsuit to be entered. On the opinion of the Court delivered by Lord Mansfield, as in the text, a nonsuit was entered. [Abbot, 11th ed. 117.]

² *Gleadon v Tinkler*. Here Tinkler and two others were part-owners. Tinkler gave directions to the others not to act as managing owners, nor to pledge his credit for repairs. They appointed a master, and he ordered repairs. In an action for those repairs, the ship-carpenter had a verdict against Tinkler. Holt 586.

³ Ersk. iii. 3. 45. This is the rule of the civil law: 'Si plures navem per se exercent,' says Vinnius 'et omnes simul contraxerint, hic neque in solidum singuli actione propria ex

contractu suo tenentur sed tantum pro ea parte quam in nave habent.' Not. in Com. Peckii, p. 158.

⁴ *Baldney v Ritchie*, 1816, 1 Starkie 338. See also *Du Bois v Ludart*, 1 Marsh. 246.

⁵ See above, p. 553.

⁶ See below, p. 571.

⁷ [But see *Leslie v Curtis*, 1836, 14 S. 994; *Morton v Black*, 1843, 5 D. 411; *Ord v Barton*, 1846, 8 D. 1011, where the Court would not allow the register to be contradicted.]

⁸ *Young v Brander*, 8 East 10, where Dunbar and another sold the schooner Rebecca to Brander, and he received the bill of sale, and took possession, and acted thenceforward as sole owner; but no copy of the endorsement was delivered till 23d June 1804, when he got a new certificate. On 11th June the captain of the Rebecca, by order of Brander, took the ship to Young, a shipbuilder, to be repaired for her outward voyage. The repairs were finished by 19th June, during which time Dunbar's name remained on the register at the custom-house. A verdict for plaintiffs, subject to the opinion of the Court. Lord Ellenborough said, that to hold Dunbar liable would be *contrary to the credit actually given*.

the other hand, the purchaser of a ship is not to be made responsible, in respect of his legal title as owner, for stores ordered previously to the sale, but only for such articles as were ordered by the master after the purchase.¹

3. Where the furnishings are made on the order of the master (the workman, or ship-chandler, or lender of money, ignorant of, or taking his chance of the ownership), those who remain truly part-owners, or who, being once vested as owners, have not legally transferred their right, but still appear on the registry as owners at the time the furnishings are made, will be liable; it being left to them by means of their undivested right to effect their relief.²

4. The shipbuilder or furnisher will not, however, be construed to limit his [521] demand for repairs or supplies on the master's employment, to those who appear on the registry as owners; for if the ship has been hired to another for a certain period, or even for a voyage, but not merely on the contract of *locatio operis mercium vehendarum*, the hirer is strictly and properly the exercitor of the master,³ and as such will be responsible.

5. It was once held, that if the lease of the vessel be unknown, the furnisher was entitled to sue the owners appearing on the register.⁴ But more recently it has been determined, that the Registry Acts are not in all cases to be relied on so implicitly. And,

See below, *Westerdell v Dale*, note 2. [*Hay v Cockburn's Trs.*, 1850, 12 D. 1298; *Abbot*, p. 26.]

¹ *Trewhella v Rowe*, 1809, 11 East 434. Parnell, sole registered owner of a ship, gave orders for materials to be furnished, and work done for repairing it; but before all the articles were delivered on board, he conveyed the ship, with all its furniture, to Rowe, by bill of sale duly registered. Action was brought against Rowe. The Court of King's Bench held: 1. That Rowe was not responsible for any goods furnished before the completion of his sale; 2. That he was not liable for furnishings delivered after the sale was completed, the order being given before; and, 3. That he was liable for articles furnished on the order of the master after the sale was completed.

² *Gleason v Tinkler*; see above, p. 568, note 2. [*Abbot* 109.] 1. Where the defender still continues a part-owner, though he has expressly forbidden the other owners to act as managing owners, he is liable on the master's contract.

2. Where the right of ownership has been transferred, but not by a valid conveyance, the owner continues liable on the master's contract. So decided in the following English cases:—

Westerdell v Dale. Dale and Wharton were joint-owners of the *St. Vincent*, and were so registered. Dale sold his share to Wharton; but the certificate was ill-recited in the vendition, so as under the statute to make it void. Wharton mortgaged the ship to Dale, but the recital was also bad in the deed. No endorsement was made on the registry on either of these occasions. While matters stood thus, Wharton, who then acted as sole owner, employed Westerdell to repair her, and the account was thus entered: 'Ship *St. Vincent*, Captain J. Lethrington, J. Wharton debtor to T. Westerdell.' Wharton then sold the ship to Dale and to Tod, but no possession was taken. Westerdell brought his action against Dale for these repairs. The question on which the case was determined was: Whether, by the exceptionable vendition, and the state of the register, Dale did not still remain owner on his original right, and so responsible? The Court held that it was not a legal transfer, but a mere attempt to transfer, and that Dale still remained owner, and responsible: that as between Wharton and Dale, the latter might have called

on the former for the account of the profits of the ship; and if he had filed a bill in equity for that purpose, it would have been no answer to have set up this bill of sale, which is void by Act of Parliament: and that Dale was therefore liable on this ground, that if one part-owner suffers the other part-owners to employ a person to repair their ship, he is bound by these acts. 7 Term. Rep. 306.

N.B.—Dale might have pleaded, in abatement, that Wharton ought also to have been sued, but he did not.

3. When the vendition is correct, but the transfer on the registry has been neglected, the same rule is followed. So it has been decided in Scotland.

Menzies & Goalen v Kerr. The Judge-Admiral held the tradesmen in a home-port entitled to bestow necessary repairs on any ship, upon the faith of their knowledge of the personal responsibility either of him who orders and authorizes the repairs, or of that of the owners of the ship. The defenders in the case were admitted to stand as owners in the subsisting registry, without any transfer made in terms of 26 Geo. III. c. 60, and 34 Geo. III. c. 68; but it was said they had, by vendition two years before, sold it, although by fault of the purchaser the transfer was not duly endorsed. Then, on an elaborate consideration of the statutes, the judge held it clear that the defenders, in the character of owners undivested, were responsible, and accordingly he pronounced judgment against them jointly and severally. The case was then brought into the Court of Session by advocacy, and Lord Meadowbank refused the bill, and adhered to the Judge-Admiral's sentence; and a petition against this judgment was refused, 22d February 1805.

Similar judgment by Judge-Admiral, 25 May 1804, *Ogilvy v Brown*; affirmed by Lord Meadowbank, 1 Jan. 1805.

³ See above, p. 554, note 1.

'If a ship be let out generally to freight,' said Lord Mansfield, 'the freighter is owner for that voyage; but if there be only a covenant to carry goods, the owner of the vessel would have the direction of her, and the hiring of the master and mariners.' This was said relative to a case of barratry. *Vallejo v Wheeler*, Cowp. 144.

⁴ *Rich v Coe*, 1777, Cowp. 636. Rich, a ropemaker, sup-

first, An entry in the registry can have no effect, if truly there be no bill of sale, or if the right be put in the defendant's name, without his consent;¹ *secondly*, where there is a lease [522] of the ship, the master is agent for the lessee, not for the owner; and the reputation of ownership from the Registry Acts is, as a ground of action in such cases, qualified by the lease.²

6. Mortgagees in possession, whose names were in the register, were formerly held responsible for repairs and furnishings.³ But by the recent statutes this matter is placed on a new footing. Where a transfer is made only for security by way of mortgage, or of assignment to trustees for sale, on a statement to that effect in the book of registry and on

plied the ship *Henry and Thomas* with cables to the value of £5, by order of the captain, Harwood, and made the captain and the owner of the ship debtors in the usual way, without naming the owners, or knowing particularly who they were. The ship belonged to Coe and others, who had let it to Harwood, the captain, who was to have the sole management and benefit for eleven years, at a rent of £36, and at his own cost to keep the vessel in repair. The action was against the owners for the debt. Lord Mansfield said the case was reserved for the opinion of the Court, 'in consequence of a general anxiety in the owners of ships to know how far they are by law liable for the acts of their respective lessees.' The Court held the owners liable, on the ground that the credit was specifically to the ship, and generally to the owners, and that the private agreement between the owners and the master could not affect the creditors, who were entire strangers to the transaction.

[Abbot, 11th ed. 117.]

¹ *Frazer v Hopkins*, 1809, 2 Taunt. 5, where, in an action for provisions to a Harwich packet, the plaintiff referred to the register book of the port of London to prove the defender's ownership by transfer from a former owner. The question was: Whether it was not necessary, in addition, to show that this registered transfer was with the defendant's consent? So the Court held, and rejected the evidence.

Tinkler v Walpole, 14 East 226, where gunpowder having been furnished for the use of an East Indiaman by order of Clarke, shipshusband and managing owner, action for the price was brought against Walpole; and the plaintiff relied, first, on two bills of sale to Walpole of $\frac{1}{4}$ ths of the ship, but there was no proof of Walpole's assent or acceptance. He next relied on two registers made on the oath of Clarke and two others, swearing that they and Walpole and others were owners. Lord Ellenborough nonsuited the plaintiff, on the authority of *Frazer's* case, and the Court was moved for a new trial to have that case reconsidered. It was fully confirmed. Lord Ellenborough, Ch. J., said: 'Notwithstanding the practice may have prevailed for a long time to receive ships' registers as evidence, without more, of the property being in the persons therein named, yet when we are brought to consider the admissibility of such evidence against the defendant, in a case where he has done no act to adopt the register as having been made by his authority, we cannot give effect to it without saying that a party may have a burdensome charge thrown upon him by the act of a third person, without his own assent or privity. If it had appeared that the defendant had by any act of his own recognised the register, he would have been liable to all the consequences as a part-owner, which it describes him to be, but here he has done no act to adopt it. His partner Clarke has indeed

dealt with the property as if the defendant were a part-owner, by registering the ship in his name; but the act of a third person, without some act of the defendant to recognise it, cannot throw upon him a burden, without violating the plain rule of law.' The other judges concurred.

Cooper v South, 4 Taunt. 802.

² *Frazer v Marsh*, 13 East 238. Marsh, the owner of a ship, let the ship by charter-party for a number of voyages, at a certain rent to Walker, then master of her. On Walker's subsequent order, stores were furnished by Frazer, who brought his action against Marsh. Lord Ellenborough tried the case at Guildhall, and the plaintiff was nonsuited, on the 'ground that, during the existence of the lease, the relation of master and owner ceased to subsist between Walker and Marsh, and that the stores must be taken to be ordered on Walker's own account.' On a rule to set aside the nonsuit, Lord Ellenborough said: 'To say that the registered owner, who divests himself by the charter-party of all control and possession of the vessel for the time being, in favour of another who has all the use and benefit of it, is still liable for stores furnished to the vessel by the order of the captain during the time, would be pushing the effect of those Acts much too far.' The question is: 'Whether the captain, in this instance, who ordered the stores, were or were not the servant of the defendant who is sued as owner? And as they did not stand at the time in the relation of owner and master to each other, the captain was not the defendant's servant, and therefore the latter is not liable for his act. There is a late case in the Court of Common Pleas (*Frazer v Hopkins and another*, note 1), where the mere entry of the defendants' names as owners in the register-book was held not to be even *prima facie* evidence to charge them, as such, with stores delivered for the use of the vessel by order of another.'

³ *Ex parte Machel*, 1813, in Chancery, Lord Eldon Chancellor, 1 Rose's Cases 447; *Annet v Carstairs*, 3 Campb. 354.

Jackson v Vernon, 1 H. Blackst. 114; *Chinnery v Blackburn*, 1784, 1 H. Blackst. note 117. In a case before Lord Ellenborough, *Twentyman v Hart*, 1816, 1 Starkie 366, Hart was a mortgagee, the certificate of registry having been endorsed to him as a collateral security; and afterwards a new register was made in Hart's name. He never took possession; but the master having ordered necessities, the action was brought against Hart. Lord Ellenborough said: 'Since the repairs were done by order of the captain, and the plaintiff knew no owner except Howard (whom the captain had given up as owner at making the order), and the defendant was never in possession of the ship, the plaintiff must be nonsuited.'

the certificate, the person to whom the transfer is made is not to be deemed as the owner, nor the person making the transfer to be held as having ceased to be owner.¹

II.—CONTRACTS WITH THE MASTER FOR REPAIRS, ETC., TO SHIP.

Not only are contracts by the owners themselves, or by their shipshusband, effectual for repairs or furnishings made to the ship; but the master also has, by his office, full [523] authority to enter into such contracts.² By the maritime practice of nations, this authority is more clearly defined, or more strictly regulated, than in the text of the Roman law.³ The rule of that law was, '*Omnia facta magistri debet præstare qui eum præposuit*;' and there was no express qualification of the power in respect of the owner's residence. According to the early maritime usage, the master's ordinary resource in difficulty was to sell part of the cargo.⁴ But more enlarged provisions were necessary for an extended trade; and it is now established, that greater power is given to the master in a foreign port, on this principle, that for extraordinary supplies at home the authority of the owners is easily obtained; while abroad the voyage may be lost, and the interests of all may suffer, if it be necessary, even for extraordinary supplies, to wait for authority from a distance. This is indeed the great principle of distinction between the *actio exercitoria* and the *actio institoria* even of the Roman law.⁵

Referring to what has already been said of the general limits of the master's power, it will be necessary here to treat more fully of the authority which he has to bind his owners.

The general ground of the master's authority is the presumed mandate which he holds from the several exercitors for conducting the navigation of the ship, as a joint adventure or partnership. These exercitors are not owners solely, but may be lessees of the ship; and the principle of their joint responsibility is, that a contract entered into with a single person shall not be disturbed, by forcing the tradesman to search out and prosecute all the owners before he can recover payment; while it cannot be shown that the tradesman did not place the whole credit of the furnishing upon one particular exercitor.⁶ The same rule has [524]

¹ See above, p. 158. 4 Geo. IV. c. 41, sec. 43; 6 Geo. IV. c. 110, sec. 45. [18 and 19 Vict. c. 104, sec. 70.]

² See above, p. 555.

³ Dig. lib. 14, tit. 1, De Exercitoria Actione; Pothier, Pand. Just. vol. i. p. 365. Stair (i. 12. 18) speaks of the master's power generally, and without observing any distinction between foreign and home ports.

So also does Erskine (iii. 3. 43).

⁴ This is the only provision which appears in Balfour's Sea Laws. After stating the case of a ship lying 'abyding the wind swa lang that mony, etc., fails,' it is provided, that 'gif he has not stuff nor vivoris, he may tak of the wine, or uther gudis and merchandice, and sell the samin for vivoris,' etc. Balfour, p. 621, c. 136.

⁵ In the mercantile decisions of Genoa, in speaking of the difference of those actions, the *actio exercitoria* is distinguished by 'necessitas contrahendi incertitudoque itineris navium, quæ aliquando in terras incognitas vi ventorum impelluntur, et ibi pecunias capere coguntur, quæ in institore cessant; quoniam dilationem res patitur et conceditur facultas dispiciendi de conditione institoris antequam contrahat et datur plenius deliberandi consilium.' Rot. Gen. de Mercatura, Dec. 14, No. 107, p. 169.

⁶ Si plures navem exerceant cum quolibet eorum in solidum agi potest. Dig. lib. 14, tit. 2, De Exercit. Actione, l. 1, sec. fin., l. 4, sec. 1. The commentators add, 'Ne in plures adver-

sarios (ut Caius ait) dstringatur qui cum uno contraxit.' Peckius, Com. in. Tit. de Exerc. Act. 155. Vinnius gives the doctrine thus: 'Si plures sint, qui navem exerceant, placet singulos ex contractu magistri in solidum teneri: idque hac ratione, ne in plures adversarios dstringatur, qui cum uno contraxit, l. 1, par. ult. et l. 2, hoc tit. fac. l. et ancillarum, 27, § ult. inf. de pecul. quippe actio exercitoria, qua tenentur exercitores, ex solius magistri persona et facto nascitur; utpote cum quo solo, non cum ipsis exercitoribus, contractum est. Cum igitur in plures dividenda non sit obligatio, quæ in unius persona originem habet, ne in plures dstringatur, qui cum uno contraxit, ex eo satis intelligimus beneficio divisionis hoc casu locum non esse. Bald. in rubr. C. eod. in fin. Idem est, si contractum sit cum plurium institore, l. habebat, 13, par. ult. et l. seq. inf. de instit. act. aut cum servo plurium voluntate dominorum navem exercente, l. 6, par. 1, inf. hoc. tit. Cæterum hoc jus apud Hollandos receptum non est, apud quos singuli exercitores, pro sua duntaxat parte exercitionis conveniri possunt. Neque enim ut singuli in solidum teneantur, visum est aut naturali æquitate convenire, quæ satis habet, si pro suis singuli portionibus conveniantur; neque publice utile esse, propterea quod deterrentur homines ab exercendis navibus, si metuant, ne ex facto magistri quasi in infinitum teneantur. Quin et hoc constitutum, ne exercitoria etiam universi amplius teneantur, quam ad æstimationem navis et eorum, quæ in navi sunt, teste Grotio, lib. 3, intro-

been followed in modern times,¹ and is laid down by our own authorities.² The practice of our Court of Admiralty has been to hold owners jointly and severally liable for furnishings to the ship on the order of the master or shipshusband.³

In commenting further on this subject, it may be proper to distinguish between the case of furnishing in a home and in a foreign port. In a home port the demand is direct against the persons of those concerned; but although there may be a lien, there is no hypothec.⁴ In a foreign port, supplies may be furnished to the effect of giving both a direct and an indirect remedy: direct, against the owners of the ship or lessees; indirect, by the operation of a suit against the ship itself.

I. REPAIRS AND FURNISHINGS AT HOME.—The common and necessary repairs and furnishings of naval stores, and daily subsistence for a ship, may even in a home port be made on the master's authority alone, so as to bind both him and the owners. Nay, in the very residence of the owners his presumed authority extends thus far. To support a demand against the owners, it will be sufficient to show: 1. That the articles were sent to the ship, or the repairs made on her; and, 2. That those furnishings and repairs were not beyond the natural and common necessities of such a vessel;⁵ and the criterion of what is to be held as necessary is, to ask what a prudent owner would himself have done had he been present.⁶

It will be no defence against this claim, that the owners themselves took the active superintendence of the outfit, and that they gave no authority for the repairs; or that there was a shipshusband appointed, and no order or authority for repairs by him: and this because they should have been more vigilant; and because the master is at any rate to be considered as acting under their sanction and approbation, or as their servant. Neither [525] will it be a good answer, that the master received money to pay for furnishings and repairs; for the public are not presumed to know this.⁷

duct. ad jurispr. Bat. c. 1, et lib. 2, de jur. bell. et pac. c. 11, n. 13. Cæterum Hevia, p. 2, cur Phil. lib. 3, c. 4, n. 22, simpliciter sequitur dispositionem juris communis.

Erskine has marked the peculiarity of the law of Holland. Ersk. iii. 3. 45.

Secus in actione quæ ex delictis nautarum in eos datur. Poth. Pand. Just. vol. i. p. 366, in note b.

¹ Loccenius, de Jure Mar. lib. 3, tit. 7, sec. 9.

² 'If there be many exercitors, they are all liable *in solidum*.' Stair i. 12. 18. See also Ersk. iii. 3. 45.

³ *Kinnear v Craig*, 13 July 1804, where, in an action for furnishings to the sloop *Alexander* of Saltcoats, the account was attested by the master. Defence by Craig, that he had no concern in the sailing of the ship, and never got profit. The Judge-Admiral, in respect it was not denied that the defender was a joint-owner at the time when the furnishings were made, and that the articles were furnished and not paid for, gave decree for the amount. Judge Cay's ms. vol. D, p. 184. Same principle recognised, *Menzies & Goalen v Kerr*, 2 March 1804; Judge Cay's ms. vol. D, p. 106. See above, p. 569, note 2 (3).

In the case, *Ogilvy v Brown*, 25 May 1804, a similar decision by the Judge-Admiral was brought under review of the Court of Session, on the ground that as Brown was proprietor of only a fourth of the ship, he should be liable only for one-fourth of the furnishings. Lord Meadowbank affirmed the judgment of the Judge-Admiral, subjoining this note: 'The Lord Ordinary conceives the rule of common law to be, to subject proprietors *pro indiviso* universally for a debt contracted by their *præpositus negotiis*; and that in this case the

employer of the charger had, by his possession of the ship by prescription of law, a title to bind the complainer (the owner) for the expense of repairing her.' Judge Cay's ms. vol. D, p. 162, and App. No. 62.

See *ex parte Machel*, 1 Rose's Cases 447, where furnishers to a ship were in England allowed 'to prove against their respective estates, and receive dividends not exceeding twenty shillings in the pound in the whole.'

⁴ See below, p. 575.

⁵ *Lindsay & Allan v Campbell*, 1800, M. App. Mandate, No. 2, where a master, in the port where the owner was resident, ordered a cable, which the owner seeing on board found fault with. The master took it ashore, but it was not returned to the furnishers. Owner held liable.

The French Ord. de la Marine was more strict; liv. 2, tit. 1, vol. 17, prohibiting repairs, or furnishings of sails, ropes, etc. for the ship, in the port of the owner's residence, without his consent. Valin's modification of this article, in so far as to give action for what was manifestly necessary, seems well-grounded on the principle in equity, *Nemo debet locupletari cum alterius jactura*. Vol. i. p. 414.

⁶ *Webster v Seekamp*, 4 Barn. and Ald. 352; an action for coppering a vessel at Liverpool whose owners resided at Ipswich. She was bound for the Mediterranean, and to copper her was said not to be necessary, though admitted to be extremely useful. It was left to the jury to say whether the furnishing was such as a prudent owner, if present, would have ordered. This the Court confirmed. [Abbot, 11th ed. 110.]

⁷ See below, *Stewart v Hall*, p. 573, note 5.

But at the owner's residence the master's authority does not extend to extraordinary repairs, or to the victualling of the ship for a voyage, or to the borrowing of money.¹

II. REPAIRS AND MONEY IN A FOREIGN PORT.—Abroad the master has greater power. His office holds him out as the accredited agent of the owners; on whose authority all repairs, furnishings of naval stores, subsistence, or money necessary for the prosecution of the voyage, may be contracted for or advanced on the credit of the owners.² The only restraint is the necessity on the part of the furnisher or advancer of money to see that the supply which the master requires is justified by apparent necessity at least; the general maxim being, that it is only as to necessities that the master is *præpositus*.

1. NAVAL STORES, PROVISIONS, OR REPAIRS.—The demand is generally made on an attested account; or on the draft of the master on his owners; or on acceptances by the master as representing them for the amount. In support of these, if questioned, it will be sufficient to show that the repairs were actually made on the ship, or that furnishings, in the nature of necessary stores, or victualling for the voyage, were actually put on board.³

Whether the repairs were *necessary* in the strict sense of that word, seems to be fairly referable in this case, as well as in the case of furnishings at home, to the criterion already stated.⁴ The proper case requiring a proof of necessity is that of money borrowed; of which below, p. 576.

It is not a good answer to such a demand, that the owners have paid the master, or supplied him with money for the supply of the necessary repairs or furnishings. With this the public, trusting to the accredited servant of the owners, have nothing to do.

Neither is it a good defence that the employment has been directly by the consignee of the ship, and that the owners have paid him; unless the credit has been limited to the consignees, or they have been furnished with accredited documents or vouchers misleading the owners into a belief that the credit was so limited to the consignees.⁵

HYPOTHEC ON THE SHIP FOR FOREIGN REPAIRS.—But the remedy provided by law for enforcing the payment of repairs and furnishings abroad, is not confined to the personal action. A right is also given without any express contract of bottomry, *respondentia*, [526] or hypothecation, by means of tacit hypothec, to foreign repairers and furnishers of neces-

¹ [See *M'Naughton v Alhusen & Co.*, 1847, 10 D. 236.]

² Consol. del Mar. c. 104, 105, 236; Ordon. de la Mar. liv. ii. tit. 1, art. 19; 1 Valin 416. See above, *Hepburn v Kinnear*, in Admiralty. [Under this rule, a mortgagee in possession is liable to the same extent as an owner. *Havilland, Routh, & Co. v Thomson*, 1864, 3 Macph. 313.]

³ *Craigie v Ogilvy and Izett*, in Admiralty. *Ogilvy and Izett*, owners of the *Olive Branch*, were sued by *Craigie*, a shipmaster in Montrose, who at a port in Norway had furnished, at desire of the master of the *Olive Branch*, a cable, value £36. *Defence*—No cable necessary; and so the question was, Whether necessity must be shown in such a case? The Judge-Admiral recognised a distinction between the furnishing of naval stores and the loan of money, holding it requisite in the latter case only to look to the necessity. He also recognised a distinction between articles of ordinary use and necessity to the vessel's safety, and articles manifestly superfluous, as mere luxuries (a Turkey carpet, *ex gr.*, for the cabin). He 'repelled the defences, reserving all questions between the owner and the shipmaster.' 12 June 1807, Judge Cay's ms. vol. E, p. 196.

[See observations on this case in *Wm. Rob.* 361. In subsequent cases it has been held that action against the owners for furnishings at a foreign port must be supported by proof that they were necessary, and that the objection of want of authority is pleadable against endorsees of bills granted for

furnishings. *London Joint-stock Bank v Stewart*, 1859, 21 D. 1827; *Drain & Co. v Scott*, 1864, 3 Macph. 114.]

⁴ *Webster's case*, *supra*.

⁵ *Stewart v Hall*, 10 Nov. 1813, H. L., 2 Dow 29. This was the case of a Greenock ship, consigned to Knox and Hay at Hull, and repaired by Hall and Richardsons of Hull, on the employment of the consignees, the repairs being pointed out by the master. The master drew a bill on Stewart, the owner, for the amount of the consignee's account-current, including as one article the amount of the repairs; but there was no receipt or vouchers of the payment of the repairs by the consignees. Hall and Richardson, on the consignee's failure, made a demand against Stewart, which he resisted. The Court of Session held that Hull was a foreign port (see below, p. 575), and that there was a *hypothec* for the repairs, never relinquished, and therefore that Stewart was liable. In the House of Lords it was taken as a case of *personal* contract binding the owners who never were discharged. And two points were decided: 1. That the owners were the debtors by law, unless there was a special agreement to the contrary; and, 2. That there was no such agreement and no discharge, there being no other voucher to show than an account which bore the owner to be debtor, and which was not discharged.

[See *Carswell v Scott*, 1839, 1 D. 1215; *Strickland v Neilson*, 1869, 7 Macph. 400.]

saries. In the Roman law, all those who had contributed to the fitting out or repairing of a ship, whether at home or abroad, were entitled to a preference by privilege in security of their advances;¹ and this rule still prevails in most of the nations of Europe. In Holland,² in Hamburg and all the other Hanseatic towns, in France,³ in Spain,⁴ and in Italy,⁵ this prevails.

In England, in consequence of two opinions delivered by Lord Mansfield (though only collaterally), it became a question for some time whether the same rule did not prevail.⁶ But it is now settled in England that there is neither hypothec nor privilege for repairs in a home port; and that this security is allowed, in the case of foreign repairs, only from the consideration that without it ships might often be interrupted in their course, at a distance from the residence of the owners.⁷ It may be imagined that furnishings for the [527] victualling of a ship are as necessary to the voyage, and as much entitled to the security of a lien, as repairs. But the Lord Chancellor has doubted whether the same rule would be followed in regard to them.⁸

In Scotland, the course of practice seems at one time to have run strongly in favour of the continental rule, viz. that the builders, or furnishers for building, or the repairers of

¹ Dig. lib. 42, tit. 5, c. 26 and 34; Vinnius in Peck. pp. 99 and 233.

² Van Leewin Censur. Forensis, P. 1, lib. 4, c. 9, sec. 7; 1 Voet, l. 20, tit. 2, sec. 29.

³ 1 Valin, Com. sur l'Ord. de la Marine, 363 and 367, the claim being restricted to a year from the furnishing (p. 315); Emerigon 557 et seq., 562 et seq.

⁴ Rodriguez de Concursu et Privilegiis Credit. 121 et seq.

⁵ Casaregis, Disc. 18, vol. i. p. 46.

⁶ The first was in *Rich v Coe*, in 1777, Cowp. 636; the other, still more explicit, in *Farmer v Davies*, in 1786, 1 Term. Rep. 108. [Abbot, 11th ed. 117.]

⁷ The law to this effect was laid down in very plain terms, so early as the year 1726, by Sir J. Jekyl, Master of the Rolls, and assented to by the counsel on both sides: 'That if a ship be in the river Thames, and money be laid out there, either in repairing, fitting out, new rigging, or apparel of the ship, this is no charge upon the ship; but the person thus employed, or who finds these necessities, must resort to the owner thereof for payment. And in such a case, in a suit in the Court of Admiralty, to condemn the ship for non-payment of the money, the courts of law will grant a prohibition; and therefore, if the owner, after money thus laid out, mortgages the ship, though it be to one who has notice that the money was so laid out, and not paid, yet such mortgagee is well entitled, without being liable for any of the money thus laid out for the benefit of the ship as aforesaid. And the ship is no more liable for this money than a carpenter laying out money in the building of a house has a lien upon the house in respect thereof, though by the law of Holland he has; but this not being the law of England, such carpenter must resort to those who employed him, or to the owner of the house, for his money.' He adds: 'But it is true that if at sea, where no treaty or contract can be made with the owner, the master employs any person to do work on the ship, or to new rig or repair the same, this, for necessity and encouragement of trade, is a lien upon the ship; and in such case the master, by the maritime law, is allowed to hypothecate the ship.' 2 P. Wms. 367. This last part of his judgment was overruled in *Hussey v Christie*, 13 Ves. jun. 594. See also 9 East 426.

In the case of *Buxton v Snee*, in 1748, where the question of hypothec occurred in dividing the price of a ship, Lord Hardwicke seems to refer it entirely to the principle, that a ship in England is under the common law, not under the maritime, which, prevailing abroad, gives hypothec for foreign repairs. 'Certainly, by the maritime law, the master has power to hypothecate both ship and cargo for repairs, etc. during the voyage, which arises from his authority as master, and the necessity thereof during the voyage, without which both ship and cargo would perish: therefore both that and the law of this country admit such a power. But it is different where the ship is in port, *infra portus comitatus*, and the contract for repairs, etc. made on land in England: then the rule of law must prevail. I know no case where the repairs, etc., whether it was by part-owners or sole owner, master or husbands, have been held a charge or lien on the body of the ship,—*Watkinson v Barnardiston*, 2 P. Wms. 367, being a direct authority to the contrary; and if the ship in the river, *infra corpus comitatus*, should be proceeded against and stopped for such debt, the courts of law would issue a prohibition, the contract being on land, and not arising from necessity.' 1 Ves. 154. See also *ex parte Shank*, 1 Atk. 234, where a repairer having got possession of the price of the ship, was ordered to account to the assignees of the owner, a bankrupt, and come in under the commission for his repairs. Lord Mansfield himself laid down the doctrine as it is now settled in *Wilkins v Carmichael*, in 1779, and on the broad principle: 'Work done for a ship in England is supposed to be on the credit of the employers; in foreign ports the master may hypothecate the ship.' Doug. 101. In a case in Scotland, in 1788, the opinion of Dr. Wynne was taken on this question; and he gave a very clear answer, that 'by the law of England, a tradesman who repairs or furnishes materials for a ship, the owner of which resides in England, does not acquire any lien upon the ship, but is considered in the same light as any other personal creditor of the owner or person who employs him.' He cites and relies on the authorities quoted in this note, without taking any notice of the two reports of Lord Mansfield's opinion in 1777 and 1786. [Abbot, 11th ed. 119.]

⁸ *Halket, ex parte*, 1814, 3 Ves. and Beames 135.

ships, were entitled to hypothec.¹ But now the rule has been settled in perfect conformity with the English law, by a decision affirmed in the House of Lords, and confirmed in the Court of Session.²

The law may now therefore be considered as fixed, that there is no hypothec on a ship for repairs in a home port; although there is reason to believe that the deviation from that maritime rule which prevails in other nations has originally proceeded in England from the peculiar notions of jurisdiction established there, rather than from any general principle of law or of expediency, and that it has been established in Scotland by mere adoption. By the law, as now settled, builders and repairers, and furnishers to ships in a home port, though they may have a lien, provided the ship is in their entire possession, or a real security by bond of bottomry, have no hypothec under which, after the ship has quitted their possession, they can be entitled to a preference over other creditors.

Between that case, however, and the case of repairs in a foreign port, there is this ground for distinction in reason and equity, that wherever a workman is deprived of the power of treating with the owners themselves, he ought to be secured by a hypothec or preference: where he may so treat with the owners, his situation is not different from that of other dealers. And on this ground, a ship repaired in a foreign port is under hypothec for the amount, and may be proceeded against in Admiralty, or a preference claimed in any competition which may arise.

But is a foreign ship, repaired here, subject to hypothec for those repairs? If the principle be admitted, that where the repairer cannot treat personally with the owners, and have execution against them within his own territory, there ought to be a preference, it should be so. There seems reason to hold, that should the creditors of the foreign owners attach her before she left the country, and have her brought to sale, the repairers here would be entitled to a preference. This opinion prevails universally at the bar in Scotland, though it has not yet been precisely determined. In England, some countenance is given to the distinction by Lord Stowell, who, in a question whether persons furnishing stores to an American ship were not entitled to payment out of the proceeds of the [528] ship brought to sale by the seamen for their wages, admitted a distinction between the case of foreign and British ships.³

It has not been determined what shall be deemed a home port in a question of repairs. In a case already cited⁴ Hull was held a foreign port, in a question as to repairs on a Greenock ship. But this decision was cancelled in the House of Lords, as determining a point unnecessary to the decision of the case; and although this may be regarded as an opinion of the Court of Session, proceeding on very ample discussion, the question must be held as still open. The natural course is to adopt the rule of the Navigation Laws, and to hold all British ports as home ports—those Acts regarding all British ports as on the same footing; the repairers having immediate access to the registers to ascertain who is proprietor; and

¹ *Gay v Arbuckle*, 1711, M. 6262; *Maxwell and others v Wardroper*, 1726, M. 6266; *Port-Glasgow Ropework v Crosses*, 1761, M. 6268.

² *Hamilton v Wood and others*, M. 6269. Here Wood and others had repaired a Scottish ship in a home port, and claimed a hypothec for the amount. Lord Justice-Clerk M'Queen sustained the claim. The Court ordered a case to be sent for the opinion of English counsel; and the opinion of Dr. Wynne, mentioned *supra*, p. 574, note 7, was returned, on which the Court found that Wood and the other furnishers had no hypothec or right of bottomry on the ship in question. This judgment was affirmed in the House of Lords, 15 June 1789, 3 Pat. 148.

In another case, *Wood & Co. v Crs. of Weir*, wherein the same company was concerned, an attempt was made to re-establish the right of preference, on the ground of an extension of the lien which the repairer of a ship has while she remains in his possession, as if that possession could be retained *animo*. But this was, in other words, precisely the plea of hypothec, and was unanimously rejected by the Second Division of the Court, 31st January 1810.

[As to the non-liability of owners for advances made on the order of charterers, see *North-Western Bank v Bjornstrom*, 1866, 5 Macph. 24.]

³ *The John Jackson*, 3 Rob. Adm. Rep. 288.

⁴ *Stewart v Hall*, *supra*, p. 573, note 5.

the communication by post giving to the owners full opportunity to take charge of the ship, and provide security for relieving her from the lien of the repairers.¹

2. MONEY may be raised abroad by the master for supplying the necessities of the ship. This is the most dangerous form in which the master's authority can be exerted; the facility of misapplication, and the temptation to it, being so great, and the owners being exposed to an unlimited personal obligation beyond even the value of the ship. If in all cases a written authority to the master were requisite, the exercitors might limit the master's power in such a way as to lessen this danger, by requiring particular conditions to each loan; as the consent of the mate or some other confidential person; or certain proceedings, judicial or otherwise, in the foreign port, grounded on satisfactory evidence of the purpose and application of the loan. But even these limitations would manifestly form only an approximation to a safeguard; and as, by the maritime law, the master, by virtue of his place and possession, holds a general authority which requires no written title, the rule of adhering strictly to the terms of the mandate, which are so anxiously dictated by foreign jurists, seems to be vain and nugatory.² The power is given to the shipmaster to provide against necessities, which may come in such a variety of forms, or be feigned in so many plausible shapes, that there is no effectual safeguard but a wise selection of a shipmaster, backed perhaps by security at home, that the owners shall be indemnified against his transactions. The checks which seem practicable are these:—1. That the lenders should make every inquiry which time and circumstances permit into the nature and extent of the commission held by the master; by requiring production of his authority, if any have been granted, in writing; or by inquiring at others on board; or by requiring to see letters from the owners. 2. That where a special commission is known to exist, or where its existence or any limitation of power must be supposed in the circumstances, the limits of the power must be observed.³ 3. That the lender shall in all cases be held bound to see that a necessity exists for the loan required by the master; and, as a part of the same rule, that the loan does not exceed the limits of that necessity. 4. That the loan shall be made [529] in a place and in circumstances to afford relief.⁴

Such are the precautions laid down in foreign authorities. They are so manifestly consistent with equity and good sense, that they have been universally adopted.

In England they are followed as law.⁵

¹ [By the Mercantile Law (Scotland) Act, 19 and 20 Vict. c. 60, sec. 18, it is declared, that 'in relation to the rights and remedies of persons having claims for repairs done or supplies furnished to or for ships, every port within the United Kingdom of Great Britain and Ireland, the islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them, being part of the dominions of Her Majesty, shall be deemed a home port.']

² See Dig. lib. 14, tit. 1; De Exercit. Actione, l. 1, sec. 12. Igitur præpositio certam legem dat contrahentibus, etc. Stypmannus, De Jure Marit. P. 4, c. 115, No. 175, where he says: Præpositio igitur est cynosura et forma totius negotii nec aliter exercitor tenetur quam quatenus et quousque in singulis contractibus præposuit. Edit. Heinec. p. 546.

³ Creditoribus hinc circumspecte agere interest, ut in genus commissionis vel officii magistrorum eorumque conditionem quantum tempus et locus permittit sedulo inquirent antequam cum eis contrahant. Casaregis, Disc. de Com. Disc. 71, sec. 5. See also Vinnius ad Peck. sec. si plures, p. 111; Loccenius De Jure Marit. lib. 3, c. 8, p. 6.

See also the judgment delivered by J. A. Murchius, an eminent lawyer of Italy, appointed by the Conservatores Maris to decide a case of this sort, and which Casaregis has

printed in illustration of his own opinion. Disc. 71, Nos. 20, 21.

⁴ Casaregis, Disc. 71, Nos. 12, 15. Roccus says: 'Verum adverte quia quatuor requiruntur ut dominus navis teneatur ad restitutionem pecuniæ mutuæ. Primum ut causa sit vera et in illam causam pecunia sit versa, licet precise creditor non teneatur habere curam ut in illam causam pecunia expendatur. Secundo, Quod mutuans sciat magistrum ad id esse præpositum. Tertio, Ut non plus mutuetur quam sit navi necessarium dictæ refectiioni vel causæ. Quarto, Ut in eo loco comparari possint res illæ necessariae ubi mutuum fuit factum' (De Navibus, Notabilia, Not. 23, pp. 20, 21).

I give the passage, as the work of Roccus is scarce; but the doctrine is delivered in the 7th law of the Digest. See Pothier, Pand. Justin. vol. i. p. 366.

These requisites are well commented on in the judgment of Murchius, above referred to. Casaregis, Disc. 71, No. 34.

⁵ Cary v White, in 1710, as reported by Abbot, 11th ed. 111. In a case tried at Guildhall, Rocher v Busher, 1815, 1 Starkie 27, objection was taken to items for money advanced to the master. Lord Ellenborough (after holding the master a good witness to prove the necessity; see below, p. 577, note 4) said: 'In strictness, a claim of this kind is limited to

In Scotland also they are laid down by our authors, and followed judicially. Although, according to Lord Stair, 'he who contracts with the master needs not instruct that the money borrowed was actually employed for the use of the ship's company or voyage,' yet 'this much he must make appear, that when he lent the money there was such need of it; albeit he be not obliged to take notice whether the master misemployed it or not, because the exercitor should have looked who he trusted.'¹ With this the doctrine of Erskine precisely accords.² He adds, that 'the bond must, for the exercitor's greater security, express the cause of borrowing.'

In Admiralty, several cases have been tried in which these rules have been applied, with the modifications which circumstances naturally dictated; as, for example, the general rule, that the lender is not bound to see to the application, was qualified in one case, where an enormous expenditure had taken place, and the master was admitted to be a weak man.³

The evidence of the master to the necessity of the furnishings has been held good in England.⁴ But although the import of the document, bearing value in necessaries, [530] may be *prima facie* proof to support the claim, it will not be held sufficient, without production of all the evidence, and the examination of the master on oath.

The master may sign a bond, or accept a bill, or draw upon the owners; taking care to express in the obligation the cause of borrowing. The checks on the exercise of this power are those already set down. The master himself is bound by all such obligations, unless he stipulate that the owners shall alone be responsible.

The modes in which pecuniary supplies may thus be raised by the master, besides the loan or mere personal engagement, are: 1. By bottomry or *respondentia*; and, 2. By sale of the ship or cargo.

articles supplied through necessity. But where the same necessity exists, money may be supplied as well as goods, and the amount recovered. This, however, must not be understood of an indefinite supply of cash, which the master may dissipate, but only such as is warranted by the exigency of the case, as for the payment of duties or other necessary purposes. I once held that proof of the strict application of the money to the purposes of the ship was necessary; and Mr. J. Heath, sitting for the Chief Justice of the Common Pleas, did the same. We are in this case left much in the dark, and I cannot advise you to find more than you may deem to have been absolutely necessary for the use of the vessel.'

Palmer v Gooch, 2 Starkie 428; *Robinson v Lyal*, 7 Price 592.

¹ Stair i. 12. 18.

² Ersk. iii. 3. 44.

³ *Bogle, Jopp, & Co. v Adam & Mathie*, 15 May 1801, Judge Cay's MS. vol. A, p. 296. Here the *Concordia* having sailed to Jamaica, under Simson as master, she struck on a rock at Jamaica, became leaky, and required repair. Money paid for and advanced to Simson at Jamaica, £3175, on bills drawn by him, and a bond of hypothecation. In support of the action there were produced: 1. An account attested by the captain; 2. The captain's bill, bearing to be for repairs; 3. Hypothecation bond; 4. A survey, report, and attestation at Kingston. It was objected that in the pursuer's correspondence the master was stated to be little better than an idiot, and that £800 were stated in the account as paid at once, unchecked, to the master. The Judge-Admiral held the account to divide into four branches: 1. Sums paid to the master for the use of the ship; 2. Sums paid to tradesmen for repairs; 3. Sums paid to retire the master's drafts; 4. Sums for pre-

mium of insurance. The accounts being attested by the master, the first point was, Whether that was sufficient evidence? He required the discharged accounts and retired bills as vouchers of the articles paid towards those purposes, to prevent a second claim, as well as to verify the debt. He held the sum of advance to be so great, where the repairs were not paid direct by the merchant, and where the master was weak in mind, that the merchant was to be held responsible for a degree of care beyond the ordinary rule, and to see to the application of the money.

⁴ In *Rocher v Busher* (*supra*, p. 576, note 5), Lord Ellenborough held the master to be a good witness to prove the necessity.

It had formerly been so held in *Evans v Williams* by Lord Kenyon, 7 Term. Rep. 481, note. Here the captain of an Indiaman borrowed money of Evans for the use of the ship. Williams, the owner, objected that the money was for the use of the captain himself. The captain was called to prove the use, and was objected to, as 'being interested to discharge himself by throwing the *onus* upon his owners.' It was answered, 'that the owners had a remedy over against him if the money came to his hands, and that he was liable on his own bill of exchange to the plaintiffs on the one hand, and to the owners on the other. Lord Kenyon thought the objection had been well answered; but to what extent the witness should be received is another question. This does not go on the ground of Maxwell being a witness of necessity, for courts have very seldom decided on such a ground. I think the plea of necessity was only admitted in cases upon the statute of hue and cry. I decide this case upon the ground that the witness stands indifferent between the parties, for whichever way the question goes here he is equally answerable.'

III.—CONTRACTS OF BOTTOMRY AND RESPONDENTIA.

These are contracts which may either be considered as personal obligations for the loan of money, or as securities entitling the lender to a preference. In this last respect they might properly find a place among Securities over the moveable property; but it is more convenient to bring all the branches of maritime law into one place.

By the contract of BOTTOMRY, or RESPONDENTIA, money is, in contemplation of a particular voyage, lent to the master of a ship in a foreign country, or to the owner of the ship or cargo¹ in a home port; on this condition, that if the subject on which the money is taken be lost by sea-risk, or superior force of the enemy, the lender shall lose his money; and that if the voyage shall be successful, the sum shall be repaid, with a certain profit, or consideration for interest and risk, as agreed upon. And for the payment both the person of the borrower is bound; and the ship in bottomry, or the goods in *respondentia*, are in certain cases hypothecated to the lender.² In *respondentia*, however, the chief security is personal. See below, p. 583.

These contracts were formerly more in use, and of more importance than at present. They are now chiefly used for the securing of loans to foreign shipmasters. Abroad, they are still spoken of as among the most frequent and important of maritime contracts;³ while in Britain the increase of trading capital has taken away a great part of their consequence, and made them comparatively of less use.

These contracts are entered into either by the owners of the vessel themselves, or by the merchant who is fitting out the expedition, or by the master of the ship at a distance from his owner.

[531] 1. Those only who have a vested assignable interest in the ship or freight may enter into a bond of bottomry to the effect of constituting a hypothec over the ship or freight, as the owners whose names are on the register, or mortgagees. The whole owners may join in bottomry, or any one owner may hypothecate his own share. Where there is disension among the owners respecting the voyage, the majority carries; and in case of refusal by the minority, the master may borrow money on bottomry for the outfit proportioned to their share.⁴

2. In the same way as in regard to those having right to the ship or freight in bottomry, those who have a vested assignable property in the goods may borrow money on *respondentia*. This may vest a person who has a mere temporary possession as factor with the power of taking money on the credit of his owner's property, but it is limited by the nature of the contract to the occasions of the voyage.

¹ [The master's right to hypothecate the cargo as well as the ship for necessaries is the subject of Lord Stowell's decision in the leading case of the *Gratitudine*, *infra*. See *Anderston Foundry Co. v Law*, 1869, 7 Macph. 836. More recently, it has been held by a court of error in England, that where the owner of cargo has been made to contribute under a bottomry bond, in consequence of the insufficiency of the ship and freight, he has a right of relief against the shipowners. *Ben-son v Duncan*, 3 Exch. 644, 2 H. L. Ca. 720.]

² This is the essence of the definitions given by Bynkershoek, *Quest. Jur. Priv. lib. 3, c. 16, vol. vi. p. 506, 7, 9*; by Valin, *vol. ii. pp. 1 and 9*; by Emerigon, *vol. ii. p. 385*; by Pothier, *Tr. du Cont. de Prêt à la Grosse Avant. vol. iii. p. 77*; by Baldasseroni, *Del Contratto di Cambio Maritimo, vol. ii. p. 383*; by Blackst. *vol. ii. p. 459*; by Park, *p. 410*; by Marshall, 2d ed. 733, 734; by Abbot, 119; and by Erskine, *iii. 8. 17*. [It is essential to the validity of a bottomry bond that a *sea-risk* should be incurred by the lender.

See *Stainbank v Shepherd*, 13 C. B. 418. The intention to undertake this risk may be inferred from the tenor of the instrument, though not expressly affirmed. The *Emancipation*, 1 Wm. Rob. Adm. Rep. 130; The *Alexander*, 1 Dods. Adm. Rep. 280. The risk of the outward passage alone is a sufficient risk to support such a bond upon maritime interest. The *Hero*, 2 Dods. Adm. Rep. 142.]

³ Baldasseroni speaks of bottomry as one '*che oggidì è il più frequente che si pratiche nelle città et paesi di mare*' (*vol. ii. 383*).

⁴ This is admitted as an exception in all the maritime codes. 2 Valin, *Comm. sur l'Ordon. de la Marine*, 10, art. 8 and 9; Molloy, *De Jure Maritimo*, b. 2, c. 11, sec. 11; Park on Insurance, 414.

The recusant owner must, according to the Hanseatic Code, be cited to contribute his share; and at least a protest would be required with us.

3. The master's power to borrow money on these contracts has already been considered; and for anything further that may be necessary on the point, I refer to the case below.¹

As bottomry deprives the owners of a great part of the profit of a successful voyage, the master of the ship is not permitted, at the place of the owner's residence, to enter into such a contract. This rule seems to exclude such transactions anywhere within the British empire;² at least it has been doubted by Lord Stowell whether the union with Ireland has or has not altered the rule formerly adopted, holding an Irish to be a foreign port as to hypothecation for repairs.³

In a foreign country the master is allowed to enter into bottomry, if he can no otherwise procure a supply. But where he has already received the money on the footing of personal credit, he is not held to have power to convert the personal contract into a bottomry transaction.⁴

FORM OF THE CONTRACT.—The contract is in the form either of a bond, or of a bill, of bottomry. And, *first*, The sum must be expressed, with the marine interest payable for the loan; *secondly*, The subject must be specified upon which the money is taken; *thirdly*, The nature of the risk must be stated, and its termination as well as its commencement.

1. The SUM ADVANCED forms the distinguishing feature between this contract and insurance; and it is essential to the contract that the sum lent, or a subject of security equivalent to it, shall be exposed to the perils of the voyage.⁵ The consequence of loss under a policy of insurance is to render the underwriter debtor for the value insured; the effect of it in bottomry is to extinguish the lender's claim for repayment.⁶ The lender in the one case, the insurer in the other, is liable to the same perils.

Where the money is taken up by the master in a foreign port, the bond must bear that the money was borrowed for the use of the ship, as the master has no power to hypothecate but for necessary supplies. And this *prima facie* evidence, supported by proof that the money was fairly and regularly lent for the ship's use, will be sufficient to sustain the contract, and give effect to the hypothec, although, in fact, the master has abused the confidence reposed in him, and misapplied the money.⁷ If there be any fraud in which the lender is participant, the contract is of course impeachable on that ground.

But it is not necessary that *money* should have been lent: the bottomry creditor [532] may be a carpenter or ship-chandler, who has repaired or supplied the vessel, and who rather chooses to put the amount into the form of a bond of bottomry or *respondentia*, than to leave it open as an account, though secured by tacit hypothec.⁸

The money lent, or the amount of the furnishing, with the maritime interest, constitutes the sum for which, on the successful issue of the voyage, the creditor has his claim. The maritime interest is in no sense usury. It is analogous to the profit in partnership, or the premium in insurance, and cannot (as it appears to have been under Justinian) be fixed like

¹ The *Gratitudine*, Mazzola master, 3 Rob. Adm. Rep. 255–278. [This implied power may be exercised by the ostensible and acting master (The *Jane*, 1 Dods. 464); or in case of necessity, by a British consul, or a person appointed by him to command the vessel (The *Zodiac*, 1 Hagg. 320; The *Cynthia*, 16 Jur. 748). See Abbot, 11th ed. 125.]

² Abbot 123.

³ The *Rhadamanthe*, Mayer, 1 Dod. Adm. 201.

⁴ The *Augusta*, D'Bluhn, 1 Dodson Adm. 283. See also *Sword v Howden*, 27 June 1826, 4 S. 757, N. E. 765. [The test of the authority of the master to enter into a bottomry engagement, according to the older authorities, was his power of communicating with the owners (The *Bonaparte*, 3 Wm. Rob. 298); because it is the master's duty if possible to obtain an advance on the personal credit of the owner. By an extension of this principle, it is now ruled that in a foreign port having telegraphic communication with the owner's place of

residence, the master cannot pledge the ship without first communicating by electric telegraph with the owners. See Sir J. Jervis' judgment in the leading case of *Wallace v Fielden*, 7 Moo. P. C. Ca. 398, and cases cited by Tudor, 2d ed. p. 60.]

⁵ *De Guelder v De Peister*, 1 Vernon 263.

⁶ [*Cochrane v Gilkison*, 1854, 16 D. 548, 20 D. 213.]

⁷ *Marshall* 749. [It is a sufficient case of necessity to support a bottomry bond, that the ship is liable to be arrested and sold in default of payment, *e.g.* for port dues. *Smith v Gould*, 4 Moo. P. C. Ca. 21. *Secus*, where the object is to protect the master from a threatened arrest in respect of his personal obligation, *Gore v Gardiner*, 3 Moo. P. C. Ca. 79.]

⁸ [A debt for general average contribution arising in respect of an outward voyage, being a personal debt only, is not sufficient to support a bottomry engagement. The *North Star*, 1 Lush. Adm. Rep. 45, 29 L. J. Adm. 73.]

common interest to a peculiar rate.¹ It is not, like the *Fœnus Nauticum* of the Roman law, a current interest of so much per cent. per month, but a certain sum fixed to be paid as the maritime interest on the whole voyage. Sometimes, however, where a certain time is appointed for the duration of the voyage, a stipulation is made of a proportional addition, per month or week, after the elapse of that time.

The moment the risk is at an end, the marine interest ceases, and the debt becomes absolute, bearing thenceforward simple interest.² This interest has been held, by some lawyers of great authority, to run only on the principal sum, not on the interest.³ But there seems to be some ground for regarding the sum in the bond as a principal and absolute debt on the successful termination of the voyage. And accordingly, by other authors of great authority, the interest is made to run on the whole sum.⁴ In England the law is laid down consistently with the former opinion.⁵

2. The CONTRACT by which sometimes money is lent on a high premium for risk, but without any pledge of the ship, etc., as a security, is not strictly speaking bottomry, but a loan on an adventure, in which the lender has only the personal security of the borrower. This is a legal contract in all cases, except the case of ships bound to or from the East Indies, in which an exception is made by statute for the protection of the trade of the East India Company.⁶ In the proper contract of bottomry or *respondentia*, a subject is pledged for the loan; and the general rule of maritime law is, that whatever is capable of insurance may be the subject of these contracts,—the ship, the tackle and furniture, the provisions, the freight, the cargo, the goods, but not the wages of the sailors.⁷

A bond of bottomry over the SHIP, of course, binds the ship and owners, without any qualification. A bond of bottomry on the FREIGHT seems properly to have in contemplation only the freight of that voyage; but it has been held that the lender has the freight of a subsequent voyage bound to him, where the interest of third parties does not intervene.⁸

[533] It appears that the contract may be entered into, although the ship be at the time at sea.⁹

As money may be taken on the ship, cargo, or parts of either, there may be many bottomry and *respondentia* bonds on one voyage. In case of partial loss, the right of each lender is appropriate to the subject in his bond.

EFFECT OF THE CONTRACT.—The effect of the contract of bottomry is to give condi-

¹ 2 Marshall 756. [The Court of Admiralty in England assumes the right of reducing the rate of interest where fraudulent or excessive. See the cases cited in Tudor's notes to the case of the *Gratitudine*, Merc. and Mar. Ca. 2d ed. p. 58. The Court will also supply blanks in the places where the rates, interest, and commission ought to have been inserted. The *Change*, Swab. Adm. Rep. 240; The *Glenmanna*, Lush. Adm. Rep. 115.]

² Dig. lib. 22, tit. 2; De Naut. Fœn. l. 4; Marshall 751.

³ Pothier lays it down, that this interest can run only upon the principal, the marine profit being itself interest, which cannot bear interest without usury. Tr. du Prêt à la Grosse Avant. No. 51, vol. iii. p. 97.

⁴ Emerigon lays down the law differently from Pothier, on the authority of a number of French decisions, vol. ii. pp. 409–416; but he expresses a humane hope that some day or other a gentler spirit may regulate this part of the law.

⁵ Marshall 758, 759.

⁶ 19 Geo. II. c. 37, sec. 5; Abbot 119. But see 2 Marsh. 752; and Park 616.

⁷ Pothier, Prêt à la Grosse Aventure, No. 9, vol. iv. p. 80; Marshall 742–747. In France it was not lawful to borrow money in this way on future freight, nor on the profits of

goods. Ordon. de la Marine, Des Contr. à Grosse Aventure, art. 4; 2 Valin 6, 7; 2 Emerigon 480.

⁸ The *Jacob*, Baer, 1802, 4 Rob. Adm. 245. A bottomry bond was executed in America, in general terms, over ship and freight. The voyage was described as from Baltimore to Cork. The ship sailed, and, without fraud, went to Dublin instead of Cork. She there discharged and sailed, and the lender had no opportunity of enforcing payment. She, after this second voyage, returned to Britain, and was arrested, and was by order of the Court of Admiralty sold. The price of the ship was not sufficient to answer the debt, and the freight of this second voyage was attached in the hands of the agents of the owners. The learned judge of the Court of Admiralty 'held the freight of the subsequent voyage, in the custody of the Court, answerable for the demand.' He intimated that this was not a general rule in all cases and circumstances, where any third party may be interested in the freight of the subsequent voyage. But in this case there is no person concerned but the owner of the ship and the holder of the bond.

⁹ Emerigon denies this, vol. i. p. 484. But Valin (vol. i. p. 346) lays it down, and his opinion seems to be followed. Marshall 754.

tionally at once a personal claim, and a real security for the sum to which the lender is entitled; that of *respondentia* creates in general only a personal obligation.

I. Respecting BOTTOMRY, Mr. Erskine has laid it down, but without citing any authority or decision, that it imposes no personal obligation upon the borrower.¹ This doctrine, however, is contrary to all the authorities,² and even to the very nature and known effects of the contract. Indeed, the controversy in other countries has been, whether it creates *any other* than a personal obligation. Our older formalists inserted a clause of personal obligation in bottomry bonds; but, on the authority of Mr. Erskine, this was at one time omitted in collections of forms. In more modern practice, however, the personal obligation is continued in bonds of bottomry.

The real right which is vested in the lender in bottomry extends over the particular subject of his security. Where the loan is to the owners of the ship, the security, unless restricted, is over the ship, with its tackle, furniture, and provisions. In England it is fixed law, that 'where the ship and tackle are brought home, they are liable, as well as the person of the borrower, for the money lent.'³ There is not a single reported case establishing this to be the law of Scotland; but this circumstance, with the understood nature of the contract among merchants, is evidence of the law being fixed beyond dispute. Erskine lays down the real burden on the ship as the legal effect of this contract; and in the records of the Admiralty Court, in every case of a competition of creditors on the price of a ship, the preference of bottomry creditors appears to have been held unquestionable.⁴

RISKS.—In questions on bottomry, it may happen that the ship may not have sailed, or that she may have been lost by such deviation⁵ or defect as would free an underwriter, or that she may have suffered damage without any such defect, or that she may have completed her voyage.

1. In the first of these cases a real right seems to be vested, as well as in the [534] last.⁶ The marine interest, indeed, cannot be due, because that is the price of a risk, which in such a case is not incurred;⁷ but the money has been advanced on the faith of a real security, and it has been applied to the benefit of the ship, and therefore to the extent of the principal and common interest there appear to be legal grounds for preference.

2. Where the ship has perished by not being seaworthy, or by deviation, the personal contract will be effectual. It may be questioned whether, in a case of want of seaworthi-

¹ Ersk. iii. 3. 17.

² Marshall 743; Pothier, *ut supra*, No. 50. [It would rather appear from the later judicial opinions on this subject, that the master has no power to grant a bottomry obligation in such terms as to subject the owner to a personal obligation. Tudor, Merc. and Mar. Ca. p. 66, citing *Stainbank v Stainbank*, 13 C. B. 441; *Benson v Chapman*, 6 M. and G. 792.]

³ 2 Blackst. Com. 457; Park 410; Marshall 742.

⁴ Ersk. ii. 3. 17.

In a competition in Admiralty on the price of the ship *George of Prestonpans*, Todd, a creditor by bill of bottomry, was preferred to a carpenter in a home port, and to several creditors by bill. 18th February 1702.

A creditor by bond of bottomry allowed to carry off the whole value of a ship, in competition with personal creditors, and with a carpenter who repaired the ship in a home port. 22 July 1718, Compet. on the *James* of Leith.

Two bottomry creditors preferred to personal creditors and repairs in home port. 7 Jan. 1726, Compet. on the *John* of Kirkcaldy.

Jamieson v Rannie, 16 March [sic]. A creditor by bond of bottomry, granted in Norway by the master for necessary

repairs after a storm, preferred to furnishers of ropes, etc. for the voyage.

Vause & Factor v Zuille, 9 April 1734. In a competition between Vause of Boston on a bond of bottomry by the master in a foreign port, dated 17th October 1731, and a vendee of a sixth part of the vessel, by deed of vendition dated 15th May 1730, the bottomry creditor was preferred.

[It is a settled rule that a bottomry bond is preferable to all other obligations affecting the ship (3 Hagg. Adm. Rep. 83; 1 Dods. 40; 2 Dods. 13), not excepting debts secured by mortgage. *The Royal Arch*, Swab. Adm. Rep. 269. As to the effect of a purchase, see the *Helgoland*, Swab. 491. Seamen's wages, however, have a preference, even although earned before the bond was taken. *The Union*, Lush. Adm. Rep. 128, overruling previous cases.]

⁵ [In such a case it is for the owners to show that the deviation was justifiable. *The Armadillo*, 1 Wm. Rob. 256.]

⁶ So it is laid down by Emerigon, vol. ii. pp. 559 and 567, where he endeavours to reconcile the part of the Ordon. de la Saisie with the 23d chapter of Il Consolato.

⁷ Dig. de Naut. Foen. l. 1; Marshall 756. In England, in the case of *De Guelder v De Peister*, Lord Keeper North so decreed. 1 Vernon 263.

ness, the risk has ever begun; and so, whether the rule applied above to the case of a ship which has not sailed on her voyage, should not regulate the lender's claim?

3. Where there is no partial loss, a distinction is (in the absence of specific stipulation) admitted between general and particular or simple average, the lender being held liable to the former, not to the latter.¹ General average is for a loss incurred, towards which the whole concern is bound to contribute *pro rata*, because it was undergone for the general benefit and preservation of the whole. Simple or particular average is one of those incorrect expressions which, though in familiar use, and sufficiently understood by persons versant in the matter, are apt to mislead. It means nothing more than the damage incurred by or for one part of the concern, and which that part alone must bear. The loss of an anchor, the starting of a plank, the leaking of a cask, the accidental loss of part of the ship, or cargo washed from the deck, are examples of simple or particular average, or loss incident to the proprietor that suffers. The loss of masts, or rigging, or goods cut away or thrown overboard, to ease the ship and lessen the common danger, are examples of general average.² In one sense, simple or particular average affects the bottomry or *respondentia* creditor, where it lights upon the subject of his security, for it lessens the security which he holds. In another, it has no effect on his debt, since the condition of payment is the arrival of the ship or goods. That condition is fulfilled by their arrival, though damaged; and unless there is an express stipulation that his claim shall be liable to particular average, the whole sum is due. In the same sense, the real security is subject to general average; but, further, the creditor is also liable to a deduction from his personal claim against the lender, on account of general average. So it is laid down by the best foreign authorities,³ who even hold an opposite stipulation to be unlawful. But different usages prevail in different countries, and that of the particular country to which the ship belongs must be regarded. In England, it seems to be a disputed point whether the lender be liable to general average, independently of stipulation. The *dicta* of two eminent judges, adverse to the lender's obligation, are reported in the books;⁴ and the two authors who have lately written on this subject differ very much in their opinions on the point.⁵ But Mr. Marshall seems to me to have supported the doctrine very satisfactorily, that bottomry creditors are liable to general average. [535] In Scotland there is neither decided case nor authority on the subject. The bond will, of course, regulate the question where it is explicit; where it is not, the rule adopted abroad, and for which so fair a principle is assigned, would certainly have much influence.

4. Where the voyage has been accomplished, the real right, as covering the whole claim, has vested over the ship, with its furniture, tackle, and freight: the ship, etc. may be brought to sale, the freight stopped in the hands of those by whom it is due.

PROCEEDINGS.—To make the debt effectual, the proceedings are in Admiralty by an application for the sale of the ship, and payment of the bottomry debt, or a warrant against those who owe freight.

The order of preference of bottomry creditors is in favour of the last in date; that loan or debt of which it can be said, '*Salvam fecit totius pignoris causam.*'⁶ So, 1. Seamen are for

¹ See below, Of Average.

² Pothier, vol. iv. p. 91; Prêt à la Grosse, No. 44. Lord Stowell's judgment in the *Copenhagen*, 1 Rob. 293.

³ Pothier, vol. iv. p. 91, No. 44; 2 Emerigon 505, with the authorities he quotes.

⁴ Lord Mansfield, in *Joyce v Williamson*, said: 'It is clear that, by the law of England, upon a bottomry contract there is neither average nor salvage.' King's Bench, Michaelm. 23 Geo. III. MS.; Marshall 754. And Lord Kenyon, in *Walpole v Ewer*, Sitt. after Trin. 1789, said: 'By the law of England, a lender on *respondentia* is not liable to average losses.' Park 423. [Abbot, 11th ed. 554.]

⁵ Park 423; Marshall 745, 760.

⁶ See the principle of this well explained by Casaregis, in reprehending the judgment given by a celebrated lawyer, who was assumed by the Tribunal of Conservatores Maris to settle a contest respecting the price of a ship. '*Totum fundamentum,*' says Casaregis, '*D. Martelli consulentiis residebat in eam trita ac vulgari conclusione quod prior in tempore potior in jure esse debet.*' *Discursus de Commercio*, Disc. 18, vol. i. p. 48.

[Where different creditors contribute towards the necessities of the ship, on the same occasion taking separate bonds, they will be ranked *pro rata* and without any preference, not-

their wages preferred to a bottomry creditor; for without their aid the furnishings are useless, and the voyage whereon the lender's right depends cannot be accomplished. 2. The last bottomry creditor is always preferred. If the owners have taken up money on bottomry to fit out the vessel, and in the course of the voyage the master has been forced to refit, the furnishers, in a foreign port, or lenders on bottomry for this purpose, are preferred before the former bottomry creditor. This proceeds on the same principle with the other rule of preference. Without this second loan the vessel could not have proceeded, nor the voyage have been accomplished. 3. The bottomry creditors on the latest voyage are, in the continental laws, preferred on somewhat of a similar principle.¹ 4. An effectual bottomry debt is good against purchasers in the course of the voyage, and it seems also to be effectual against prior lenders on vendition in security: for they are either owners, or at least the subject of their right is benefited, or the managers of it furnished with means by the bottomry loan.

II. RESPONDENTIA.—The contract of RESPONDENTIA is in foreign nations attended with the same real security over the cargo that bottomry produces over the ship.² In England, Blackstone has laid it down that the claim is only personal; but he rests this doctrine upon a principle so narrow,³ that doubts are naturally suggested of the soundness of his rule in any case. Accordingly, the later authors seem to admit the real security, wherever there is an express stipulation to that effect.⁴ In Scotland, we are not very familiar with [536] this contract; and no cases are to be found in our books in which it has become the subject of discussion. It is to be expected, that were any case to occur, our judges would pay much regard to the English rules; and that they would be brought with great reluctance to sanction a real security upon goods on the footing of a *respondentia* bond, unless on special stipulation.

CLAIM.—The claim under contracts of bottomry and *respondentia* is not very different in the two contracts. 1. In *respondentia*, as in bottomry, where the goods have been utterly lost by the fault of the master, in consequence of wilful deviation, from the vessel not being seaworthy, or from the goods being improperly packed and loaded, the claim of the *respondentia* creditor is effectual, but of course merely personal. 2. Where the loss has arisen

withstanding that the bonds bear different dates. The *Exeter*, 1 C. Rob. Adm. Rep. 173.]

¹ Guidon de la Mer. ch. xix. art. 2 and 3; Ordon. de la Marine, 'Des Cont. à la Grosse Avanture,' art. 10; Valin, vol. ii. p. 11; Casaregis, Disc. 18, n. 14 and 23, and D. 62, No. 20.

² Pothier, Tr. du Cont. de Prêt à la Gr. Avant. Nos. 56, 57, vol. iii. p. 97; Emerigon, vol. ii. p. 561.

³ 'If the loan is not upon the vessel, but upon the goods and merchandise, which must necessarily be sold or exchanged in the course of the voyage, then only the borrower personally is bound to answer the contract' (2 Black. Com. 458). This principle does not apply to every case: for, 1. The voyage may be homeward; 2. If the voyage be out and home, the goods substituted for the outward cargo might afford the same security, and in foreign nations this is the law. Emerigon, vol. ii. p. 561.

⁴ Thus, Mr. Park says: 'Bottomry is a loan upon the ship, *respondentia* on the goods: in the former, the ship and tackle are liable, as well as the person of the owner; in the latter, for the most part, recourse must be had only to the person of the owner' (p. 410). Marshall, in his first edition, after saying that the *respondentia* lender has in general only the personal security of the borrower, adds: 'But the personal responsibility of the borrower is not in all cases the only security of

the lender. Where the money is lent for the outward and homeward voyage, the goods of the borrower on board, and the returns for them, whether in money or in other goods purchased abroad with the proceeds of them, are liable to the lender' (p. 633). On this passage, in the first edition of this work, it was observed that Marshall quoted for this doctrine only the authority of Pothier and Emerigon, two foreign lawyers; that both of these are certainly of great authority (though in truth he has the support only of Emerigon, for Pothier in the place referred to is speaking of the question of risk, not of preference); and that there seemed reason to suspect that while the practical doctrine ought to be taken as broadly as it is laid down by Blackstone, the narrowness of the principle which he assumes has had a tendency to unsettle the rule. In Mr. Marshall's second edition he has altered this passage, confined the doctrine to the French law ('According to the French writers, the personal responsibility, etc.'), and on the authority of a case in King's Bench laid it down: 'That unless there be an express stipulation to that effect in the bond, the lender has no lien on the homeward cargo, nor any other security for his demand than the personal responsibility of the borrower or his sureties, if he has any' (p. 743).

The case referred to by Marshall is *Busk v Fearon*, sent on a case by the Lord Chancellor for the opinion of the King's Bench. 4 East 319.

from any other accident, for the risk of which an insurer would be liable, the claim is extinguished. 3. Where the voyage has never been entered upon, the claim is restricted to the principal sum, with common interest. 4. Where the voyage has been successfully accomplished, the claim for the principal and marine interest becomes absolute. 5. When the ship is lost, but the goods saved, a *respondentia* creditor is entitled to his money; as, where the ship is saved, but the goods lost, the bottomry debt is good.

In concluding on this contract, it may be observed that there is nothing in the nature of it to prevent the creditor from taking collateral security for the personal obligation, provided the condition of completion of the voyage be made a part of it, and that it is not a wager.¹

SALE OF THE SHIP OR CARGO FOR THE SUPPLY OF NECESSARIES.

The last resource for the supply of necessities is the sale of the ship or cargo.

The master has no power thus to sell, without having first deliberately tried every other expedient.² Nay, it has sometimes been denied that he has any such power, but only a power to hypothecate.³ In later cases, however, this power has been sanctioned in England, and the precedent will apply in Scotland. In one case of the sale of the ship, it was laid down as law by Lord Stowell, that it must be shown there was a necessity; and that in making out such a case, it is requisite to prove not only that the vessel was in want, but likewise that it was impossible to find money for that purpose without a sale.⁴ In another case, relative to a sale of part of the cargo, the same principles were applied;⁵ and generally it may be observed, that the duty of the master being to send the goods to their destination, [537] no power is implied in him which has not this object in view: nor is he entitled to levy money by an absolute sale of goods, to be delivered at the port of destination to the lender or his agent, without a right of redemption to the owner.⁶ 2. That although he may sell perishable goods which cannot be carried to their port, yet, where the goods are of a different description, circumstances must show a necessity to justify a sale short of the port of destination.⁷ How the master shall proceed to tranship, to deposit and store, or how else to deal with the goods, may be difficult to be determined in various circumstances; and no general rule can well be delivered, except the injunction to do that which a wise and prudent man will think most conducive to the benefit of all concerned.⁸ But at least a sale is the last thing to be thought of, and the most difficult to be justified.

In short, the doctrine seems to resolve into this, that in proving the necessity that is to justify a sale either of ship or cargo, without the consent and at a distance from the residence of the owners, it must at all events be made to appear that the necessity was imperative;

¹ So found by the Court of Session in *Mason v Henderson*, 1784, M. 9467. [Abbot, 11th ed. p. 6.]

² *Underwood v Robertson*, 4 Camp. 138.

³ *Johnson v Shippin*, 2 Lord Raymond 984.

⁴ *Fanny v Elmira*, Hicks, 1809, Edward's Adm. 117.

[In the development of this branch of the law, a distinction has been introduced between the right to sell a part of the cargo, and the right to sell the ship and cargo. The former right may be exercised to provide funds for the repair of the ship, because this is for the benefit of the remaining part of the cargo; 'but,' said Lord Stowell, 'it never can be for the benefit of the cargo that the whole should be sold to repair a ship which is to proceed empty to the place of her destination.' *The Gratitudine*, 3 C. Rob. 240. But, secondly, the master may sell the whole ship and cargo, for the purpose of remitting the proceeds to their respective owners, when the voyage has become hopeless—obviously a right of a very different character from the former. 'This principle,' said Lord Gifford,

'may be clearly laid down, that a sale can only be permitted in case of *urgent necessity*, that it must be *bona fide* for the benefit of all concerned, and must be strictly watched' (1 Bing. 450). See the cases in Tud. M. and M. C. p. 73.

Connected with this subject is that of the powers and duties of the master in relation to transhipment of cargo, as *negotiorum gestor* for the freighters. In many cases this is obviously a preferable course to that of a forced sale in an unsuitable market. The leading case is *Shipton v Thornton*, 9 Ad. and El. 314. See also Tudor, M. and M. Ca. p. 77.]

⁵ *Freeman v East India Co.*, 5 Barn. and Ald. 617. See also *Royal Exchange Co. v Idle*, 8 Taunt. 755, 3 Brod. and Bing. 151, note.

⁶ See *Johnston v Greives*, 2 Taunt. 344.

⁷ *Van Omeron v Dowick*, 2 Camp. 41.

⁸ See *Christy v Rose*, 1 Taunt. 313; *Liddard v Lopez*, 10 East 256, Abbot 242-3.

that there was no correspondent of the owners at hand, who could supply necessities for the ship; that no money could be had by hypothecation; and that everything had been done in *bona fide*, and for the true benefit of the owners.

CLAIMS FOR REPAIRS AND FURNISHINGS ON BANKRUPTCY.

Claims may arise on contracts for the repairs and necessities of a ship, either on the bankruptcy of the owners, or on that of the master, or on that of all the parties to the contract.

I. CLAIMS ON THE BANKRUPTCY OF THE OWNERS.—1. The owners are liable only *pro rata* on contracts in which they personally engage. They are not sureties for each other; but each is considered as the manager of his own share of the common estate. On the bankruptcy, therefore, of any one owner, or on the bankruptcy of them all, the claim must be restricted to the individual shares.

2. When the contract is by the shipshusband or master, the tradesman has in Scotland a claim against each owner for the whole sum, drawing no more on the whole than full payment. The claim is as extensive as in England, where the plea of abatement has been omitted.¹

3. If the tradesman do not claim against the owners, but takes recourse against the master, the master will be entitled to a claim for relief against the owners.

4. Where a claim has been entered on both estates, if the master be indebted to the owners, he will be entitled to plead compensation or retention against his owners to the effect of relieving himself.

II. CLAIMS ON THE BANKRUPTCY OF THE MASTER.—The general rule is, that the master is himself debtor for all furnishings of repairs and necessities made by his order to the vessel under his charge, or sent to the ship while under his charge, without a special contract with the owners, and for all supplies of money to him as master. A claim may therefore be entered on his bankrupt estate in such cases, whether the supplies and furnishings have been actually bestowed on the ship, or converted to the master's use, or embezzled by the crew under his command. The claim may be made against the estates both of the owners and of the master, or it may be directed first against the owners, or first against the master's estate.

1. Where both have failed, and the supplies having been fairly applied, the [538] claim is made against both, the creditors may rank on the estate of each for the whole sum. In this case the master's estate will have the benefit of set-off against any balance of freight levied by him. He will also be entitled still to insist on levying any freights not yet paid, but which he had previously power to levy, so as to indemnify himself for his engagements.

2. If the supplies have been fairly employed for the necessary occasions of the ship, then the master's estate, against which a claim for the amount has been made, will be entitled to demand relief from the estate of the owner, provided no claim has already been made on that estate by the merchant. But even where such claim is entered, compensation or retention will be pleadable by the master's estate against the owners, on any balance which the master may happen to owe to the owners.

3. If the master have abused his powers, and perverted to his own use the supplies given or money paid to him, the owners will be entitled to demand relief from the master's estate, provided a claim has not already been entered on that estate by those who have made the advances.

¹ [Abbot, 11th ed. 78.]

SECTION II.

OF CONTRACTS FOR THE EMPLOYMENT OF THE SHIP ON GENERAL OR SPECIAL AFFREIGHTMENT.

A ship may be hired or freighted by one or more merchants for a particular voyage, or on time; or it may be advertised for the general use of all merchants who have goods to send to the port of the ship's destination, and independent contracts may be made for the carriage of specific articles. The former is called a *CHARTERED SHIP*, being freighted by a special contract of affreightment, executed between the owners, shipshusband, or master on the one hand, and the merchants on the other. The latter is said to be a *GENERAL SHIP*, or a ship on *GENERAL FREIGHT*; the bills of lading granted by the master on receiving the specific goods being commonly the sole evidence of the contract for carriage of those goods. Bills of lading are used both in special affreightment and in taking goods on board of general ships, not to supersede, in the former case, but to aid the evidence of the charter-party, by proving against the shipmaster the goods actually taken on board under the contract, and to afford the means of transferring the goods while the ship is at sea.

It is proposed in this section to explain, in the first place, the leading principles by which the doctrine of these contracts is regulated; and then to consider the several questions that may arise on the failure of any of the parties.

SUBSECTION I.—GENERAL PRINCIPLES RELATING TO CONTRACTS OF AFFREIGHTMENT.

The contract of affreightment is that by which an entire ship, or a principal part of it, is let to a merchant for the carriage of goods, or for such other use as it may be applied to; the owner of the ship being bound that the ship shall in all respects be fit for the stipulated purpose, and the merchant being bound to pay a certain sum for the freight or hire of the vessel. This contract, by us called *AFFREIGHTMENT* or *CHARTER-PARTY*, *AFFRETEMENT* in the French books, *NAULIS* in those of Italy, is of the class of contracts *locatio conductio*.¹ The essential principles and rules by which it is regulated are the same in special and in general [539] freight. These the charter-party expresses pretty fully; while the bill of lading, in general freight, leaves the chief obligations to the construction of law.

I.—OF CHARTER-PARTIES OF AFFREIGHTMENT.

In Scotland, the charter-party is not trammelled by those technical rules which, to a stranger, appear to oppose so many bars to the efficacy of the contract according to the jurisprudence of England.² The contract, when duly executed by the owners, or by the shipshusband, or by the master within the limits of his powers, is binding on the owners, and gives action direct in the Court of Admiralty against all concerned. It also in general contains a registration clause, in virtue of which it may be the ground of summary execution, without any necessity for a previous action.

The engagement to carry goods is in its nature a contract consensual, not absolutely requiring writing, but which may be proved by the oath of the owners; by the evidence of the master, mate, and others; by a bill of lading; by the fact of the merchant's goods having actually been carried; or by the fact of the goods being actually on board. The special contract of affreightment was formerly required by statute to be executed in writing in the form of a charter-party,³ and now any written contract entered into on this occasion is sub-

¹ See above, p. 481, Of Contracts of Hiring.

² See Abbot, P. iv. c. 1, p. 195 et seq.

³ By 1466, c. 14, no ship was to be freighted without a charter-party, of which the points are specified. This law

had fallen into neglect within the short space of twenty years, and was renewed by 1487, c. 109. But this, as well as the former Act, is not now in observance.

ject to a stamp-duty;¹ but no particular form of instrument or solemnity is necessary. This contract may be proved by formal charter-party, authenticated according to the requisites of the Act 1681 and other statutes; or by a memorandum, letter, or the like, holograph; or even if not holograph, but only signed by the parties, such writings will, as in *re mercatoria*, be sufficient to sustain action.

The affreightment may be of the whole ship, or of a part of the ship, described commonly by the ton, or barrel bulk.

Where the whole ship is freighted, it is the freighter's for that voyage: the unoccupied space is his, to fill up in any way that he pleases; and the master cannot receive other goods without the freighter's consent. If other goods be taken, either with his consent or without his knowledge, the master is accountable to him; while the whole freight is due, whether the ship be filled up or not.²

Where a part only is freighted, the master sufficiently discharges his obligation, if he give the stipulated room either in the place of the ship agreed on, or in a safe and proper place.

The ship may be hired for one or more voyages specifically described, or for a particular time. In the former case, the obligations are all regulated in reference to the particular voyage; in the other, they will be construed according to the more extensive object of the contract. The freighter on time is held *tanquam dominus navis* to many effects; as in questions of responsibility for furnishings on account of the voyage, or in the course of the ship's employment;³ or in questions of stoppage *in transitu*.⁴ In affreightment for the voyage, the ship is still in all respects considered as in the possession of the owners.

¹ The stamp-duty for a regular charter-party, or for a memorandum, letter, or other writing to stand in place of a charter-party, is, by the statute 55 Geo. III. c. 111, £1, 15s. [The stamp-duty for a charter-party, or a memorandum, letter, or other writing to stand in place of a charter-party, is five shillings by the statute 5 and 6 Vict. c. 79. It may be stamped within fourteen days after execution without a penalty, but only on payment of a penalty of £10 within a month after the expiration of the fourteen days.]

² Pothier (*Charte-Partie*, No. 22, vol. ii. p. 377) on this point corrects Valin, vol. i. p. 607.

³ See above, p. 569.

⁴ See p. 232, *ante*, note 1.

[A shipowner may either by the charter-party contract to employ the vessel and the services of the master and crew for a time exclusively for the benefit of the charterer, the master remaining the servant of the shipowner and not of the charterer, and the possession of the vessel remaining as the possession of the shipowner and not of the charterer in any case in which their rights come in question; or the shipowner may by the charter-party contract that the charterer shall during its subsistence have the possession of the vessel, and that the master shall during that time be the servant of the charterer. The former is a *locatio operis vehendarum mercium*—a contract of carriage of goods; the latter either a *locatio navis* or a *locatio navis et operarum magistri et nautarum ad merces vehendas*—a lease of the ship or of the ship and services of the master and crew, whereby the charterer takes the vessel into his possession as he would lease a house, and takes the master and crew into his own employment, through whom as his servants he will maintain the possession demised to him. In the latter case the charterer is considered *tanquam dominus*, or as owner *pro hac vice*. We have seen how this distinction may affect questions of stoppage *in transitu*, p. 232, *ante*, note 1. The

question of the right to detain goods for freight, as it stands at common law, independent of special contract, is dependent on this possession of the ship, as giving the possession of the goods, without which, apart from special contract, there can be no lien. So, again, the distinction determines the question as to who it is as the master's principal that is liable to a shipper of goods for non-delivery of them; and again, it may enter materially into the question as to who it is that is liable for supplies of necessaries to the ship, although that is a question which turns rather on the credit on which they were made, than directly on the possession of the vessel. The importance of the distinction is not less than the difficulty of determining to which class the charter-party belongs is frequently found to be. There is no general rule except this, that the whole clauses of the instrument must be construed together, and effect given to every clause; and the effect and operation of the whole on the state of possession is to be deduced as a question of the fair meaning and intention of the parties. The mere technical phrases which by inveterate usage are introduced into almost every charter-party, often without any idea on the part of either shipmaster or merchant what the venerable clauses mean, go for little, if there are other clauses the result of which is to qualify and restrain them. Thus, words of 'demise' will not pass the possession, though in *Hutton v Brag*, 7 Taunt. 14, it was once held that they did so, notwithstanding such clauses co-existing alongside of the demising words; but that case is not now law. (*Dean v Hogg*, 10 Bingh. 345; *Christie v Lewis*, 2 Brod. and Bingh. 410.) Each case depends on its own specialties. See the English cases in *MacLachlan, Shipping*, pp. 307-315; and *Abbot*, pp. 240-263, 11th ed.; and see *Parsons' Maritime Law*, vol. i. pp. 232-236, where there is a valuable collection of American cases on the point.]

[540] By this contract, the owners or their representative let to freight to the merchant; and he on his part hires and takes to freight the ship by name and description, during a definite time, or for a specified voyage or voyages, for which the merchant binds himself to pay freight, either a particular sum, or so much per month, or so much per ton, etc. This being the essence of the charter-party, the obligations of the respective parties are raised by construction of law as the *naturalia* of the contract, unless in so far as altered by special stipulation.

I. The OWNERS and MASTER are bound in fulfilment of their contract to the following particulars:—

1. That the ship shall be seaworthy, or in all respects fit for the stipulated purpose; the hull sound; the tackle and outfit sufficient; the master and seamen able, and skilful, and adequate.¹ 2. That the ship shall be at the loading port, and clear for taking in the stipulated cargo, on the appointed day; and shall lie in readiness to load, during a reasonable time; after which the master may sail; or, if he stay, he may claim a consideration for loss of time. 3. That the ship shall sail at the appointed day, wind and weather serving. 4. That in taking the goods on board, in stowing them, and during the voyage, the master and crew shall take due care of the goods, according to the diligence prestable in the contract of location.² 5. That the ship shall be navigated according to the rules of good seamanship, and by the most direct, or at least the usual, course for the destined port. And, 6. That on arrival at the port of destination, the master shall deliver the goods, according to the bill of lading or address, in the same good condition as when put on board.

II. The obligations of the MERCHANT or FREIGHTER are: 1. That he shall furnish a sufficient cargo.³ 2. That the goods shall be sent within a reasonable time, otherwise the master may depart. 3. That, provided the voyage is completed, and the goods delivered, the stipulated freight shall be paid either at delivery of the goods, or at a stipulated time; or that a bill shall be accepted for the amount. Many nice and difficult questions may arise, depending on the construction of the contract, whether in various circumstances freight may be demanded *pro ratâ itineris*. 4. That if the ship be detained beyond a certain period, the owners shall be entitled to an indemnification for loss of time.

III. There may be many modifications of these terms, engagements, and risks; and many particular stipulations may be introduced, fixing new points of agreement between the parties, and giving rise to special claims. For example, although the parties may have arranged generally the destination, it may often be requisite (particularly in time of war) to reserve a power of directing the course and termination of the voyage, according to circumstances. The merchant may accordingly reserve this power generally, or within certain limits; and under such reservation, the supercargo is held to have the power in absence of the merchant.⁴ How far this power may be exercised by the bill of lading, shall be considered below.⁵ But a mere parole substitution of one port for another stipulated in the charter-party will not be sufficient.⁶

Sometimes, again, instead of leaving the time of loading or unloading to legal construction, a certain number of days is specified; and instead of leaving the indemnification for undue delay as a vague claim of damages, a certain sum, under the name of demurrage, is stipulated. But all these, together with the more minute discussion of the questions

¹ [On the shipowner's obligation as to seaworthiness, see MacLachlan, Shipping, pp. 350–3; Parsons' Mar. Law, vol. i. p. 239, note 3.]

² See above, p. 483.

³ [See Jones v Holm, 2 L. R. Ex. 335, as to the case of a fire occurring when the ship is partially loaded.]

⁴ Davidson v Gwynne, 12 East 396.

⁵ See below, p. 590.

⁶ Thomson v Brown, 1 Moore 358. [It would seem that the efficacy of an agent's agreement as to deviation, and the charterer's liability for extra freight, depend on proof of the agent's authority. (Simey v Peter, 1865, 3 Macph. 883.) Under a charter-party for a return voyage, an unimportant deviation in the outward voyage, causing a delay of a few days, will not entitle the freighter to rescind the contract. Macandrew v Chapple, 1 L. R. C. P. 643.]

arising out of the correlative obligations now enumerated, will be considered under the claims on the bankruptcy of the several parties.¹

II.—OF SHIPS ON GENERAL FREIGHT.

The contract for the conveyance of merchandise in a general ship is made between [541] the shipowners, or the master acting for them, and the several owners of the goods to be carried. It is the pure contract *locatio operis mercium vehendarum*. It is left to legal construction, being seldom reduced into a written contract further than as it may be said to consist, *first*, Of the advertisement of the ship for freight; and, *secondly*, Of the bill of lading.

1. The ADVERTISEMENT proceeds expressly or tacitly from the owners or shipshusband.² The master in a foreign port has their full authority, while in a home port their assent is presumed to a public advertisement. The advertisement, therefore, is a part of the contract. Where it is conceived in general terms, the law supplies all the parts of the contract which the bill of lading does not express. Where the advertisement contains any special conditions, they are held as undertakings warranted on the part of the owners.³ Some doubt was entertained on the import of an advertisement bearing the expression 'to sail with convoy;' whether it amounted to a warranty, or expressed only an intention which, if accidentally frustrated, gave no relief. But it has been held in England, under three judges eminent for their knowledge in mercantile jurisprudence, that such an advertisement does infer a warranty.⁴

The owners of a general ship, advertised as bound for a particular port, must give to every person who may ship goods on board specific notice of any alteration in the destination; and they will be liable for all the consequences of neglecting this.⁵

2. The BILL OF LADING expresses more directly, and in the way of contract, the principal points of the owner's and master's contract. But it is chiefly confined to the description of the goods acknowledged to be received, the port of delivery, and the risks to be run, with the rate of freight to be paid by the shipper.

In a general ship a merchant may by contract engage freight to a certain extent, and the agreement may be effectually established by parole evidence. It may, however, be observed: 1. That as the master has full power to contract for and take in goods where the ship is on general freight, no agreement with the owners engaging freight will be effectual to secure to a merchant room in the vessel; unless it is intimated to the master, or to those acting for him on board, before he has taken goods on board, or engaged freight for the whole of the vessel.⁶ And, 2. That although a merchant is entitled, on the advertisement of

¹ See below, p. 593 et seq.

² *Rinquest v Ditchel*, 3 Esp. 64; Abbot, 11th ed. 278. Lord Kenyon held owners bound to sail with convoy, though there was no proof of the owner having authorized the advertisement.

³ Lord Chief Justice Abbot lays down this law, *ubi supra*. There is also reference in the note to a case, *Snell v Maryatt*, which is stated more correctly in the addenda, p. 644, where a question arose on the expression 'to sail with convoy' in the advertisement, whether this was controlled or altered by a subsequent bill of lading not bearing those terms? The doubt seemed to be, not so much whether the advertisement could be received as part of the contract, but whether the expression amounted to a warranty which, in the peculiar circumstances of the case, would ground an action.

⁴ *Rinquest v Ditchel*, *supra*, before Lord Kenyon. In *Snell v Maryatt*, 1808, in granting a new trial, the attention of counsel was directed to the import of such an expression,

but it was never tried. In *Saunderson v Busher*, 4 Camp. 54, note, Lord Chief Justice Gibbs held such an expression to import an undertaking to sail with convoy; and Lord Ellenborough concurred in this dictum. *Magalhaem v Busher*, 4 Camp. 54.

⁵ *Peel v Price*, 4 Camp. 243. Here a ship, first advertised for Messina and Naples, was afterwards altered to Naples and Messina. Peel came with his goods for Messina after this alteration, and he insured to Messina. He was afterwards obliged to effect other policies at a higher premium, with leave to sail to Naples, and brought his action for the difference. The owners were held liable for not having given specific notice of the alteration.

⁶ [This is evidently contrary to legal principle, and it is, so far as we have been able to ascertain by inquiry, also contrary to mercantile practice. A merchant who engages freight-room from the owners never thinks it necessary to intimate to the master.]

the ship for general freight, to insist that goods which he brings alongside, and which are [542] not unfit to be taken, shall be received by the master, provided the ship is not filled up; yet if the master has engaged, or if the owners have made a contract, which has been intimated to the master, for the unoccupied room in the vessel, the merchant who comes on chance must yield the preference.¹

III.—BILLS OF LADING.

A BILL OF LADING is the written evidence of the undertaking to carry by sea, and deliver the goods therein described, for a certain freight.

Bills of lading are made use of both in combination with a charter-party, and for an engagement of freight in a general ship. But the bill of lading is commonly the sole evidence of the contract in the latter case, while in the former it is only collateral, its chief use being to fix the goods on the master, in fulfilment of that part of the charter-party. The form and effect of bills of lading have already been referred to in considering the question of delivery.² It is here necessary to consider the subject more at large.

Bills of lading are generally preceded by a simple receipt, acknowledging on the part of the master, or of the mate, or other person on board acting for him, that the goods have been received. This fixes the goods on the ship, and both master and owners would be liable to all the usual obligations or *naturalia* of the contract on this document alone. But the bill of lading is more ample, and serves important uses in the transference of the goods. The master must be careful not to give a bill of lading until the receipt is returned to him or cancelled; for he may thus place himself under a double responsibility—to the shipper on the receipt, and to a holder of the bill of lading purchasing on the faith of it.³ Care also must be taken not to deliver a bill of lading, even without a receipt, to any one but the shipper, without his orders, for he may in the same way incur a double responsibility.⁴

A bill of lading is called by French authors *Connoissement*; by Italian, *Polizza di Carico*; and by the Latin authorities of the Continent, *Apocha Oneratoria*. The form used in Britain is uniform, and generally printed with spaces left for introducing the names and descriptions of the ship, captain, goods, and voyage.⁵ Special stipulations may, however, be introduced.

[543] Bills of lading of goods to be exported are invalid, if not on a stamp.⁶ The right to the goods may, indeed, be otherwise established; but wherever the bill of lading is requisite to support the right of the claimant, the want of a stamp will be fatal.⁷

¹ *Thomson v Clark*, 15 June 1809. Thomson, trusting to the advertisement of a general ship, together with the assurance of the master that he would take goods if in time, brought alongside a quantity of goods, which were refused by the master, on the ground of his room being occupied by goods expected, and for which freight was engaged. Thomson, thinking he had a right to insist that his goods should be taken, took the violent proceeding of arresting the ship and the master, with goods worth £70,000. The water-bailie of Clyde, under the direction of Mr. Reddie, the learned assessor of that court, held that Thomson was not entitled to have his goods taken on board, as he had not established any special contract to that effect. And the Court of Session affirmed the judgment.

² See above, p. 212 et seq.

³ *Craven v Ryder*, 6 Taunt. 433, and 2 Marsh. 127; *Hawes v Watson*, 2 Barn. and Cresswell 540. [Abbot, 11th ed. 279. See *Schuster v McKellar*, 7 El. and Bl. 704, 26 L. J. Q. B. 281.]

⁴ *Ruck v Hatfield*, 5 Barn. and Ald. 632.

⁵ Shipped, by the grace of God, in good order and well conditioned, by A B, in and upon the good ship called _____, whereof C D is master, and now at _____, bound for _____, the goods following, viz. (*here describe the goods*), marked and numbered as per margin, to be delivered in the like good order and condition at the port of _____ (the acts of God and the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever, excepted), unto _____, he or they paying freight for the said goods at the rate of _____ per _____, with primage and average accustomed. In witness whereof, I, the said master of the said ship, have affirmed to three bills of lading, of this tenor and date; any one of which bills being accomplished, the other two are to be void.

Dated at _____ this _____ day of _____ 1827.

C. D.

⁶ See below, p. 594.

⁷ *Davis v Reynolds*, 1 Starkie 115. In this case 19 mats

The parts of this instrument to which it is important to attend are these:—

1. After the name of the ship and master, the VOYAGE is described. Where the charter-party leaves the direction of the voyage to the merchant, the signing of bills of lading to a particular port precludes a subsequent change by the merchant; unless he shall give up those bills of lading, or indemnify the master and owners against claims by the holders of the bills.¹ On the other hand, in such a case the taking of bills of lading specifying a certain port will not irreversibly fix the destination or conclude the election, provided indemnity be offered. The master cannot in this case be heard to say that he has insured to the port mentioned in the bill of lading; for under such a charter-party he ought to have insured to port or ports within the limits. Where a port mentioned in the enumeration of ports in the charter-party is omitted in the bill of lading, it fully relieves the master from going to that port; but where the foreign correspondent has desired him to go thither, his going has been held justifiable as in a question with the freighter.²

2. The Goods are described by their external characters and marks, varied according to the nature and condition of the commodity and the degree of knowledge which the master has of it, and for which he agrees to be accountable.

3. The obligation to DELIVER may be either general, and left in blank, or filled up to a particular person as consignee, or to the consignor and his assignees. It may also be limited to a special purpose, but this latter form is seldom practised.³

4. The exception of RISKS for which the owners and master are not to be responsible⁴ has been of late years enlarged from the simple exception 'of the dangers of the seas,' to an exception 'of the act of God, the king's enemies, fire, and all and every danger and accident of the seas, rivers, and navigation, of what nature and kind soever, excepted;' but from this, in particular cases, where cargoes are brought in boats from the shore, is saved, 'the risk of boats, so far as ships are liable thereto.'⁵

5. The master may insist on the condition of the PAYMENT OF FREIGHT being performed before he delivers the goods, or he may, at his discretion, dispense with that condition.⁶

There are commonly three bills of lading made out (but that is regulated by the occasion): one for the buyer or consignee to go by post; another to go with the cargo; and a third for the seller or consignor,—each bill containing a clause that, one being performed, the rest shall be void. Each is a contract in itself as to the holder of it, but the whole make only one contract as to the master and owners.

Under this instrument several questions may arise.

1. *Condition of the Goods.*—The shipmaster is as a trustee, having possession of [544] and a special property in the goods, for the purpose of carriage and delivery to the person who shall have right to demand performance of his engagement. The bill of lading is his acknowledgment for the goods, as received in good order and well-conditioned, accompanied

of flax were sent from the north of England to London, and landed on Reynolds' wharf there. The buyer of the flax from the consignee tendered a bill of lading in support of his demand of the goods. It was rejected for want of a stamp. Then the plea was that there was no evidence of a transfer. Lord Ellenborough said: The right of possession follows the right of property. When the goods arrived at the wharf they were delivered to the wharfinger, as bailee, for the benefit of the person entitled. At that time the consignees were entitled, for they had paid for the goods, and had thereby acquired a right of property which they were competent to assign.

¹ Davidson v Gwynne, 12 East 381.

² Shepherd v De Bernales, 13 East 565. Here ships were freighted to go to Tangiers, St. Lucar, or Cadiz; and in the bill of lading Cadiz was omitted. The consignee at Tangiers

ordered the master to deliver at Cadiz, and he did so. The freighter was held to have no defence against payment of freight on the ground of the master having gone to Cadiz.

³ See below, p. 595 (5).

⁴ [As to exceptions relating to loss from leakage and the like, see *Moes, Moliere, & Tromp v Leith & Amsterdam Shipping Co.*, 1867, 5 Macph. 988. Such clauses do not exempt the owners from liability for negligence of the crew. *Phillips v Clark*, 2 C. B. N. S. 156; *Grill v General Iron Screw Collier Co.*, 1 L. R. C. P. 600, aff. 3 L. R. C. P. 476.]

⁵ See below, p. 608.

⁶ See afterwards, whether under a charter-party freight may be claimed where the master has delivered the goods in a bill of lading containing this clause: without demanding the freight from the consignee. [*Paynter v James*, 2 L. R. C. P. 348.]

by his obligation to deliver them in equally good order, under condition of the payment of freight. In general, the master is not liable for anything but the external packages, and the fidelity of those on board in not invading the property within, unless the bill of lading shall contain a particular description of the goods and of their condition.¹ By the French marine ordinance² it was necessary to specify in the bill of lading the quality, quantity, and marks of the goods. But this means only the exterior and apparent quality; for it seldom can happen that the goods should be so exposed to the master's examination as to enable him to undertake for any specific condition of those goods. 'It is held,' says Valin, 'that the bill of lading affords evidence only of the genuine exterior and apparent quality of the goods; as, when it bears the goods to be indigo, hemp, sugar, linen, cotton, the master is responsible for goods of that sort, and for the same number of bales or casks, and with the same marks with those described in the bill of lading. But as to the specific internal or concealed quality—as whether the indigo is the true or bastard species, the linens of a particular quality, etc.—the bill of lading imports no obligation in this respect, unless proof be made of the bales, etc., having been exposed and examined.'

The master sometimes adds, for security against responsibility, 'the quality or contents unknown.' This ought to be added where there is any difficulty or uncertainty about them; and the claim will in such a case be limited to the delivery of the casks, bales, etc., as identified by their marks, in the same condition in which they were put on board.³ In England, a bill of lading, though very particularly expressed, is not, in a question on a policy of insurance, taken as evidence of the property alleged to have been lost; and at all events, the addition of the clause, 'contents unknown,' has been held to render the bill of lading useless as proof of the contents.⁴

Where the master examines and expresses in his bill of lading the special condition of the goods, this will be evidence against himself and the owners; and it would seem that it will be good evidence also against third parties, as against underwriters.⁵

2. *Competition of Holders of Bills.*—When the several parts of the bill of lading are found to have been endorsed to different persons, a competition may arise for the goods. Generally in such a case the shipmaster gives up the goods to him who offers the best

¹ [Shankland v Athya & Co., 1865, 3 Macph. 810. Held that a shipmaster, by signing bills of lading acknowledging receipt of goods in bags, became bound to deliver the same bags *in forma specifica*; and being unable to show that the bags were injured without his fault, he was liable for the deficiency in weight.]

² Ord. de la Marine De Connoissemens, liv. 3, tit. 2, art. 2; 1 Valin 599; Pothier, Charte-Partie, No. 17, vol. ii. p. 375.

³ See Casaregis, Disc. 10, No. 56, where the obligation so restricted is held as a provision against any further liability, 'nisi ad traditionem doliorum seu sarcinarum integrarum, non autem ad mercium qualitatem et scrupulosam ponderationem.'

See also Targa, Ponderazioni, Della Polizza di Carico, c. 30 and 31, p. 68.

⁴ Haddow v Parry, in 1810, 3 Taunt. 303. In an action on a policy of insurance, 'on specie or bullion, by any one of His Majesty's ships, at and from Jamaica to England,' a bill of lading was offered in evidence, signed by Lieutenant Lawrence of the Rook. It was a bill of lading for 12,000 dollars, 12th August 1808; and under were inserted the marks of the chests, and of their numbers and contents, being described as containing 2000 dollars each. The Rook was taken by a superior force after a gallant resistance, in which Lieutenant Lawrence and four-fifths of his crew were killed. At the trial, before Sir James Mansfield, the bill of lading alone being tendered in evidence of the contents of the chests, he

directed a nonsuit for insufficient evidence. On a motion for a new trial, Sir Allan Chambre observed that the bill was signed with the words, 'Contents unknown;' and the Court declared that these words rendered the bill of lading no declaration of what the chests of dollars contained. And so the rule was discharged.

[A master, by signing bills of lading for goods in bulk described by weight, does not bind the owner for a greater quantity of goods than he actually receives. *Grant v Norway*, 10 C. B. 665; *Hubbersty v Ward*, 8 Ex. 330, 22 L. J. Ex. 113. The rule has since been applied to cases where the bill of lading is signed by the shipper's agent, in place of the master, according to a usage which has sprung up in the Mediterranean steam packet trade. *Jessel v Bath*, 2 L. R. Ex. 267; *Maclean & Hope v Munck*, 1867, 5 Macph. 893.]

⁵ [By 18 and 19 Vict. c. 111, sec. 3, it is enacted that bills of lading in the hands of an onerous holder shall be conclusive evidence of shipment against the master or other person signing the same, although the goods may not have been shipped, unless the holder, at the time of receiving the bill, had actual notice of goods not being on board. But the master may exonerate himself by showing that he was not to blame, or that the misrepresentation was caused wholly by the fraud of the shipper, or of the holder, or of some person under whom the holder claims.]

indemnity against future challenge. A still safer course is to lodge the goods in a warehouse, and to call the competitors to a judicial determination of their contest in a multiple-poining, in which the master may obtain a warrant for payment of his freight, or [545] for the sale of as much of the cargo as will satisfy it.

In exercise of the master's discretion, or in deciding the matter judicially, the rule of law is, that the property passes by the bill first endorsed.

In England this rule appears to be adopted, on the principle that where equity is equal between the parties, the legal right must have effect.¹

But it may be observed, that if any one claims on the part of the consignor of the goods, to the effect of stopping *in transitu*, the master is bound to prefer him, provided the first endorsed bill has not got into the hands of a third party without notice.

The cargo may also be demanded by the vendee, or consignee, or by one having right from him, where it has arrived before the bill of lading; and delivery on such demand will be good against all the world, except subsequent endorsees of the bill of lading for a valuable consideration.²

3. *Bills signed to different Persons.*—Where the master has signed different bills of lading, there seems to be room for a distinction:—

First, Where the shipper or consignor has shipped the goods without orders, he has authority to cancel a first bill of lading, and take another to a different person;³ and in such a case, there can be no doubt of the right under the second bill of lading to demand delivery of the goods. But he who first acquires an onerous title will carry the property.⁴

Secondly, Where goods are sent in execution of an order, or in the way of sale, the seller, after he has put the goods on board under a bill of lading to the buyer, cannot make the master alter that bill. He has no right to vary the consignment, except on the insolvency of the buyer or consignee; and the master will still be answerable under the first bill, and will be held to have altered the bill of lading at his own risk, unless he take an indemnity.⁵

¹ Abbot, 11th ed. 434. Reference is there made to *Caldwell v Ball*, 1 Term. Rep. 205. See below, note 4.

² *Nathan v Giles*, 1814, 5 Taunt. 558, 1 Marsh. 226. Here Levin, by his attorney Josephs, applied to Nathan for an advance of £1000, and Josephs pledged to Nathan in security a cargo of wheat, which had arrived before the bill of lading, undertaking to deliver the bill of lading. The captain refused to deliver, but on indemnity delivered to brokers on account of Nathan, they being to retain the proceeds till relieved of their indemnity to the master. The cargo was sold, and the price attached by a creditor of Levin. Afterwards the bill of lading arrived, and was delivered to Nathan. And it was held that Nathan had a complete title, subject to the risk of Levin's dishonestly endorsing the bill of lading for a valuable consideration, which not having been done, Nathan's right prevailed over the attachment.

³ Where goods are shipped without orders, says Lord Stowell, such a right exists. The seller, if he may be so described, retains an absolute power over the goods, for there is no purchase. But where orders have been received and executed, and delivery has been made to the master of the ship, and bills of lading signed, the seller is *functus officio*, except in the particular case where he is again reinstated by the privileges of the *vendeur primitif*. The *Constantia*, 6 Rob. Rep. 327. [Abbot, 11th ed. 300.]

⁴ *Caldwell v Ball*, 1 Term. Rep. 205. Here Ball, the master, signed a bill of lading to deliver to Messrs. Thomson & Fairbrother, or their assigns. This was endorsed by Thomson

in the West Indies, and sent to Fairbrother with a letter, saying that he 'had been obliged to assign the other bills of lading to Cappel & Co. for security of bills drawn in their favour,' and that bill was endorsed to Caldwell, who thereupon advanced money for Thomson's use. The other bills of lading were subsequent. The master signed them for different parts of the cargo (making up the whole), to deliver to the order of the shipper or his assigns. These Thomson endorsed to Thomson & Fairbrother, provided they should engage to pay the net proceeds to Frome & Co., otherwise to the order of James Frome, nephew, on account of Cappel & Goldwin. These last bills were delivered to Cappel & Goldwin, as mentioned in the letter to Fairbrother, and were afterwards received by Frome & Co.; so these were first acquired by a third party, though the other bill was first granted on the day the first bill was endorsed to Thomson & Fairweather. On the master's arrival, Caldwell demanded the goods under the first bill of lading, offering freight, etc. Frome claimed the goods unless the net proceeds were paid to him. The jury gave verdict for Ball, i.e. they held him justified in delivering to Frome & Co.; and the Court refused a new trial, on the ground that the equities being equal, the first title was with Frome & Co.

⁵ Emerigon gives three cases illustrative of this doctrine in the French jurisprudence. The first is of six bales of silk consigned to the bearer of the bills of lading, and those bills sent to one person, while a different bill of lading was afterwards transmitted to another house, and where the inferior court of

[546] *Thirdly*, The effect of the endorsement of a bill of lading is to vest the endorsee, where he is a holder for value and *bona fide*, with authority to receive the goods beyond recall or countermand.¹ But where no value is given for the endorsement, it does not pass the property.² And so there may be stoppage *in transitu* on bankruptcy; or if it be made a condition that the buyer shall accept bills in course, although the bill of lading has been sent to him the goods may be re-landed, the condition not being performed.³

4. Bills of lading are negotiable by the custom of merchants.⁴ If the bill of lading be originally blank, or if it be endorsed blank or to the bearer, the shipper or other holder [547] may fill up the name of a person to whom the goods shall be delivered. Or the bill still remaining blank, the holder, provided he has not come by the bill accidentally or fraudulently, has the legal right. The master is bound to deliver to the holder, and he will

Marseilles divided the goods between them, but the court of appeal preferred the holder of the first bills of lading. The second is of a quantity of sugar under bills of lading to Rey, but which the shipper having first tried to get altered, attempted to defeat by endorsing his own bill of lading to another: Rey was preferred. And the third related to bales of wool in somewhat similar circumstances. 1 Emerigon 317.

In Admiralty, under Lord Stowell, a case was decided on the same principles. A hundred hogsheads of brandy were shipped on order and for account and risk of Kye. Afterwards the shipper and the master went before a magistrate; and on the back of the retained bill of lading it was recited that the master had received the goods for Kye, but that the interest of the shipper requires that they should not be so delivered, and the master is prohibited from delivering them to Kye, but is ordered to deliver them to Ryberg. Lord Stowell said of the alteration of the bill of lading: 'I am clearly of opinion that if Mr. Kye had been an insolvent person, it would have amounted to a complete and effective revindication of the goods. But if the person to whom they are consigned is not insolvent, if from misinformation or former excess of caution the vendor has exercised this privilege prematurely, he has assumed a right that did not belong to him; and the consignee will be entitled to the delivery of the goods, with an indemnification for the expenses that may have been incurred. In the law of England, as far as I can collect it, and in all the books into which I have looked, it is not an unlimited power that is vested in the consignor to vary the consignment at his pleasure in all cases whatever. It is a privilege allowed to the seller for the particular purpose of protecting him against the insolvency of the consignee.' After quoting the cases from Emerigon already taken notice of (*supra*, note), he adds: 'These cases I consider to be a clear exposition of the law, that persons having accepted orders and made the consignment have not a right to vary that consignment except in the sole case of insolvency. The alteration may be made provisionally without actual insolvency; but if the insolvency does not take place, the act which was done is a mere nullity, and the seller has exercised a power to which the law does not ascribe any legal effect.' The goods were afterwards adjudged to Mr. Kye on a proof of the facts. The *Constantia*, Henrickson, 6 Rob. Adm. Rep. 321-330.

¹ See *supra*, p. 230 et seq., and the cases of *Lickbarrow v Mason*, etc.

Haille v Smith, 1 Bos. and Pull. 564. Here bills of lading

were endorsed in security of money to be advanced by a banker. The advance was made by the person endorsing the bills of lading drawing bills on the banker, and the banker was held entitled to recover in trover for the goods.

Cumming v Brown, 1 Camp. Rep. 104. In this case there was a sale to Main, the consignee endorsing to him the bills of lading, which he endorsed over to Cumming, his creditor, for a previous debt, and also for money advanced, both amounting to the value of the goods. Cumming was held to have right to the goods against the consignor.

Virtue v Jewell, 1814, 4 Camp. 31. Here the fact of notice of the insolvency of the consignee would have entitled the consignor to stop notwithstanding the endorsement, had it not been for the value which at the time of consignment the consignor had received from the consignee. [Abbot, 11th ed. 420.]

² See the case of *Coxe v Harden*, 4 East 211, Abbot 428.

The opinions delivered to the above effect in that case ruled the determination in *Waring v Coxe*, 1 Camp. Rep. 369, where goods having been sold by Everard to Baggot & Co., one bill of lading was forwarded, by means of which Baggot & Co. got possession of the goods on their arrival; but after notice that the goods were to be delivered, not to Baggot & Co., but to Waring, Everard sent another bill of lading to Waring, in consequence of which he (being in fact agent for Everard to stop the goods *in transitu*, on account of Baggot & Co.'s insolvency) demanded the goods from the people on board. Lord Ellenborough held: 1. That Waring, as endorsee without value, had no right to the property; and, 2. That the right to stop *in transitu* is personal, and cannot thus be transferred.

[The right of the endorsee will accordingly be protected if he have given value to his immediate endorser, without notice of fraud or insolvency on the part of the latter. The *Argentina*, 1 L. R. Adm. and Ecc. 370.]

³ *Brodie v Tod & Co.*, 20 May 1814, 17 Fac. Coll. 609. Tod & Co. of Hull sold 15 bags of clover-seed to Arnot of Leith, and sent to him the bill of lading and invoice, desiring him to return the draft for the price in course. This he failed to do, and they re-landed the goods. In an action of damages for breach of contract, the Court of Session held this countermand to be good.

⁴ [The right of action on bills of lading is, by 18 and 19 Vict. c. 111, sec. 1, given to 'every endorsee to whom the property of the goods therein mentioned shall pass.' And in a question of title, the possession of the bill is *prima facie* evidence of property in the goods. 3 L. R. C. P. 190.]

exclude other assignees or creditors. It is settled that there is no distinction to be taken between a bill of lading endorsed in blank and an endorsement to a particular person.¹

5. Where the bill of lading is endorsed under a special condition, the right to the contents is charged with the condition.²

6. The ordinary condition, 'he or they paying freight,' makes the payment of freight a burden on the consignee's right; and if the consignee refuse to pay, the master has a lien; as to which, see below (Of Liens).³ But although the goods have been delivered without insisting for freight at the time, the master has a personal action against the consignee; and if he cannot recover from him, against the shippers; the clause being introduced for benefit of the master only. It is the custom to apply for payment of freight a certain time after the goods are delivered, it being understood that the delay is not a discharge of the consignee, but an indulgence; and the taking of delivery is as a new personal contract to pay freight.⁴

The person to whom the receipt for goods put on board is given, and who holds it, has the proper right to the bill of lading; and the master is not entitled to give the bill of lading, except to the person who can give the receipt in exchange. See above, p. 482.

Bills of lading for goods to be exported were, by 48 Geo. III. c. 149, subject to a stamp-duty; and it was held that goods carried from one part of Great Britain to another were not exported in the sense of the Act.⁵ But by the last Stamp Act, a stamp also is necessary for goods carried coastwise.⁶

SUBSECTION II.—CLAIMS ON CONTRACTS OF AFFREIGHTMENT UNDER CHARTER-PARTIES AND BILLS OF LADING.

As the obligations are reciprocal, claims may arise out of the contract of affreightment (whether under a special charter-party or in a general ship) against the estate of the owners or master, or against the estate of the merchant.

I. CLAIMS ON THE BANKRUPTCY OF THE SHIPOWNERS.

Setting apart those questions which depend on rights of preference or security, of which hereafter, and looking only to the effects of the personal contract, it may be convenient to follow as nearly as possible the course of the voyage.

¹ See the verdict in *Lickbarrow's case*, *supra*, p. 235.

[Where a bill of lading is blank in the name of the consignee, it is presumed that the consignor, especially if he be an unpaid vendor, intends to reserve to himself the property in the goods, and that the property shall pass by endorsement of the bill. And therefore, until the bill of lading has been endorsed and accepted by the endorsee, the consignor is entitled to vary the destination of the goods at his pleasure. (Sm. Merc. Law, 7th ed. p. 304, citing *Wait v Baker*, 2 Exch. 1; *Ellershaw v Magniac*, 6 Exch. 570, note; *Scothorn v South Staffordshire Railway Co.*, 8 Exch. 341.) And even if the bill of lading is completed, the power of transferring the property in the goods remains to the shipper as long as the goods are in the hands of any agent of his. *Mitchell v Ede*, 11 Ad. and E. 888; *Ellershaw v Magniac*, *supra*.]

² *Barrow v Coles*, 3 Camp. 92. Here a bill of lading was endorsed deliverable to Vos, if he should accept and pay a draft annexed; if not, to the holder of the draft. Vos endorsed the bill of lading to Coles, but did not pay the draft. Lord Ellenborough at Nisi Prius held that the special endorsement on the bill of lading was sufficient to prevent Coles from

acquiring the bill of lading from Vos for an onerous consideration, without satisfying himself that the condition was complied with. Verdict for the holder of the draft. [Abbot, 11th ed. 437.]

³ *Walley v Montgomery*, in 1803, 3 East 590. [But to discharge the owner's claim against the original consignee, he must have accepted the endorsement containing the condition. Where a bill of lading was endorsed to wharfingers in these words, 'Deliver to W. and K., or order, looking to them for all freight, dead freight, and demurrage, without recourse to us,' and the owners accepted the endorsement, they were held not entitled to sue the consignee for freight.' In this case it was admitted that the bill was not endorsed with the intention of passing the property in the goods. *Lewis v M'Kee*, 2 L. R. Ex. 37.]

⁴ See below, p. 614, where this question is fully discussed.

⁵ 48 Geo. III. c. 149, Sched. Part. I. Bill of lading for any goods, merchandise, or effects to be exported, 3s. *Scotland v Wilson*, 1814, 1 Marsh. Rep. 204.

⁶ 55 Geo. III. c. 78, Sched. Part. I. [Now regulated by 5 and 6 Vict. c. 79, sec. 21. Duty 6d., payable under a penalty of £50.]

1. *In relation to the Loading.*

As to the goods taken on board, the usual stipulation in the charter-party is, 'with all [548] convenient speed to receive on board, load, and stow, in a regular and proper manner, all such goods and merchandise as shall or may be sent by the said freighters alongside the said ship or vessel, not exceeding what the said ship can conveniently or safely carry over sea, besides her provisions, tackle, apparel, and appurtenances, the master's cabin and the usual and necessary room for the ship's crew excepted.' This, however, is only a special setting forth of what is implied in the contract of affreightment, and what, in its due proportion and relation, is implied in the engagement of freight in a general ship.

1. The owners and the master are chargeable with those goods (or the value of them, or damages for the loss of them), which are fixed on them by the ship receipt or bill of lading. The bill of lading, as already said, contains evidence of the existence, quantity, and external and apparent quality of the goods, considered in relation to the duties of the master;¹ the master and owners being responsible for the preservation and delivery of the articles received, the casks, bales, etc., as identified by their marks, in the same condition in which they were put on board.

2. The goods must be taken on board with due care and skill: Tackling must be supplied sufficient to guard against injury: The ship itself must be capable of receiving the sort of cargo for which she is engaged; must not be endangered by taking on board contraband goods; and must not be overloaded, but room left for her own furniture, and the provisions of the crew, and the proper working of the vessel.² A failure in any of these points may ground a claim against the estate of the owners and master. Thus, if a cask be accidentally staved in letting it down into the hold of the ship, a claim will lie for the loss;³ or if a ship is freighted to go to America for timber, and, owing to the small size of her port-holes, she cannot take in the large timber of that country, a claim of damage will arise to the merchant, on the warranty that there shall be no obstruction to the loading.⁴

3. The custom of the port regulates the responsibility in taking goods on board, where the ship is at a distance from the warehouse. In receiving goods on the quay, or in sending his own boats for them, the master is responsible for them from the moment of delivery.⁵ If in the timber trade it is the custom to float down the timber in rafts by the merchant's servants, the responsibility of the ship will begin only with delivery into the ship; if the master send his crew to float down the timber, the risk will be reversed.

4. The goods must be properly stowed, otherwise a claim may arise against the estate of the owners, as represented by the master. By most of the marine ordinances this is specially provided for,⁶ and rests securely on the general principle of the contract. By special statute in Scotland, 1467, c. 4, provision is made against improper stowage, 'under pain of tinsel of the freight, and amending of the skaith of the merchands.' And it is in particular provided, that no goods shall be carried upon deck; that such goods shall pay [549] no freight; and that if they be ('casten') thrown overboard, the other goods shall not make contribution with them.⁷

¹ See above, p. 592.

² Si quelque tonneau se perdoit par le defect de guindage ou cordage, le maitre est tenu le payer au marchand. Cleirac, Jugem. d'Oleron, art. 10, p. 50; *Ib.* Ord. de Wisbuy, art. 22, p. 170; Balfour's Sea Laws, c. 126, p. 620.

³ Abbot, 11th ed. 307, citing *Goff v Clinkard*, 1 Wilson 282.

⁴ Pothier, *Charte-Partie*, No. 27, vol. ii. p. 278.

⁵ Roccus says: 'Nauta qui recepit a Titio merces in littore maris, si ibi merces perierint periculo ipsius nautæ pereunt tanquam si essent in navi receptæ.' P. 88, Dig. lib. 4, tit. 9, l. 3, in pr. *Nautæ*, Caup., etc.

In *Corban v Down*, 5 Espinasse 41, delivery to the mate was held sufficient to charge the owners according to the custom of London.

⁶ Jugemens d'Oleron, art. 11; Cleirac, p. 54, and his Commentary; Ordon. de Wisbuy, art. 23; Cleirac, p. 170. See 1 Valin 376; Roccus de Navibus, Not. 30, p. 29. Si plus Justo onere navem onerent sunt in culpa et tenentur de damno, etc. Ord. of Antwerp, 1563, art. 8; 2 Magens on Insurance, p. 16; Ord. of Rotterdam, art. 125, 126, 127; 2 Magens, pp. 101, 102.

⁷ Acta Parl. vol. ii. p. 87. In the collection ascribed to

In reference to what has already been said as to the hiring of an entire ship, the burden is generally expressed in such cases; and from non-compliance with the description, or where the freight is rateable, and the burden is found different from that stated, claims of damage may arise. It would seem, 1. That where the burden is mentioned only in description, and loosely and vaguely, it will not conclude the parties: neither, on the one hand, to restrain the freighter, at a gross sum for the voyage, from loading a full cargo according to the actual capacity of the vessel; nor, on the other, to bind the master to receive as a full cargo what has been so loosely stated.¹ 2. That it will be effectual to confirm the contract, if the parties be careful by proper words to limit it.² The only legal criterion of the tonnage on which, independently of special bargain, is the description in the ship's certificate of registry.³

2. *In relation to the Condition of the Ship.*

If in the condition of the SHIP there be essential defects, the merchant will have his claim for any loss thence arising. The ship must be seaworthy, by which is meant, that in all respects it shall be able for the voyage; that there must be a skilful master and able seamen; that the ship itself must be fit, in hull and in tackle, to encounter the perils of the sea; that it must be furnished with the proper papers; and that in rivers, ports, and narrow seas, the aid of a pilot must be taken. What, as a warranty, is implied in every policy of insurance, is either expressed in the contract of affreightment, or by the law implied as a part of the contract, viz. 'That the ship shall be tight, staunch, and strong, properly manned, and provided with all necessary stores, and in all respects fit for the intended voyage.'⁴ If any vice in these respects shall have either the effect of defeating the voyage, or of injuriously delaying it, or of injuring the cargo, the freighters will have their defence against the claim for freight, or action for damages.

It is of some importance to mark the distinction between a *warranty* and a *covenant*. In a policy of insurance, seaworthiness is properly a warranty; in affreightment it is a part of the contract of the shipowners. Want of seaworthiness in the former case voids the contract; in the latter, it gives relief from the hire, or grounds a claim of damage. The distinction rests on the difference between a hypothetical engagement and a mutual contract. In the former, the engagement itself depends on a certain event taking place, and there is no latitude, no equity: the only question is, whether the event has happened? In the mutual contract a more liberal construction is admitted: the question is, whether [550] the reciprocal engagement has substantially been performed?⁵ Ignorance of the defect will not avail the owners; nor will the most regular and formal survey at setting out on the voyage have any other effect than to strengthen the evidence in their favour, should the vessel be wrecked in questionable circumstances. The controversy between Valin and Pothier⁶ on this point may be considered as settled in this country in favour of Valin's

Balfour, a law, of date 15th February 1507, is quoted to a similar effect. Sea Laws, c. 123; Balfour's Practics 620.

¹ *Hunter v Fry*, 1819, 2 Barn. and Ald. 421. By charter-party a ship was described as 'the ship Humber, of the burden of 261 tons or thereabouts,' and the freighter covenanted to load a full and complete cargo. The burden truly was 400 tons instead of 261. It was held that the loading of goods equal in number of tons to the tonnage described in the charter-party was not sufficient fulfilment of the covenant, but that the freighter was bound to put on board as much as the ship was capable of carrying with safety. And a verdict was given and approved of, for the difference between the sum actually paid for freight, and that which would have been payable if the skipper had loaded a full and complete cargo.

² [Abbot, 11th ed. 201.]

³ The statute 43 Geo. III. c. 56, limiting the number of passengers to be conveyed in ships on distant voyages, enacts this as the regulation of the tonnage, according to the rate of which passengers are permitted to be taken. [See 17 and 18 Vict. c. 104, sec. 20.]

⁴ *Lyon v Mells*, 5 East 428. So strong is this implied covenant, and so inseparable from the contract of affreightment, that the owners cannot get quit of it by notice, whatever limitation may be competent in this way of other responsibilities. [Abbot, 11th ed. 302.]

⁵ See Lord Mansfield's doctrine in *Hibbert v Pigou*, Marshall 369; Park, vol. ii. p. 499. See also Lord Eldon's distinction between representation and warranty, in the Scottish case of *M'Morren v Newcastle Fire Insurance Co.*, 3 Dow 255.

⁶ Even where there is a survey at the commencement of the

opinion. In England, it is held that the want of seaworthiness implies a personal neglect, or at least that it is a breach of the contract; and this derives aid from the great principle of policy which regulates the responsibility of carriers by sea and land.¹ In Scotland, the doctrine has long been settled as an absolute rule, whether the defects were known at sailing, or secret and unsuspected, 'that the hazard of leakage, and such ordinary hazards as occur, not by stress of weather or any such extrinsic accident, but only from the ship and her furniture, lie not upon the merchant, nor are relevant to free the skipper, who must have his ship sufficient, at his peril.'²

1. SHIP, RIGGING, AND TACKLE.—The ship, and rigging, and tackle, must be sufficient for the safety of the adventure, and performance of the voyage. Thus, a ship which has been lengthened, and the new part not built with knees, has been held unfit for a foreign [551] voyage.³ A French ship, originally built without knees, according to their system of naval architecture, would not probably on that account alone be held insufficient.⁴ So the want of ground tackling, sufficient for the ordinary perils of the sea, is a defect in seaworthiness.⁵

voyage, Valin holds the claim of the merchant for loss to be unaffected by it, provided it appear that the vessel was not seaworthy at her departure. 'Dès que par événement il seroit vérifié que par des vices cachés il n'étoit plus navigable; c'est à dire, s'il étoit constaté qu'il avoit des membres pourris lassés ou tellement gâtés qu'il fut réellement hors d'état de résister aux accidens ordinaires des coups de vent et des coups de mer inevitables en toute navigation.' 1 Valin 620.

Pothier combats this opinion, contending for the more equitable conclusion, that absolute ignorance of the secret defect may well deprive the owners of freight, but ought not to subject them for damages. Charte-Partie, No. 30, vol. i. p. 319.

¹ *Lyon v Mells*, 5 East 428. Lord Ellenborough, in delivering judgment, said: 'The declaration avers a breach' (of the terms of the contract implied by law), 'that the lighter was not tight and capable of carrying the yarn safely; and the facts stated support the breach so alleged, by showing that the vessel was leaky, and had nearly sunk in the dock before the yarn could be unloaded from the lighter into the sloop. This we consider as personal neglect of the owner, or more properly as a non-performance on his part of what he had undertaken to do, viz. to provide a fit vessel for the purpose.'

See Abbot, *ubi supra*.

² *Lawrie v Angus*, 1677, M. 10107. Here Lawrie had a box of silk-ware on board of Angus' ship, which in the course of the voyage was 'wet by the leakage or spouting of the pump.' He brought his action for damages, and succeeded. The pleas in defence were: 1. The ship and pump were sufficient at the embarking of the goods, and that a split or rift was broken in the pump upon the voyage, which no man could foresee. 2. That the box was securely stowed till Lawrie, who was himself on board during the voyage, insisted on changing it, and placing it near the pump. The merchant answered, that in this contract of freight the shipmaster undertook all hazards, except what occurs by stress of weather, or by accident of the sea, as breaking on a rock, or by piracy. A proof was ordered of these facts: '1. In what condition the pump was at loosing, and if it had a stillage of timber about the pump, and if it was the ordinary custom to cover such stillages with pitched canvas, and if this was so covered? 2. How it came in the voyage to spout, and if there were any stress of weather or accident at sea? 3. If the merchant

chose to set his ware by the pump, and if the hazard was signified to him?' On considering the proof, the Court 'found that the merchant chose not to set his goods by the pump; that the seamen could perceive no fault in the pump when they loosed, but that there broke up a rift or split in the voyage, and that the weather was fair all the time of the voyage, without any stress or accident.' The parties were then ordered 'to debate that point, whether the hazard of leakage, and such ordinary hazards as occur not by stress of weather, but only from the ship and her furniture, lie upon the merchant, or the skipper and his owners?' And 'having heard them at length thereupon,' the Court pronounced judgment in the terms quoted above.

Lamont v Boswell, 1680, M. 10110. The above rule was taken to decide this case, where, after repairing a ship at Dantzic, a leak sprung while the ship was in the roadstead, by which lint was injured. The skipper was found liable, 'seeing no extraordinary accident was proven either by stress of weather or otherwise.'

³ *Watt v Morris*, 10 May 1813, 1 Dow 32. This was a case of insurance. The ship had been lengthened from 80 to 113 tons burden; the new parts not being fastened with knees, which were usual and proper for such a ship. She sailed heavily, and was at last lost. In an action on the policy, the defence was on the breach of warrant of seaworthiness. The Court of Session held the insurers liable. The House of Lords reversed the judgment.

⁴ See *Parker and others v Potts*, in House of Lords, 15 Feb. 1815, 3 Dow 23.

⁵ *Wilkie v Geddes*, House of Lords, 27 Feb. 1815, 3 Dow 57. Here a ship at anchor in Leith roads drove under a strong breeze. She was riding with her best bower, and on dropping the small bower the cable broke. The master, with the view of entering into harbour, cut the cable, and made for Leith. The ship took the ground near the beacon, and in an action on the policy the defence was grounded on the warranty. The evidence showed the cables of the anchors to be rubbed and injured, and too light and short. The Court of Session did not consider the proof as sufficient, and pronounced judgment against the underwriters. Reversed in the House of Lords, on the ground that the law of the case was clear, and the evidence such as a jury would have held sufficient to show want of seaworthiness.

So, a ship which has not the rigging, sails, etc. necessary to enable her to escape from an enemy, or proceed with due expedition, is not seaworthy.¹

These illustrations are taken from cases of insurance; but they are equally applicable to the present inquiry, with a due regard to the distinction already stated between the contracts.

2. CAPTAIN AND CREW.—The captain and crew must be of sufficient skill and strength for the voyage.² Where, therefore, in a policy of insurance, liberty was given to touch at one port, and the captain from ignorance went into another instead of it, this ignorance was held to be a defect in the sufficiency of the equipment.³

3. PILOT.—The master of a ship, though understood to be competent to the common course of a voyage, cannot be supposed so familiar with the peculiar dangers and difficulties of narrow firths and rivers, and the entry into ports, as to be able to conduct those parts of the voyage in safety.⁴ To supply this skill, bodies of pilots or steersmen have been established in all maritime countries. After due trial or experience of their qualifications, pilots are licensed to offer themselves as guides in difficult navigation; and they are usually, as the counterpart of their privilege, bound to obey the call of a shipmaster to exercise their function. By the earlier marine laws, pilots ignorant of their duty were liable to penalties, the severity of which, while it shocks a modern reader, shows the importance then attached to the skill and fidelity of a pilot.⁵

In England pilots are established at several ports under the appointment of certain [552] incorporations, deriving their rights from ancient charters, or from particular statutes, which have been passed for regulating pilotage. Those statutes were consolidated in two Acts in 1812 and 1813,⁶ and again a new consolidating Act was passed in 1825.⁷ But those Acts extend to Scotland no further than as they may be evidence of maritime usage, and as illustrating some of the rules and principles of this branch of jurisprudence.

In Scotland the matter has hitherto been left to the rules of maritime law, and the usages and regulations of the several ports, firths, and rivers of the kingdom, relative to the appointment of pilots. The Trinity House of Leith seems to be the only institution in Scotland similar to those which are the object of the English Acts above referred to. It was instituted in the fourteenth century, and enjoys many privileges by royal charters (the last of which is dated 29th June 1797); and, in particular, authority to examine and appoint pilots for the Firth of Forth, and for the seas and firths, and along the coasts and islands of the

¹ *Wedderburn v Bell*, 1807, 1 Camp. 1. The ship in this case was lost in her voyage across the Atlantic, having parted with the convoy. Her main-top-gallant sail and studding sails, useful in light breezes, were rotten and unserviceable, though the sails used in stormy weather were in good condition. The crew was also insufficient. Under Lord Ellenborough's direction, the underwriters had a verdict in an action on the policy of insurance. [Abbot, 11th ed. 302.]

² See the above case of *Wedderburn*.

³ *Tait v Levi*, 1811, 14 East 481. This was an action on a policy of insurance, to port or ports in the Mediterranean, not higher up than Tarragona, which was then in possession of our Spanish allies. The captain, from ignorance, went into Barcelona, then in possession of the French (the enemy), instead of Tarragona. A verdict for the underwriters was directed by Lord Ellenborough, and the Court of King's Bench confirmed the nonsuit, on the ground that, there being special care taken to stipulate the means of avoiding a danger that required great discrimination, precise knowledge was requisite in the master. [Abbot 305.]

⁴ *Stypmannus Jus Maritim.* 322, No. 20.

⁵ *Il Cons. del Mare*, cap. 247; *Casareg. Spiegaz.* p. 165;

Cleirac, p. 90, No. 3; *Emerigon*, vol. i. pp. 402, 403. Balfour's translation of the law is a curious one. *Sea Lawes*, c. 17, p. 618: 'Gif ony ledis man undertakis the leiding and convey of a ship to ony steid, town, or place, and the ship perish throw his default, and the merchandize incurrs skaith thairthrow, he is bund and oblist to restore the damage, gif he has quhairwith, and gif he has not, may lose his heid thairfor; and gif the master, or ony of the mariners dois strike off his heid, they sall not be callit nor persewit ony mair thairfor; bot they sould first, and befor they do the samen, tak cognition gif he be responsal in guides or gear, and able to mak an amendes or not.'

⁶ 52 Geo. III. c. 39, and 53 Geo. III. c. 140. Those are not general Pilot Acts, though sometimes improperly called so. See *Attorney-General v Case*, 3 Price Rep. 321. The Act of the 48 Geo. III. c. 104 has a title in the statute book greatly broader than belongs to it: it is an *English Act* merely.

⁷ 6 Geo. IV. c. 125. These are all English Acts; and if any question were to be raised on them in Scotland, the English authorities alone can be safely resorted to.

Northern and German Oceans.¹ This corporation has appointed certain rules and orders for ensuring the good conduct and attendance of pilots; but the employment of those pilots can be enforced only by an authority greater than that of the corporation; and the beneficial exemptions from responsibility which, under the English statutes, shipmasters enjoy on duly placing their ship under the care of a pilot, are left to the disposal of the common law in Scotland, and the rules of discreet and prudent management.²

1. It is a part of the rule which obliges the owners, in respect to the seaworthiness of their ships, to have on board persons able and sufficient to navigate her, that they must have a pilot on board in all places which are said to be a pilot's fairway, where a pilot is by regulation or usage deemed necessary—whether at the commencement of the voyage, in its course, or at its close.³ And where a pilot cannot be had, they must take the aid of persons locally acquainted with the navigation.⁴ On this point questions may occur with underwriters or with freighters; and in both cases the employment of a pilot seems to be an implied part or condition of the contract.

2. In compliance with this condition, it will be sufficient if the master take such pilot as by the regular custom of the port, or the law of the place, is authorized to act in that capacity, provided he be at the time fit to act, and not by intoxication or otherwise manifestly incapable. If a pilot offer himself who is not licensed or qualified by the rules of the port, but whom the master has reason to believe to be a sufficient pilot, it has been doubted whether this be enough to save from responsibility. The question does not seem to have been determined;⁵ but at least it would be requisite for the master to make out an exceedingly strong case in justification of his choosing such a person.

¹ The town of Edinburgh has also a right to appoint pilots for the navigation of the port, harbour, and road of Leith.

² [By the Merchant Shipping Act, 17 and 18 Vict. c. 104, the existing pilotage authorities (including Trinity House, within certain limits) have the exclusive power of determining the qualification to be required from persons applying to be licensed as pilots, of granting licences to act accordingly, and fixing the districts within which they may act. They may also license the master or mate of any ship to act as pilot of that ship, or the other ships of the same owner, within limits to be specified in the certificate to be granted (secs. 333, 368).]

Every qualified pilot, on his appointment, shall receive a licence containing his name, usual place of abode, a description of his person, and a specification of the limits within which he is qualified to act. And the principal officer of customs at the place at or nearest to which he resides, must, upon his request, register his licence; and no pilot can act until his licence is registered; and if he act beyond the limits for which he is qualified, he is an unqualified pilot (sec. 349).

If, while acting as a qualified pilot, he is not provided with his licence, or refuse to produce it to the person by whom he is employed, or to whom he tenders his service; or refuses, or wilfully delays, when not prevented by reasonable cause, to take charge of a ship within his limits, upon a signal for a pilot, or upon being required to do so by the master, etc.; or refuses, on the request of the master, to conduct the ship into any port or place into which he is qualified to conduct her, except on reasonable ground of danger to the ship; or if he quit the ship without the consent of the master, before the service for which he was hired has been performed; or be intoxicated, or do certain other acts specified in the statute, besides incurring a penalty, he is subject to suspension or dismissal (secs. 351, 365).

The employment of pilots is now compulsory in all districts in which it was formerly compulsory; and all exemptions from compulsory pilotage also continue in force (sec. 353). And home-trade passenger ships must employ qualified pilots, unless they have certificated masters or mates (sec. 354).

A qualified pilot may supersede an unqualified pilot; but it shall be lawful for the master to pay to the latter a proportionate sum for his services, and to deduct the same from the charge of the qualified pilot (sec. 360).

An unqualified pilot may, however, take charge of a ship where no qualified pilot has offered to take charge, or made a signal for that purpose; or when a ship is in distress, or is under circumstances making it necessary for the master to avail himself of the best assistance which can be found at the time; or for the purpose of changing the moorings of a ship in port, or taking her into or out of dock, where this can be done without infringing the regulations of the port (sec. 362).]

³ Si magister navis (says Ulpian) sine gubernatore in flumen navem immiseret, et tempestate orta temperare non potuerit, et navem perdiderit, vectores habebunt adversus eum ex locato actionem. Dig. lib. 19, tit. 2, l. 13, sec. 2, Locati Cond. See Roccus, De Navib. et Naut. No. 163, and Stracc. De Nautis, p. 3, No. 12. [Abbot, 11th ed. 306.]

⁴ Thomson v Bisset, 1826, 4 S. 670, N. E. 677. In this case the ship was in pilot's fairway, at the entrance of a difficult harbour in the Isle of Scarpa, in the Hebrides: there were no licensed or branch pilots to be procured; but the lighthouse-keeper and his assistant, and the fishermen on the coast, were in use to guide vessels. The master was held bound to take that aid.

⁵ See *Law v Hollingsworth*, 7 Term. Rep. 160.

3. The principle of the rule which requires a pilot, does not seem to apply to [553] the case of a port or river to which the ship belongs, and with the navigation of which the master is familiar.¹

4. In cases where a pilot is necessary, the fact of his merely being on board will avail nothing, if the master control his proceeding, and damage arise. On the other hand, the presence of a pilot on board will not defend the master and owners from responsibility for neglect or wilful obstinacy, to the injury of others: it can only have the effect of supplying the requisite of seaworthiness, and placing the peculiar dangers of the river or port on the same footing with the ordinary dangers of the sea. It seems even doubtful how far the owners can be saved from responsibility for damage arising while under the pilot's care. In England, this is provided for by the statute above mentioned;² but as the Act does not extend to Scotland, we are left to general principles. Perhaps the very groundwork, on the solidity of which the efficacy of this safeguard in navigation depends—namely, the entire superseding of the captain's authority in the conducting of the ship—should, in a question with the freighter, save the owner from responsibility. But at least a different consideration seems admissible in the case of collision or damage done to others not engaged in the adventure. And accordingly we find that in England such responsibility has been contended for in several cases beyond the operation of the Pilotage Act.³

4. **BILLS OF HEALTH, LICENCES, AND NECESSARY PAPERS.**—Under the stipulation that the ship shall be furnished 'with everything needful and necessary for the voyage,' the master will be bound to provide the vessel with such papers as are necessary for her sailing to the destined port, or to guard against capture or detention. She must have a licence when engaged as a licensed ship, and a bill of health when she sails from a suspected port, or when that is required at the port of destination.⁴ But the necessity of a licence will [554] be limited to the necessity of the actual voyage, not extended to any imaginary necessity to guard against a possible danger.⁵

¹ Consistently with this, we find in the English statutes an exception from the obligation to have a pilot, in the case of a vessel within the limits of the port or place to which his ship belongs. 52 Geo. III. c. 39, sec. 59; 6 Geo. IV. c. 125, sec. 62.

² By 52 Geo. III. c. 39, sec. 50, it is enacted, That no master or owner shall be answerable for loss or damage, nor prevented from recovering loss and damage upon a contract of insurance, 'for or by reason or means of any neglect, default, incapacity, or incompetency of any pilot taken on board, in pursuance of any of the provisions of the Act.' See also 6 Geo. IV. c. 125, sec. 55. It has been held that the above law does not apply to vessels having on board pilots under any other regulations than those of this particular Act. *Attorney-General v Case*, 3 Price's Cases 320. So it cannot be held in Scotland, that the damage occasioned by the pilot's negligence, etc., is to fall merely on the pilot. See below, the question of Collision of Ships. [The *Protector*, 1 Rob. 45, overruling *Neptune the Second*, 1 Dods. 467.]

³ *Bennet v Moita*, Holt's Cases 359, 7 Taunt. 258.

So with regard to the Liverpool Pilotage Act (though incorporating this part of the 52 Geo. III.), the Court of Exchequer held that this freedom from responsibility did not exist, on the ground that the Liverpool Act was not compulsory or penal on the captain to take a pilot. *Attorney-General v Case*, 3 Price 302. [In *Carruthers v Sydebotham*, 4 M. and S. 77, the Court of King's Bench held that the owners were not liable. See Abbot, 11th ed. 181.]

⁴ *Levy v Costerton*, Holt's Rep. 167. The *Samuel* was

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freighted for Cagliari in Sardinia with iron. On her arrival at that port, the plague being at Malta, there was a general alarm at Cagliari. The Board of Health refused her admission for want of a bill of health. She then sailed back to Palermo to rejoin convoy, and at length got a certificate from the convoy's captain, which, not being verified by the captain's signature, was not held sufficient at Cagliari. She was delayed for two months. Iron had fallen in value, and the action was for the difference. Evidence was given of a bill of health being always required at Cagliari. On the other hand, the custom-house had for several months not granted such certificates, leaving the application for them to be made to the foreign consuls. Lord Chief Justice Gibbs said: 'The words "needful or necessary for the voyage" oblige the defendant to have every paper required to advance or facilitate the object of the voyage.' 'The ship was excluded because she wanted this document, and the law of Cagliari was well known upon this subject.' 'It is contended that the words apply only to documents required by the laws of this country or the law of nations. But this is not the meaning of the covenant in the charter-party: the words bind the owner to furnish the ship with every document necessary to the performance of the voyage; and as the ship was excluded from Cagliari on account of her not being provided with a bill of health, the defendant is responsible.'

Same case also, 4 Camp. 389, and 1 Starkie 212.

See generally as to licences, *Siffken v Allnut*, 1813, 1 Maule and Selwyn 39; *Butler v Allnut*, 1 Starkie 222.

⁵ *Johnson v Greaves*, 1810, 2 Taunt. 344. A ship chartered

3. *In relation to the Conduct of the Voyage.*

In the conduct of the VOYAGE the master is bound to be ready at the appointed time; to sail as soon as wind and weather permit; to accomplish his voyage by the shortest and most direct course, consistently with safety and the usual practice; and to navigate the ship with skill and care.

I. COMMENCEMENT OF VOYAGE.—1. If the loading port is at a distance from the place where the ship is, she must be so despatched as to reach that port against the stipulated time. If a day is specified, and the ship do not arrive, the merchant may hire another, the owners being liable, on the common principles of location, for any damage arising out of this necessity, unless they can justify themselves by inevitable accident or obstruction.¹

2. The ship, when ready, must sail without delay; but the master is not only entitled, but bound, to avoid sailing in a dangerous gale,² and a claim for loss will arise from his misconduct if he neglect this precaution. In the older regulations he was bound to take counsel; but with the improvement of navigation this is left entirely to him,³ his owners and himself taking the risk on themselves.

In England there has been much discussion on the nature and effect of such stipulations under the doctrine of conditions precedent and simple covenants. The doctrine is plain and intelligible, and well understood in Scotland. The question is, Whether, according to the true nature of the contract, this stipulation is meant to be an absolute condition, without which the counterpart of the contract is not to be performed? or, Whether the breach of it merely impairs the expected advantage, or exposes the party to loss, which may be the subject of a claim for damages? In a contract of affreightment, although there be an undertaking to sail on a particular day, or with the first convoy, it is not like a warranty in a policy of insurance, the non-performance of which voids the contract; but it is an obligation to be substantially performed, the breach of which may expose the party to a claim of damages, and which admits of an answer by reasonable excuse.⁴

[555] II. CONVOY.—The ship may be bound either by public law or by warranty to sail with convoy.

1. In time of war, when the danger of great losses to this country, or gain to the enemy, is imminent, the Legislature interferes to prohibit the sailing of merchant ships without convoy.⁵ In the former and in the late French war this policy was followed. In time of peace, these hostile precautions are not required; and a very brief statement of the points in detail while the necessity subsisted may be sufficient:—1. The rule was general, that no private merchant vessel should sail on a foreign voyage without convoy. 2. The master

to any port or ports in St. Domingo, with a covenant to procure a licence. A licence was obtained, the ship sailing to Cape François and Gonaïve (ports under Christophe, and not in the power of the enemies of Great Britain). The ship was afterwards captured by a British frigate with her return cargo, which the licence was not sufficient to protect, supposing a licence necessary, and she was condemned; but this was reversed, as no licence was necessary to the ports before mentioned. It was held that there was action on the covenant to procure a licence, because that covenant could only apply to a voyage for which a licence was necessary.

¹ In *Shadworth v Higgin*, 3 Camp. 385, an example of such stipulation held a condition precedent. See text below, p. 603 (2). [Abbot, 11th ed. 310.]

² This is laid down in all the foreign codes. In Balfour is this rule: 'The master should ask counsel at his fellows in making of sail, and gif some of them sayis that the weddar is gude, and some sayis the contraire, the master should accord

with the maist pairt; and gif he does otherwise, and ocht cum to the ship bot gude, the master should pay the skaith gif he has quhairwith.' Sea Laws, c. 37; Balf. Pract. 922.

³ [Abbot, 11th ed. 312.]

⁴ See above, p. 594. *Davidson v Gwynne*, 1810, 12 East 381. Here one point was, Whether the direction to proceed and join the first convoy for Portugal was a condition precedent? Lord Ellenborough, and Grose, Le Blanc, and Bayley, Justices, held it not so, and that in the following cases the doctrine was settled, that unless the non-performance alleged in breach of the contract goes to the whole root and consideration of it, the condition broken is not to be considered precedent, but as a distinct covenant, for the breach of which the party insured may be compensated in damages. See *Boone v Eyre*, 1 H. Blackst. 273; *Campbell v Jones*, 6 Term. Rep. 573; *Constable v Cloberie*, Palmer 397. See also *Ritchie v Atkinson*, 10 East 295.

⁵ See the policy of France in this respect in 1 Valin 691.

was required to use his utmost endeavours to continue with the convoy during the whole voyage, and not to separate without leave of the commander, under heavy penalties. 3. Bonds with sureties to observe these rules were required at clearing out. 4. On breach of these rules, all insurances on ship, cargo, or freight, belonging to the master, or any one directing or privy to such evasion, were made void. 5. The only exception admitted was under licence, in granting which Government had an opportunity of considering the particular case.¹

2. In time of war, the obligation to sail with convoy is generally an express, but, if not, it is an implied part of the contract. If the freighter insure, it is a warranty in the contract with the underwriters. This obligation may be undertaken by bill of lading, stating the ship to be bound to the port of destination with convoy;² or by advertisement, if a general ship;³ or by charter-party, so as even to have the force of a warranty. Under this obligation, although the insurance be vacated (which it would be for breach of the warranty), the merchant will have his indemnification against the master and owners. The general rules are these:—

1. Under a warranty to join convoy, the obligation is to join at the place of rendezvous appointed by Government, and the obligation is held sufficiently fulfilled by joining convoy at the usual place of assembling for convoy. This is part of the law merchant, which makes usage the great interpreter of mercantile contracts. A capture on the intermediate course, therefore, will not ground a claim against the owners for breach of contract, unless there be a special stipulation.⁴ If the convoy have sailed, a ship cannot legally endeavour to overtake it.⁵ If, having sailed with convoy, the ship be driven back, she is not obliged to wait for a new convoy, but may sail on her voyage. Or if she be driven into a port where there is no convoy appointed, she may sail without convoy from that port.⁶

2. The convoy must be the naval force under the command of that person whom Government has appointed.⁷

3. The criterion of sailing with convoy is, generally speaking, the possession of sailing instructions from the commander of the naval force. Without this, the master cannot answer signals; he does not know the place of rendezvous in a storm; he does not put himself under the control or protection of the convoy.⁸ But this rule admits of exceptions, in so far as it will be sufficient, if the master has taken every means in his power to obtain orders, and has been prevented by inevitable accident from having them.⁹

4. The ship must continue with the convoy, in order to fulfil the contract. There are here three points: 1. It will be an excuse for parting, if the ship has been separated by a storm or inevitable accident; 2. It is not enough to depart with convoy (though the words are so conceived), without continuing under protection; and, 3. It is not enough if the convoy is only for part of the voyage.¹⁰ But,

5. Although the convoy does not go the entire length to the place of destination, it will be enough if it be the only convoy which is appointed for vessels destined to that port. The

¹ 38 Geo. III. c. 76, and 43 Geo. III. c. 57. These Acts were limited to subsist 'during the present hostilities with France.'—See Abbot, 11th ed. 312. See also Marshall on Insurance, 3d ed. 383; Park on Insurance, 7th ed. vol. ii. pp. 512–515.

² *Sanderson v Busher*, 4 Camp. 54, note; *Magalhaens v Busher*, 4 Camp. 54.

³ See above, p. 589, *Rinquest v Ditchel*.

⁴ Park, vol. ii. p. 504, and cases there quoted; Marshall 366; 1 Emerigon 166; Abbot, 11th ed. 313. *Warwick v Scott*, 4 Camp. 62.

⁵ *Cohen v Hinckley*, 1 Taunt. 249.

⁶ *Laing v Glover*, 5 Taunt. 49.

⁷ This was exemplified in a very strong case of insurance,

where the ship arrived in due time at the place of rendezvous, and, finding the convoy gone, put herself under the protection of a man-of-war which had come there to join the squadron. This was held not to be a departure with convoy within the meaning of the engagement. *Hibbert v Pigou*, Park, vol. ii. p. 598; Marshall 368.

⁸ *Webb v Thomson*, 1 Pull. and Bos. 5; *Anderson v Pitcher*, 2 Pull. and Bos. 164. Lord Eldon has in the latter case given a comprehensive view of the whole doctrine. [Abbot, 11th ed. 314.]

⁹ *Victorin v Cleeve*, before Lord Chief Justice Lee at Guildhall, 2 Strange 1250; Park, vol. ii. p. 509. See the remarks on the case in Lord Eldon's argument, 2 Bos. and Pull. 169.

¹⁰ Park, vol. ii. pp. 505–509; Abbot, p. 240.

contract must be so modified by construction.¹ But it is not enough that the ship has sailed with the convoy appointed for another voyage, though that convoy is bound on the same course for great part of the way, if the ship be left unprotected during any part of the course which the proper convoy would have covered. It may indeed be said, that unless the loss has happened in the unprotected part of the voyage, there should be no ground for exception. But it is impossible to separate the question on the warranty from the provisions of an Act intended for a great object of public policy.²

6. It is a part of the same rule, that convoy must be always understood in reference to the orders of Government, by which it is to be regulated.³

III. COURSE OF THE VOYAGE.—Damage may arise during the voyage from delay or deviation; from injury received by the goods; or from the entire loss of them by capture, shipwreck, or jetson. But no indemnification can be claimed against the owners in any of those cases, where the delay, or injury, or loss, has been occasioned by perils of the sea or of the enemy. Against damage proceeding from perils of this description, the merchant may protect himself by insurance. Where the loss is of a nature which a policy of insurance will not cover (as not being from perils of sea or enemy), the owners and the master must be responsible. If the ship be driven by force of winds or by hostile chase into a port not included in the stipulated voyage, or if she be disabled by sea-damage or an enemy, not only can the merchant claim no damage from the owners for any injury the goods also may have sustained, but he cannot so claim on account of the deviation and delay occasioned by taking refuge, or which may be requisite to have the ship repaired, if that be practicable. Formerly, the master seems to have been held bound even in such cases to find another ship; but now the law is, that if the ship is capable of being repaired, the master is not bound to send the goods in another, but may detain them till the ship be refitted. Referring to the law, as already stated, relative to the power of sale and disposal on the part of the shipmaster,⁴ either for the purpose of extricating the ship, or as agent for the merchant in preserving his goods, it may be added, that for any undue delay, deviation, or injury, by fault of the master, the claim by the merchant is for damages. This may furnish a plea of retention against the claim for freight, on the *actio contraria*; but cannot support a defence against payment of freight, as on a broken condition or warranty.⁵

4. *In relation to the Termination of the Voyage.*⁶

[557] TERMINATION OF VOYAGE.—In bringing the voyage to a close, the master must take the assistance of pilots where necessary; secure the vessel safely; and deliver the cargo to the consignee, or holder of the bills of lading; or after the lay-days are over, to a wharfinger, for the benefit of all concerned, otherwise the owners and he are liable for the goods, or for the damage suffered.

1. The cargo or goods are to be delivered safely. If not, the freight may be forfeited, or a right to damages raised. If the object of the voyage fail in this, the very last act of it, the freight will be lost: as, where a ship is obliged to anchor on the outside of a bar, and to land the cargo by boats, the loss of the goods in their way from the ship to the shore will be attended with the same effect as if lost in the middle of the voyage. If damage be suffered in the act of delivery by sea-water, by collision, by bad tackling, or the like, the merchant will have his claim of damages.

Where the bill of lading acknowledges the goods to be received, and engages to deliver them safely, the master is chargeable with them as in good condition. He must by his con-

¹ [Abbot, 11th ed. 313.]

² *Cohen v Hinckley*, 1 Taunt. 249.

³ Abbot 312; Park, vol. ii. p. 510.

⁴ See above, p. 583.

⁵ [See *Taylor v Forbes*, 1830, 9 S. 113; *Tenent v Carmichael*, 1843, 5 D. 639; *McDonald v Thomson*, 1843, 5 D. 719; *Strickland v Neilson*, 1869, 7 Macph. 400.]

⁶ [Abbot, 11th ed. 330.]

tract guard himself against responsibility for what is unknown; and if he do not so guard himself, and do not obtain satisfaction as to the condition of the goods, he is held tacitly to undertake for the safety of the goods to the full extent.¹

2. The goods must be delivered according to the number and weight acknowledged in the bill of lading. In the question for what the owners and master are accountable, there is no difficulty where the things consist in *number*. But where the commodity is in *quantity*, to be ascertained by measurement, great difficulties arise from the variations in weights and measures, and from the effect of heat, moisture, motion, etc., in diminishing or augmenting the bulk of the substance. In such cases, it must be left to a jury to determine whether there is truly embezzlement, or whether the difference does not proceed from natural causes or variation of measurement. A cargo of grain, for example, generally comes into less compass by the mere agitation of the voyage; and as corn merchants in their dealings generally allow an average to correct the measurement, perhaps it would be thought a fair rule that some proportion should be allowed of diminution, to save from the charge of embezzlement.²

Where foreign weights are mentioned in the bill of lading, the usage of merchants settles the construction of the contract. By that usage the weight expressed in the [558] contract is checked by the king's landing scales, and freight paid according to the net weight ascertained there.³

3. The manner of delivery, and the termination of the responsibility, will in all cases be regulated by the custom of the port. The delivery must be to the consignee or to his wharfinger, or in boats, or on the wharf, according to that custom. But the consignee may on tendering freight demand delivery overboard, without landing the goods on the wharf.⁴ If the custom is to discharge into lighters, the master is to watch and guard the lighters till fully laden,⁵ but not afterwards;⁶ nor will this obligation lie on the master, if it be the usage for the consignee himself to superintend the delivery of the cargo.⁷

The master will acquit himself of his obligation to deliver, if he lodge the goods with another shipmaster, or carrier, or wharfinger, provided he take care that they be so lodged as to make that other chargeable with them.⁸ The master is bound to land and lodge the

¹ *Sprott v Brown*, 1803, M. 10114. A large mirror was shipped from London, addressed to Edinburgh, and contained in a case marked 'Glass.' The master gave a receipt for the case, 'which I promise to deliver safe.' The contents of the case had not been examined. On arrival at Leith it was sent on men's shoulders to Edinburgh, and when opened the great plate was found broken to pieces though the frame was unhurt. In an action against the master and owners, the Judge-Admiral 'found, that on receiving a package with the word *glass* written on it, it was incumbent on the master, if he did not mean to abandon all recourse against the person shipping the goods, to refuse taking the package on board till the shipper did satisfy him that it was actually sound and entire; that, seeing the word *glass* so written, he was certiorated of the extent of his risk, and had sufficient ground to justify an extra charge on account of that risk; and therefore found it established, *presumptione juris et de jure*, that the defenders must have had the extra risk in contemplation when they fixed the rate of freight, and decerned against them for the value,' etc. The case was brought under review of the Court of Session by suspension and reduction. But that Court unanimously adhered to the judgment of the Admiral. [See *Armstrong v Edinburgh and Leith Shipping Co.*, 1825, 3 S. 323; *Bishop v Mersey and Clyde Navigation Co.*, 1830, 8 S. 558; *Urquhart v Brown*, 1833, 11 S. 567; *Dunlop v Lambert*, 1839, H. L., M'L. and Rob. 663.]

² In *Stein v Stenhouse*, 2 Feb. 1811, 16 Fac. Coll. 174, there were shipped 452 bolls of barley from Newburgh to Leith, but only 447½ bolls were delivered. It appeared from the lists of the shore-dues of Leith that the measurement at the end of the voyage was *less* in one out of 30, and *more* in one out of 100. The Court held that the diminution in this case did not raise any presumption of embezzlement.

³ *Giraldes v Donison*, Holt 346, where too much having been paid, it was allowed to be recovered back.

⁴ *Syeds v Hay*, 4 Term. Rep. 260. Here the consignee demanded delivery overboard; but the master refused, and delivered the goods to a wharfinger, who, he said, had by usage a right, when a ship was moored against his wharf, to have the goods landed on his wharf, and to have wharfage fees. The evidence was not sufficient to make out the wharfinger's right. The case turned on a point of the law of actions of trover; but the substantial question was, Whether the master had discharged himself by landing the goods at the wharf, when they were required from himself overboard? The Court held the master liable. [Abbot, 11th ed. 332.]

⁵ *Catley v Wintringhame*, Peake's Cases 150; *Robinson v Turpin*, *infra*.

⁶ *Robinson v Turpin*, 1805, before Lord Ellenborough. [Abbot, 11th ed. 335.]

⁷ *Dunnage v Joliffe*, Abbot 335.

⁸ See above, p. 494.

goods with a wharfinger where there is any difficulty about freight, instead of keeping them on board. In some landing-places (as in the London Docks) the wharfingers provide men to unload the ships, and do not permit labourers provided by the owners to be employed. In such case they are held liable for negligence in the unloading by which damage is occasioned, although they make no direct profit by the employment of those men.¹ The master will also discharge himself and his owners by delivering to one entitled to stop, and who shall regularly stop, the goods *in transitu*.²

4. If by the terms of the charter-party a time for completing the delivery is stipulated, the consignee is entitled to insist for the whole of that demurrage.³

5. The delivery is to be made only on payment of freight, and on payment also of the premium, and other petty average expressed in the bill of lading, and of any average contribution for loss in the voyage.⁴ It has been laid down as recognised in practice, that security for average is required before delivery of goods.⁵ But the master is not entitled to retain the goods for arrears of freight due on other goods.⁶

5. *Of the Responsibility of Shipowners under the Edict, and of the Limitations of this Responsibility by Statute.*

RESPONSIBILITY UNDER THE EDICT.—The responsibility of shipowners and masters under the edict has been reserved for this place,⁷ because it has undergone by special statute some [559] modifications which are not extended to the case of the other persons comprehended within this law.

The rule of the edict is, that the persons comprehended under it being once chargeable with goods, they must answer for their restitution in the same condition, unless the goods have perished or suffered injury by the king's enemies, or inevitable physical accident. The exception in the charter-party and bill of lading includes 'the act of God and the king's enemies; the dangers and accidents of the sea, rivers, and navigation; the restraints and detention of kings, princes, rulers, and republics; and all and every other unavoidable dangers and accidents.' This is only an express enumeration of the inevitable perils which by law would excuse the owners from responsibility. Formerly the exception was expressed in terms more brief, 'the dangers of the sea excepted.' The alteration was made in consequence of a trial the event of which alarmed shipowners; where a vessel which had struck on a sunk mast in the mouth of a river, and so had been forced on a bank which had altered its form by floods in the river, was held to have suffered by a peril too remote to come under the proper description of the act of God.⁸ But it does not appear that the alteration changes much the rule of responsibility which would have been applied under the old form.

1. To the description of a peril of the sea, or according to the new form, 'an act of God, danger, or accident of the sea, rivers, and navigation,' it is essential that it shall be a peril unavoidable. If due skill, vigilance, and care could have avoided or repaired the misfortune,

¹ *Gibson v Inglis*, 4 Camp. 72, where a pipe of wine was staved by the negligence of the servants of the London Dock Company.

² See above, *Of Stopping in Transitu*, particularly p. 246 et seq.

³ See below, *Of Demurrage*, p. 622.

⁴ See below, *Of Freight, etc.*, p. 614, and of *General Average*, *infra*, Sec. III. Subsec. 2.

⁵ Abbot 332.

⁶ *Stevenson v Likly*, 1824, 3 S. 291, N. E. 204.

⁷ See above, p. 495.

⁸ See Abbot 338 et seq., who relates this case of *Smith v Shepherd*, with the effect of the alarm occasioned by the decision; first, in an attempt to procure an Act of Parlia-

ment, which failed; and next, in the alteration of the bill of lading.

[Special conditions, as that the owners shall not be accountable for leakage or breakage, do not relieve them from liability for gross negligence. *Phillips v Clark*, 2 C. B. N. S. 156. (See *Wilton v Atlantic, etc. Co.*, 10 C. B. N. S. 453; *Moes, Moliere, & Tromp v Leith and Amsterdam Shipping Co.*, 1867, 5 Macph. 988.) The rule laid down in *Phillips v Clark* is in conformity with the decisions on special contracts between land-carriers and their employers, as cited 1 Sm. L. Ca. p. 210, and the views expressed in Dom. Proc. on the question, What is a reasonable condition? *Peek v North Staffordshire Railway Co.*, 32 L. J. Q. B. 250, 273.]

the owners will be liable. Thus, it is a peril of the sea if a ship strike a rock, or run on a sandbank, or suffer in accidental collision by force of the winds against another ship, without fault or negligence on the part of those on board.¹ But if the ship have been negligently or unskilfully navigated, so as to be run on a known rock or shallow, without the compulsion of an irresistible gale to occasion the disaster; or if in traversing the course of another vessel the master or steersman has not kept his proper courses, and so has occasioned a collision; or if during the night he has not kept lights where they are required by the usage of navigation, the owners will be responsible for damage to the merchant.²

2. Capture by pirates is a peril of the sea, and so held after taking the opinion and examination of merchants as to the construction by usage of the true perils of the sea.³

The question, What is a peril of the sea? gives rise to the preliminary difficulty, [560] By what tribunal is that to be determined?—by the jury, as a question of fact, or by the judge, as matter of law for the Court? And this difficulty depends on the combination of fact with the legal construction of a written instrument. It is true, in general, that the construction of ambiguous expressions in instruments belongs to the Court; but the meaning of the words, as applied to the practice of trade, must be derived from usage, and merchants must be resorted to for the proof of that usage. And perhaps the rule is most correctly stated by the author of the *Treatise on Merchant Ships and Seamen*, where he says that 'the cases furnish very strong authority to show, that even if the decision of the question does strictly and properly belong to the judge, yet his decisions will be guided by usage, and the course of practice among merchants, which are matters of evidence and of fact.'⁴

3. But not only the common perils of storms, and their direct consequences, by striking on a rock, stranding, etc., are clearly within the excepted perils. So also are the more remote dangers consequent on such accidents. Thus, the loss of goods plundered by the inhabitants on a ship going on shore, was, in a question of insurance, held as a peril of the sea.⁵

4. The effect of storms and tempests on the ship herself, in straining, springing a leak, shipping great seas, and other such accidents occasioning damage or injury to the cargo, being within the exception, so as to free the master and owners from liability where there is no fault or negligence, it was questioned whether such effects produced by the operation of superior force from the hand of man are under the same rule; as where a vessel is taken in tow by a king's ship, or is forced to bear up to answer a signal, and in the course of her sailing under this external force suffers damage which otherwise would not have happened? It has been held that such a case falls under the exception, as a peril of the sea.⁶ But if

¹ *Buller v Fisher*, 3 Espin. Cases 67; *Smith v Scott*, 4 Taunt. 126.

² See Abbot, *ubi supra*, where this doctrine is well delivered. Roccus gives the rule thus: *Magister navis oneratae, pleno velo navigans, si inciderit in vada (vulgariter dicta nelle secche), tenetur de culpa; quod non praeviderit id quod a diligente nauta fuisset praevisum. Verum si ex impetu ventorum et tempestate coactus, et non ex imperitia in vado seu scopulos inciderit navimque fregerit et merces sint amissae vel deteriores factae, tunc non tenetur.* Note 55. Again, see, in note 56, his amplification of the rule: *Culpa vacat nauta si id agit quod diligens faceret.*

Emerigon details a judgment in a case of capture by pirates, where the distinction was correctly drawn. Holding such capture a peril of the sea, the judgment was against the owners, on account of the captain and his whole crew having gone on shore on a deserted island in the Morea to hunt, pirates having taken advantage of this desertion to run away with the ship (vol. i. p. 532).

The case of the *Trent and Mersey Navigation v Wood*, as

commented on by Abbot, p. 329, may also be taken as an illustration; there being a fault in the master, in so far as he did not infer from the appearance of a ship in the river the neighbourhood of an anchor.

³ *Pickering v Barclay*, and *Barton v Wolliford*, as quoted by Abbot, 11th ed. 340. Loss by pirates was, in the Roman law, placed on the same footing with shipwreck. The doctrine of Labeo, as confirmed by Ulpian, is: '*Si quid naufragio aut per vim piratarum perieris non esse iniquum exceptionem ei dari.*' Dig. lib. 4, tit. 9, l. 3, sec. 1, *Nautae*, Caup.

See *Cullen v Butler*, 5 Maule and Selwyn 461.

⁴ [Abbot, 11th ed. 340.]

⁵ *Bondrett v Hentigg*, before Lord Chief Justice Gibbs, Holt's Cases 149.

⁶ *Hagedorn v Whitmore*, 1816, 1 Starkie 157. In this case the ship was taken in tow by a British ship of war, and obliged to use an extraordinary press of sail, in consequence of which, and a high sea, she shipped a quantity of water, by which her cargo of linens was damaged. It was an insurance

this compulsion proceed from the fault of the master,¹ or from an order which was unlawful, and not backed by irresistible force, this extraordinary injury will scarcely be brought under the exception.²

5. Detentions and restraint by kings, princes, rulers, etc., are held to apply only to 'actual and operative restraints, not merely such as are expected and contingent, however reasonable and well-grounded the apprehension may be, or however fair and honest the intention of the master.'³ Detention of a British ship by a British man-of-war, proceeding on state necessity, or on mistake, not attributable to the master's fault, is within the exception.⁴

[561] 6. The saving clause adjoined to the exception of the charter-party in West India voyages, where boats are used in loading and unloading (viz. 'saving the risk of boats, so far as ships are liable thereto'), was meant to provide a remedy against the exemption which, under the general words of the exception, might be pleaded in case of loss of goods in boats, and against the carelessness which might thus arise. The judges in England have held, that though the wording of this saving clause is very obscure, it was meant to keep owners, as to responsibility for loss in boats, on the same footing on which, previous to the introduction of the exception, they stood as to losses on board the ship; that is, that they are not liable for dangers of the sea.⁵

7. If a ship depart from the usual or stipulated course, and a loss happen, the master and owners will (under certain qualifications by statute) be responsible. Thus, 1. If, being chartered to sail from Leith to London, the master choose to call at Berwick or any intermediate port, and a storm afterwards arise, in which the goods of the merchant shipped on board are damaged, or obliged to be thrown overboard, the master and owners will be liable for the loss; the owners to the extent of the value of the ship and freight, the master for the whole amount. 2. If, according to the course of the voyage, it is usual or necessary to call at an intermediate port, any loss arising in similar circumstances will be construed as a proper peril of the sea, to be covered only by insurance. But, 3. If the contract of affreightment should be so expressed as to exclude such intermediate ports, though in the usual course of the voyage, the master and owners will be liable, as in the case first stated of the ship having deviated by calling at an intermediate port.⁶

case. Lord Ellenborough held this a peril of the sea. See next note.

¹ In the preceding case there was a circumstance which, had the case been for *loss on the charter-party*, would surely have barred the owners from pleading the exception. The captain, when hailed by the king's ship, took her for a Frenchman, and, concealing his British licence, produced simulate papers, which led the king's officer to take the ship in tow.

² *Phelps v Auldjo*, 1809, 2 Camp. 350. This case may serve to illustrate the doctrine, though it was an insurance question. A ship in harbour abroad was ordered to examine a strange sail in the offing: the master, without protest or remonstrance, and uncompelled by any force or threat, set sail and found the vessel neutral. Lord Ellenborough held this a deviation unexcused, as, without force, the master had gone probably in hope of a prize. Damage to the cargo in such an expedition would probably not be held to fall under the exception in the charter-party.

³ *Atkinson v Ritchie*, 10 East 534. Here the master, on a justifiable alarm proceeding from the British consul at St. Petersburg, of an intended embargo in the Russian ports, sailed with half a cargo. He was found responsible in damages to a large amount. The judgment delivered by Lord Ellenborough particularly deserves perusal.

⁴ *Hagedorn v Whitmore*, p. 607, note 6; so said in that case by Lord Ellenborough.

⁵ *Johnston v Benson*, 1819, 1 Brod. and Bing. 454. Here, on such a bill of lading, the ship being at Anotta Bay, Jamaica, sent the shallop on shore with goods. A hurricane arose, and the shallop was lost, with the goods. The whole was proved to be according to the usage of landing goods there. An action was brought against the shipowner for breach of engagement by non-delivery of the goods so lost. A verdict, under the direction of Dallas, J., was given for the defendant, and the Court refused a new trial.

⁶ *Stewart v Johnston*, 17 Jan. 1810, 13 Fac. Coll. 504. Here the Perth Merchant Shipping Company publicly advertised vessels to sail from Perth and Leith, the only intermediate port mentioned in these advertisements being Newburgh. Stewart shipped 51 bolls of malt at Perth for Leith. The ship delivered part of her cargo at St. Andrews. She was detained there two days, and afterwards was lost between St. Andrews and Leith. The Court of Session, in an action for the value of the malt against the master and owners, held that the shippers were entitled to rely on the public advertisements as their contract of affreightment; and whatever was the custom (into which they were not bound to inquire), to expect that the shortest, safest, and most expeditious course

The claim for damages on account of breach of charter-party is to be determined on a different principle from that which rules the case of insurance. Insurance is a contract of indemnity against loss, not for the securing of gain; and the prime cost is the value to be indemnified. Affreightment is a contract whose object is the attainment of expected gain, by means of the transportation of goods to a particular place, which the shipmaster and owners undertake to perform. The loss by failure in the performance of this contract cannot be indemnified, unless by paying to the merchant the value of the goods as at the port of destination.¹

LIMITATION OF RESPONSIBILITY BY STATUTE.—By several statutes, the responsibility of owners of ships, and in one instance of masters also, has been very materially limited. Those limitations, 1. have been held not to extend to lighters, barges, boats, or vessels of any burden or description, used solely in rivers or inland navigation; but only to those which are used in sea voyages.²

2. Shipowners are freed from any responsibility for *loss or damage by fire*.³ [562]

3. Owners and part-owners are declared not to be answerable, *beyond the value of the ship and freight*, for any loss by act or neglect, without their fault or privity; value of the carriage of their own goods, and hire due or to grow due under any contract of carriage, being in this question deemed freight,⁴ and the master and mariners being responsible as at common law.⁵

It is also provided, that if any loss or damage shall happen by more than one separate accident, or on more than one occasion, in the course of a voyage, or in the interval between

was to be pursued between the different ports mentioned in the advertisements. The Court therefore refused to allow a proof of the practice followed by the company in performing voyages from Perth to Leith.

¹ *Hujusmodi damnum proveniens ex culpa magistri in rebus et mercibus, æstimandum est ad rationem illius, quod valuisent merces, vel valere potuissent in loco ad quem destinatæ erant, considerato et habito respectu ad tempus quo ad illum pervenire potuissent.* Casaregis, Disc. 23, sec. 88. See also Kuricke, Jus. Mar. Hanseat. tit. 9 art. 2.

² 53 Geo. III. c. 159. This matter came into question in a case from Greenock, relative to a gabbart or lighter used in navigating the Clyde; and when the case went to the House of Lords, this point of exemption of such vessels, which seems to have been taken for granted in Scotland, seemed so important, that the opinion of the twelve judges was required on it. But the pressure of business having prevented the opinions from being given, the Chancellor, taking the aid of Abbot, Chief Justice of the King's Bench, peculiarly conversant with the meaning of this Act of Parliament, delivered the opinion, 'that the Act of the 26 Geo. III. c. 86 relates only to ships and vessels usually occupied in sea voyages, and that it gives no protection in case of small craft, lighters, and boats, and so on, concerned in inland navigation.' *Hunter & Co. v M'Gown & Co.*, 12 June 1819, 1 Bligh 571.

³ By 26 Geo. III. c. 86, sec. 2, it is enacted, 'That no owner or owners of any ship or vessel shall be subject or liable to answer for or make good to any one or more person or persons, any loss or damage which may happen to any goods or merchandise whatsoever, which shall be shipped, taken in, or put on board any such ship or vessel, by reason or means of any fire happening to or on board the said ship or vessel.' [This enactment also is limited in construction to sea-going vessels, and does apply to the case of a fire on board a lighter

in which goods are being taken to the ship. *Morewood v Pollock*, 1 El. and Bl. 743.]

⁴ 53 Geo. III. c. 159, secs. 2 and 4.

⁵ 7 Geo. II. c. 15, A.D. 1734; 26 Geo. III. c. 86, sec. 1, A.D. 1786: 'That no person, etc., who is owner or owners of any ship or vessel, shall be subject or liable to answer for or make good to any one or more persons, any loss or damage by reason of embezzlement, secreting, or making away with, by the master or mariners, or any of them, of any gold, silver, diamonds, jewels, precious stones, or other goods or merchandise, which shall be shipped, taken in, and put on board any ship or vessel; or for any act, matter, or thing, damage or forfeiture done, occasioned, or incurred by the said master or mariners, or any of them, without the privity or knowledge of such owner or owners, further than the value of the ship or vessel, with all her appurtenances, and the full amount of the freight due or to grow due for and during the voyage wherein such embezzlement, etc., or other malversation of the master or mariners, shall be made or done.'

By 53 Geo. III. c. 159, sec. 1, the above Acts are amended, part-owners are expressly included, and liability discharged 'for any loss or damage arising or taking place by reason of any act, neglect, matter, or thing done, omitted, or occasioned, without the fault or privity of such owner or owners, which may happen to any goods, wares, or merchandise, or other things laden or put on board the same ship or vessel; or which may happen to any other ship or vessel, or to any goods, etc., being in or on board of any other ship or vessel, further than the value of his or their ship or vessel, and the freight due or to grow due for and during the voyage which may be in prosecution, or contracted for at the time of the happening of such loss or damage.' [See *Sutton v Mitchell*, 1 T. R. 18; *Brown v Wilkinson*, 15 M. and W. 391; *African Steamship Co. v Swanzy*, 2 Kay and J. 660, 25 L. J. Ch. 870; *Leycester v Logan*, 3 Kay and J. 446, 26 L. J. Ch. 306, 4 Kay and J. 725.]

two voyages, any such loss shall be compensated in the same way, and to the same extent, as if no other loss had happened during the same voyage, or in the same interval.¹

4. Owners or masters are freed from responsibility for loss or damage to gold, silver, diamonds, watches, jewels, or precious stones put on board, *unless the true nature, quality, and value shall be entered in the bill of lading, or otherwise declared in writing to the master or owner.*²

[563] 5. By the English Pilotage Acts, no master or owner shall be answerable for loss or damage 'for or by reason or means of any neglect, default, incapacity, or incompetency of any licensed pilot acting in the charge of such ship or vessel, under or in pursuance of any of the provisions of the Act, where and so long as such pilot shall be duly qualified to have the charge of such ship, or where and so long as no duly qualified pilot shall have offered to take charge thereof.'³ This statute does not apply to Scotland, being limited to pilotage on the coasts of England.⁴

In commenting on these Limitation Acts, it may be observed, 1. That the Act of the 53 Geo. III. c. 159, in the case of registered ships, comprises all the accidents and neglects intended to be provided for by the Legislature, and for most, if not all purposes, may now be considered as containing the law on the subject.⁵ 2. That these laws are grounded on reasons of policy recognised by other commercial nations.⁶ 3. That the statutes are generally intended to limit the responsibility of owners, not of masters. There is, indeed, only one of the cases enumerated in which masters are named in the Act, viz. where jewels, money, etc., have been put on board without any disclosure of their nature or value. In such case, on proof of actual embezzlement, a remedy will lie against the master, as proof of privity on the part of the owners will charge them; but otherwise the loss will fall on the merchant.⁷ 4. That as to damage from fire, since the master is not by name comprehended within this exception, it may be questioned whether it was not intended that the rigid policy of the common law should operate on him to the general safety of all concerned; but the stipulation in the modern bill of lading removes his responsibility.⁸ 5. That, where goods are injured by the spilling of corrosive liquids, as aquafortis, though in common language they are said to be burnt, the owners will not be free on the exception of fire out of their responsibility. Such an accident may indeed occasion fire, as lime may and sometimes does, when carried by sea; but where there is no ignition, and damage thereby occasioned, the statute will not be held to apply:⁹ and the matter will be determined on the footing of

¹ 53 Geo. III. c. 159, sec. 3.

² 26 Geo. III. c. 86, sec. 3 (1786): 'And whereas disputes may arise, whether the owners or masters of ships are liable to answer or make good the value or amount of any gold, silver, diamonds, watches, jewels, or precious stones, which may be lost after the same have been put on board their ships, on freight, without the shipper's declaring at the time the value of such goods;' be it therefore enacted, etc., 'That no master, owner, or owners of any ship or vessel shall be subject or liable to answer for or make good to any one or more person or persons, any loss or damage which may happen to any gold, silver, diamonds, watches, etc., which from and after the passing of this Act shall be shipped, taken in, or put on board any such ship or vessel, by reason or means of any robbery, embezzlement, making away with, or secreting thereof, unless the owner or shipper thereof shall, at the time of shipping the same, insert in his bill of lading, or otherwise declare in writing to the master, owner, or owners of such ship or vessel, the true nature, quality, and value of such gold, silver, diamonds,' etc. [See the corresponding limitations contained in 17 and 18 Vict. c. 104, secs. 388, 503, 504 to 516, as amended by 25 and 26 Vict. c. 63: see sec. 54.]

As to the declaration of the nature and value of the goods required by sec. 503, see *Williams v African Steamship Co.*, 1 H. and N. 300.]

³ 6 Geo. IV. c. 125, sec. 55. See Abbot 261 and 158.

⁴ See above, p. 599. [But now, by 17 and 18 Vict. c. 104, which is applicable to the United Kingdom, sec. 388, 'No owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship within any district where the employment of such pilot is compulsory by law.' See the *Agricola*, 2 W. Robinson 10; *Hammond v Rogers*, 7 Moore P. C. Ca. 171; *Pollock v M'Alpin*, 7 Moore P. C. Ca. 427.]

⁵ Abbot, 11th ed. 181.

⁶ See Vinnius in Peck. p. 155; 1 Valin 569; Ord. of Rotterdam, edit. 1621, art. 167; 2 Magens 107.

⁷ See below, p. 611.

⁸ I see this doubt stated by Lord Chief Justice Abbot, p. 260. He gives no opinion on the question, but holds it clear that the ordinary words of the bill of lading exclude the responsibility.

⁹ *Brodie v Robertson*, 28 June 1805, Judge Cay's Notes,

negligence, on the edict, unless the damage was plainly occasioned by sea-risk. 6. That, generally speaking, this law, which takes away the responsibility for fire, will not be held to derogate from the special regulations of ports and harbours prohibiting fires on board of ships lying there. In a case already quoted, where the 26 Geo. III. was in the courts of Scotland held to apply to ships engaged in river navigation, it not being alleged that the owners were aboard when a fire happened, the owners were held to be freed by the statute; care being specially taken to guard against the supposition that the Act was held to free the captain from responsibility.¹ 7. The owners are not, on the Act 53 Geo. III., [564] held responsible beyond the value of ship and freight, although the loss be occasioned by the misconduct of one of their number, who was also master.² 8. The value of the ship is to be estimated, not as at the commencement of the voyage, but as at the time of the loss; and although there may be some practical difficulty in this, it is a difficulty in matter of evidence, not of law.³ The fishing stores (belonging to the owners) of a ship employed in the usual manner in the Greenland fishery, and which often are as valuable as the ship itself, are valued as part of the ship and her appurtenances;⁴ although in insurances they are usually made the subject of a separate agreement, that being entirely a matter of contract, of which the construction depends in many cases on usage. In reckoning freight, the whole freight of that voyage is to be taken, whether paid in advance or not.⁵ But the value is not the amount of freight contracted for: it is not to exceed the amount that would have been carried had the voyage been completed, subject to diminution by jetson and other losses.⁶ 9. It is declared that the remedy against the master and mariners shall remain entire for embezzlement or fraud, abuse or malversation.⁷ If, therefore, it can be proved against the master that he actually received into his own custody a valuable packet of money or jewels, and if the evidence shall satisfy a jury that he has embezzled them, he will be responsible, although the contents were not disclosed or stated in the bill of lading. And, in the same way, he would be liable for the value of goods so embezzled, if, in the distribution of the value of the ship among those who had suffered loss, the owner of those goods should not receive his full payment. 10. In those cases in which the responsibility of the owners is restricted to the value of the ship and freight, provision is made for the case of several merchants having claims on a ship inadequate to the whole demand. This is to be settled by a proportionate distribution; to effect which, certain proceedings are declared competent in England. 11. In questions of embezzlement which regard either the owners, or master, or mariners, doubts may arise on the bill of lading. Where the bill bears a certain quantity, as of coffee, and less is delivered, it is of itself proof of embezzlement if the difference is considerable. Where the bills bear contents unknown, this will not preclude a proof of actual embezzlement, though it will throw the *onus probandi* on the merchant. Where goods are to be carried for hire, the proprietor has a right to the utmost

vol. D, p. 385. This was a case on a policy of insurance in the Scottish Court of Admiralty. The question was, Whether under a policy of insurance a loss might be recovered occasioned by the breaking of some baskets of oil of vitriol, as being damage occasioned by fire? Held to be an injury from improper stowage, that it was the effect of the sea, the wind, and waves, on goods improperly stowed which occasioned the breakage of the oil of vitriol, and that this breakage, by erosion or otherwise, occasioned the damage.

¹ *Hunter v M'Gown*, 16 May 1811, 16 Fac. Coll. 242.

² *Wilson v Dickson*, 1818, 2 Barn. and Ald. 2. This was an action against joint-owners of the *Hope* for loss on goods improperly sold by the captain, one of the joint-owners. The arbitrator, on a reference, submitted by his award this question to the Court: Whether the fault or negligence of one of the owners takes away the protection given to part-owners

by the Act? The Court held that it did not; that joint-owners are not like partners, but are exposed to have persons introduced into the ownership of whom they know nothing, and that the Act specially protects each against responsibility, without his own fault or privity.

³ See the above case of *Wilson v Dickson* (preceding note), in which this also formed a point. See also *Cameron v Raeburn*, where this point was taken as settled by *Wilson's* case. 1 Bing. 471.

⁴ *Dundee*, Holmes, 1823, 1 Haggard's Adm. 109; *Gale v Laurie* (same case), 1826, 5 Barn. and Cress. 156.

⁵ *Supra*, note 2.

⁶ *Cameron v Raeburn*, 1824, 1 Bing. 465.

⁷ This is both by the 7 Geo. II. c. 15, and by the 26 Geo. III. c. 86, sec. 5, and also by 53 Geo. III. c. 159, sec. 3.

care; where they are not to be carried for hire, still proper and prudent care must be taken of that which is committed to the master's custody.¹

II.—CLAIMS ON THE BANKRUPTCY OF THE MERCHANT OR SHIPPER.

[565] On the bankruptcy of a merchant who enters into a charter-party, or who ships goods in a general vessel, claims against his estate may be grounded upon any of the obligations incumbent upon him by the contract, express or implied, and of which a short enumeration has already been given. Without entering minutely into all the questions which may be raised in this way, the points, Of Furnishing a cargo, Freight, and Demurrage, are important.

1. *Of the Obligation to furnish a Cargo.*

This, which forms one of the chief engagements on the part of the merchant, includes two points of obligation, on each of which a claim may arise against him: one relative to the quantity of goods to be furnished as a cargo; the other to the time at which the cargo is to be furnished.

1. The ship may be freighted for a gross or general sum, or at so much per ton; or the engagement may be rateably, at so much per cask or bale. In the two former cases, the freight will be demandable, and the rate is ascertained, whether a cargo is furnished or not: so that the actual loading of a cargo is of importance, chiefly as it affords security by lien for the freight.² But in the latter case the cargo must be furnished in order, strictly speaking, to raise a claim for freight at all, or at least to ascertain its amount. Questions sometimes occur as to the amount of damage to come in place of freight, as where the stipulated cargo was to consist of different commodities at various rates. The rule for such a case seems to be, that an average must be taken.³

If the cargo is not furnished, the master may, after waiting the appointed or a reasonable time, take a protest, and engage for another cargo; and action will be competent to him for the loss suffered by the change.

¹ *Nelson v M'Intosh*, 1816, 1 Starkie 237. A seaman went on board at Trinidad, but was left behind. The captain afterwards opened his box in presence of several passengers, and placed the contents in a canvas bag, and deposited them in the captain's chest in the cabin, where his own valuables were kept. In the river the captain and mate left the ship. One mate remained. An excise officer was on board, and two young men slept in the cabin. Next morning the captain's trunk was carried off. Under the direction of Lord Ellenborough, a verdict was found for the seaman against the captain.

[See *Scott v Gillespie*, 1827, 5 S. 624; *Jones & Co. v Ross*, 1830, 8 S. 495; *Gowans v Thomson*, 1844, 6 D. 606.

By the statute 17 and 18 Vict. c. 104, sec. 503, it is enacted that no owner of any sea-going ship or share shall be liable to any extent whatever to make good loss or damage that may happen, without his actual fault or privity, by fire of or to any goods, merchandise, or other things taken in or put on board such ship; nor for the robbery, embezzlement, etc., of any gold, silver, diamonds, watches, jewels, or precious stones taken in or put on board the ship, unless the owner or shipper thereof has, at the time of shipping them, inserted in his bill of lading, or otherwise declared in writing to the master or owner of the ship, the true nature and value of the gold, etc. Nor (sec. 388) shall any owner or master be answerable to any person for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in

charge of the ship, within any district where the employment of such pilot is compulsory by law. And by sec. 504, no owner shall be answerable in damages to another beyond the value of the ship and freight, where without his actual fault or privity any loss of life or personal injury is caused to any person carried in the ship; or by reason of the improper navigation of the ship, caused to any person carried in any other ship; or for damage or loss caused to goods, merchandise, or other things on board that ship; or by reason of the improper navigation of the ship to any other ship or boat, or to any goods, merchandise, or other things on board any other ship or boat.]

² Where the ship is freighted at so much per ton, it is of importance to have the goods put on board to the full extent, for there is no lien on what is deliverable to the consignee for the dead freight. See below, p. 621.

³ *Thomas v Clarke*, 1818, 2 Starkie 450. In a charter-party of this sort, a great variety of articles were mentioned to be shipped at Rio Janeiro, as coffee at 12s. per hundredweight, sugar at so much per hogshead, etc. The ship was forced to return without a cargo. Lord Chief Justice Abbot intimated 'that the proper course would be to estimate the freight by means of an average, so as to take neither the greatest possible freight nor the least, and that he should inform the jury that such an average was the proper measure of damages;' and so the verdict went. [Abbot, 11th ed. 212.]

See below, p. 614.

If the ship is not fully loaded, the master may sail with the cargo which he has received, and demand full freight; or he may take in goods from others so as to fill up the vacant room, and instead of trusting to a claim of dead freight, indemnify himself in this way for the deficiency. But there is considerable delicacy necessary to be observed in taking in the goods of others. It may be of importance to the merchant to exclude from the market the goods which might so be taken, and rather to sail with a deficient cargo than to forward them. He is undoubtedly entitled to exercise this privilege, provided he give full security for the freight; and the shipmaster ought to be very careful to give the merchant the fullest opportunity of using this privilege before taking other goods on board.¹ The master may take in other goods in the case of the merchant's insolvency.

Where the freight is rateable according to the cargo, the merchant must furnish a full and complete cargo, unless he has taken care specially in the charter-party to limit the extent of the cargo on which the master is entitled to insist. The parties may settle previously what shall be considered as the cargo to be loaded; and when it is so settled, [566] it will be of no importance in the question whether the ship might have carried more or not. But this will require a precise and specific limitation. It will not be enough to control the general rule, that in describing the ship a certain measurement is mentioned, where either the implied bargain or an express agreement obliges the merchant to find a full and complete cargo: for no given dimensions can be a just measure of the quantity of tons which the vessel may carry; this necessarily varying with the specific gravity of the goods. It has been ruled, that as on the one hand, in a charter-party for a gross sum, the master would not be entitled to refuse to take as much as the vessel could conveniently and safely carry, notwithstanding such descriptive mention of the measurement; so, in a rateable freight, he is entitled to insist on such complete cargo being delivered to him.²

2. The time within which the cargo is to be furnished is generally regulated by special convention. Independently of any such stipulation of lay-days and demurrage, the merchant is bound to bring forward the cargo within a reasonable time; or where the bargain is specific, he must furnish the cargo at the day appointed, otherwise the master is free to take other freight, and to bring his action for damage. This ruled a very strong case, where the merchant was not held entitled to a literal interpretation, but bound to have his cargo ready by the time which, according to the substantial purpose of the contract, the parties must truly have intended.³ It is, however, a justification for not providing a cargo, if the merchant have stipulated the arrival of the ship on a particular day as a condition:

¹ See Pothier, *Charte-Partie*, No. 20; Abbot 214. [In *M'Gavin v Cuddy*, 1843, 6 D. 297, it was held that dead freight is the actual damage occasioned to the shipowner, and that any expense saved to him in consequence of the ship returning empty falls to be deducted.]

² *Hunter v Fry*, 1819, 2 Barn. and Alder. 421. Here the charter-party described the master as master of 'the ship Hunter, of 261 tons burden or thereabout.' The voyage was to the West Indies, and the freight at so much per ton. The freighter's agent was to supply a full and complete cargo of 'coffee in bags and casks, with logwood for dunnage, etc., not exceeding in whole what the said ship could reasonably stow and carry over and above her stores,' etc. In loading the ship there was furnished only 28 tons of coffee, 20 tons of logwood, and 288 tons of sugar. She could have carried 240 tons of coffee in bags, 40 tons in casks, and 20 tons of logwood for dunnage; and a sum of £918 was the amount of freight that would have been earned over what was received had the full cargo of coffee been sent. Judgment was given for the above sum; Lord Chief Justice Abbot, and Bayley, Holroyd, and Best, Justices, delivering their opinions that the description was not

restrictive, and the contract for a full and complete cargo. [Abbot, 11th ed. 203.]

³ *Thomson v Inglis*, 1813, 3 Camp. 428. Here the contract was to load a full and complete cargo at Tobago, and to despatch the ship therewith in time to join the convoy that should be appointed to sail for Great Britain on the 1st August. The ship arrived at Tobago 8th July, and was ready to load on 14th. The convoy sailed on 22d July, at which time the ship might have been loaded. A small quantity of goods was then on board, and the merchant offered a full loading if the master would stay a few days. But he would not, and he set sail to join convoy. Lord Ellenborough held, that as the vessel was in time to load for the 22d, when the convoy passed, the charterers were, according to the reasonable construction of the charter-party, bound to supply her before the time when the general West India convoy passed by the station; and that the captain was not bound to wait, though he might afterwards have overtaken the convoy, as he must thereby have increased the risk of capture. A verdict went for the dead freight.

for the presumption is, that he must dispose of his goods in another ship, if that contract be broken; or that, if the ship do not arrive, he will not enter into contracts for providing the goods.¹

See further, of Demurrage, below, p. 622.

2. *Of the Obligation to pay Freight.*

The principal obligation of the merchant is to pay freight; and this obligation rests either on the charter-party, or on the bill of lading, by which the payment of freight is [567] made a condition of delivery. Lien for freight will be considered afterwards. At present, only the personal obligation is to be taken into view.

FREIGHT is stipulated either, 1. As a gross sum for the whole voyage; or, 2. At so much per ton of the ship's burden; or, 3. Rateably, at so much per ton, or cask, or bale of the goods embarked; or, 4. By time, at so much per month, week, etc. Those agreements have different effects, of which something has already been said in speaking of the furnishing of a cargo.²

PRIMAGE, or HAT-MONEY, and PETTY AVERAGE, are duties which are generally provided by the charter-party or bill of lading to be paid along with the freight. The former is a small payment to the master for his care; the latter has nothing to do with average loss, but merely covers the expense of towing, beaconage, etc. These duties are regulated entirely by usage, and sometimes are converted for a percentage on the freight.

The FREIGHT as agreed on, with these additional duties, or where no special agreement has been made, the usual and accustomed freight, may be demanded before the goods are taken possession of by the consignee: adding, on the one hand, the average contribution which may be due on the goods, either to the owner of other goods or to the ship; and deducting, on the other, what may be due for average contributions from the ship, or the rest of the cargo, to the owner of the goods.³

A remarkable distinction exists between the stipulation of freight by time, and the ordinary case of freight in the gross, or by the measure of the cargo. In the former case, the duration of the voyage is at the risk of the merchant; in the latter, at the risk of the shipowners.

In freights on time, it is material to fix what shall be the inception or commencement of the voyage. If no time be fixed, it is from the day on which the ship breaks ground and begins the voyage.⁴

The month is understood to be a calendar, not a lunar month.⁵

1. Where, after a charter-party has been executed, a bill of lading is granted for the whole or part of the cargo, deliverable to a certain person or assigns, 'he or they paying freight,' can the master deliver the goods to a third party, holder of the bill of lading, without demanding freight at the time, and afterwards claim against the shipper under the charter-party for payment of freight? When this point first occurred in England, Lord Kenyon held the shipper not to be answerable; but the Court of King's Bench was of a different opinion, and a new trial having been granted, a verdict was under Lord Kenyon's direction given against the merchant for the freight.⁶ The doctrine is now, by subsequent

¹ *Shadforth v Higgin*, 1813, 3 Camp. 385. A ship was freighted to go in ballast for a cargo, and the merchant engaged to provide a full one, 'provided she arrives out and ready by 25th June.' The ship did not arrive till 3d July. The question was, whether the merchant was answerable for having failed to furnish her with a full cargo? Lord Ellenborough ruled this to be a condition precedent, on failure of which the defender's liability was to be avoided, and a nonsuit went accordingly. [Abbot 225.]

² See above, p. 613.

³ See below, Of Average.

⁴ *Curling v Long*, 1 Bos. and Pull. 636; *Molloy*, b. ii. chap. 4, sec. 3. See judgment of Mr. Justice Heath in *Beal v Thomson*, 3 Bos. and Pull. 405; *Abbot* 279.

⁵ *Jolly v Young*, 1 Esp. Cases 186.

⁶ *Penrose v Wilkes*, 1790, *Abbot*, 11th ed. 370.

cases, completely settled according to that decision.¹ The principle on which the English determinations have proceeded, seems correctly to accord with the true construction of the contract. That principle is, that the clause introduced into the bill of lading relative to the payment of freight is intended solely for the benefit of the shipper. So it had been decided in Scotland previously to the case quoted in the preceding note.² It has also been [568] held, that where the shipmaster has taken from the agent for the owner of the goods a bill on a third person, which is not duly honoured, the freighter is still liable on his charter-party.³ And where the original shipper still retains an interest in the goods, an assignment of the bill of lading will not discharge him of his obligation for freight.⁴

2. It has been doubted whether the person taking delivery under a bill of lading, with a condition that the consignee is to pay freight, becomes liable for payment of the freight as by personal contract. It is settled, 1. That a consignee is, in the general case, liable for the freight, and may be sued for it;⁵ but that one who is merely agent for the consignor does not become personally answerable.⁶ And, 2. That where the consignee sells to another, that other becomes liable for freight on receiving the goods. An opposite opinion was at first entertained both by Lord Kenyon and by Lord Stowell.⁷ But Lord Ellenborough held, in a case tried before him, that the taking of the goods by the purchaser under the bill of lading was a virtual assent by him (as ultimate appointee of the shippers for the purpose of delivery) to take the goods upon the terms of the bill. This opinion was confirmed by the Court of King's Bench,⁸ and is approved of by the present Chief Justice of that Court.⁹ But if it plainly appear that the freighter alone was credited, the endorsees of the bill of lading will not be personally liable for the freight after delivery of the goods;¹⁰ and the endorsee of such a bill of lading, making goods deliverable to order or assigns on payment of freight, although he has paid over the proceeds of the goods to the endorser of the bill of lading before being called on to pay the freight, will still be liable for it.¹¹

¹ *Tapley v Martens*, 1800, 8 Term. Rep. 451; *Christy v Rowe*, 1808, 1 Taunt. 300. The Court held that the master, having delivered the goods, if he could not afterwards get the freight from the consignee, might sue on the charter-party.

Shepherd v De Bernales, 1811, 13 East 565, in which last case Lord Ellenborough, who delivered the judgment of the Court, takes a very deliberate review of all the prior cases.

[*Domett v Beckford*, 5 B. and Ad. 521. Held that, where there is no charter-party, the liability of the shipper exists at common law.]

² *Wilson v Bennet*, in Admiralty, 17 Dec. 1801, Judge Cay's Notes, vol. A, p. 253. This question made only one point of the case. The Judge-Admiral's determination was affirmed in the Court of Session, 10 March 1809, 15 Fac. Coll. 254. See below, p. 618, note.

³ *Marsh v Pedder*, 1815, 4 Camp. 257. Gibbs, Chief Justice, held it to be the same as if the freighter himself had paid the freight by a bill which turned out bad. If the bill is not paid, the principal remains liable. Osy here was agent of the freighter, and settled with the plaintiff in that character. Circumstances may vary the effect of taking a bill of exchange either from agent or principal. If the party having the offer of cash, merely for his own accommodation prefers a bill of exchange, upon that he must seek his remedy.

⁴ *Kelting v Jay*, 1823, 2 S. 121, N. E. 112.

⁵ [Abbot, 11th ed. 373.]

⁶ *Ward v Felton*, 1801, 1 East 507.

⁷ *Artaza v Smallpiece*, 1 Esp. Cases 23; the *Theresa Bonita*, De Jong, 4 Rob. 236.

⁸ *Cock v Taylor*, 1811, 13 East 399. Here a bill of lading

at Alicant stated the goods to be shipped by Montgomery & Co. on the Whim, to be delivered, etc. at London, etc., to the order of Hargraeve & Dalzell, or to their assignees, he or they paying freight. The bill of lading was endorsed to William Peters, and by him to Taylor & Son of London. When the goods were delivered to Taylor & Son, no freight was demanded or paid. The master brought his action against Taylor & Son for the freight, who pleaded that, being purchasers from the original consignees, they were not liable for freight, there being no contract between them and the ship-owners, express or implied. Lord Ellenborough held the action maintainable against them, as the ultimate appointees of the shippers for delivery, and who, having taken the goods under the bill of lading, virtually assented to the terms of the bill. Verdict accordingly, and a rule refused for a new trial.

⁹ [Abbot, 11th ed. 375.]

¹⁰ *Moorsom v Kymer*, 2 Maule and Sel. 303.

¹¹ *Bell v Kymier*, 1814, 5 Taunt. 477, 1 Marsh. 146. This case Lord Ellenborough said he could not distinguish from the above. 'The holders of the bill of lading were bound to know that they were liable for the freight, and therefore should not have paid over the proceeds without first taking care that their employers had paid it.'

Dougal v Kemble, 1826, in C. P., 3 Bingham 383. [By 18 and 19 Vict. c. 111, sec. 1, it is enacted that every consignee of goods named in a bill of lading, to whom the property of the goods therein mentioned shall pass upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods, as if the contract

3. If a consignee take the goods from the shipmaster, without a distinct intimation that he means to refuse payment of freight, he will not be held entitled, however bad the condition of those goods may be, to retain them on account of a claim of damage against the master and owners.¹

[569] IN WHAT CIRCUMSTANCES FREIGHT IS DUE.—It is next important to distinguish the cases in which freight is demandable in whole or in part. The GENERAL RULE is, that freight is due only provided the voyage has been performed, and the goods delivered at the destined port. For the intention is, that the goods should be carried to a particular destination, and the agreement is to carry them thither, unless prevented by the dangers of the sea or other unavoidable accident; while the counterpart is to pay freight only if the goods be delivered at their place of destination.² But to this doctrine there are exceptions, resting on the ground either of an express contract, or on that of an implied contract, or on the equity between the parties, in the circumstances of the case.

In England this matter, as dealt with in courts of common law, rests on the narrow footing of a special contract, express or implied.³ In Admiralty, the decision proceeds not only on contract express or implied, but on the relative equity between the parties.⁴

In Scotland the mingled jurisdiction of law and equity prevents the necessity of having recourse to different principles of judgment in various tribunals. In the Court of Session, as well as in Admiralty (and in both on the same grounds as in the Admiralty of England), the equity between the parties, as well as the contract expressly entered into, or that which may be inferred from their conduct, furnish grounds of exception to the general rule above laid down. And,

1. Where the ship has been lost or disabled during the voyage, but the goods have been saved, and carried on to their destined port, freight is due, the condition or undertaking by the shipmaster being performed. And the master is entitled, with this view, either to retain the goods a reasonable time, till the ship be repaired, or to hire another vessel to complete the voyage.⁵

2. Where the goods have arrived at their destined port, but have suffered injury, it is settled, 1. That freight is due although the goods should have fallen in price, or have become damaged or spoiled by their own inherent vice.⁶ 2. That freight is due by implied contract if the merchant take the goods; and that the freight must in such case be paid without abatement on account of the damage, or of the expense in trying to remove the injury which

contained in the bill of lading had been made with himself. But this (sec. 2) is not to affect the right of stoppage *in transitu*, or claims of freight by or against the original shipper or owner of the goods.]

¹ *Pillans & Co. v Pitt*, 1825, 4 S. 350, N. E. 354.

² See the general doctrine delivered by Lord Ellenborough in *Hunter v Princep*, 10 East 378. See also *Liddard v Lopes*, *ib.* 526; *Osgood v Groning*, 2 Camp. 466.

³ Abbot, 11th ed. 396: 'Upon a review of the cases it will appear that, considering the subject with regard to the proceedings of the courts of common law of England, the right to freight *pro rata itineris* must arise out of some new contract between the master and the merchant, either expressly made by them, or to be inferred from their conduct.' See the whole passage, with the cases referred to.

⁴ *The Friends*, *Crichton*, 1 Edwards' Adm. Rep. 246. Lord Stowell, in explaining the grounds of judgment, and alluding to cases where American ships bound for France had been brought into British ports, and the full freight was given, said: 'In these cases the Court gave the master the full benefit of the freight, not by virtue of his contract, because, looking at the charter-party in the same point of view as the

courts of common law, it could not say that the delivery at a port in England was a specific performance of its terms. But there being no contract which applied to the existing state of facts, the Court found itself under an obligation to discover what was the relative equity between the parties. The Court sits, no more than the courts of common law do, to make contracts between parties. But, as a Court exercising an equitable jurisdiction, it considers itself bound to provide as well as it can for that relation of interests which has unexpectedly taken place under a state of facts out of the contemplation of the contracting parties in the course of the transaction.' Below, p. 619, note.

⁵ *Jugem. d'Oleron*, art. 4; *Cleirac*, p. 17; *Ord. de Wisbuy*, art. 16; 1 Valin, *Com. sur l'Ord.* 617, 630. 'If a freighted ship,' says Lord Mansfield, 'becomes accidentally disabled on its voyage, without the fault of the master, the master has his option of two things—either to refit it, if that can be done within convenient time, or to hire another ship to carry the goods to the first port of delivery.' *Luke v Lyde*, 2 Burr. 887.

⁶ *Guidon*, c. 7, art. 10; 1 Valin 635; *Pothier*, *Charte-Partie*, No. 59, vol. ii. p. 390.

the goods have suffered, unless the damage has proceeded from the master's fault or [570] the insufficiency of the ship.¹ 3. That the merchant will not be allowed to pick and choose, taking that part of the cargo which is not damaged, and rejecting that which is spoiled.² But it has been much contested, especially among foreign jurists, whether in the case of damage by mere accident the merchant can abandon the cargo for the freight? Valin and Casaregis favour the abandonment.³ Pothier argues against it strenuously.⁴ The principle on which the former place their opinion seems extremely questionable,—that the goods forming the sole object of the contract ought to be the only pledge for the freight, and that from the goods alone payment of it ought to be exacted. This is not true, for the personal contract gives a direct action for performance, and an *actio contraria* for the hire. It would, besides, make this contract a bargain of risk to the master, without any hope of corresponding advantage, if this doctrine were sanctioned; whereas the true nature of the contract is that of carriage, or *locatio operis mercium vehendarum*, which, in being available only if the service be duly and fully performed, is already attended with risk enough, inseparable from its nature. This question Lord Chief Justice Abbot leaves doubtful in the law of England, having found no case in which the point has been adjudged; but stating in general, that he understands the right to abandon in such circumstances never to be claimed in English practice.⁵ In Scotland this matter appears to have been regulated on the principles of equity and of the contract of carriage, whereby the owners are liable for all damage arising from negligence, bad stowage, the bad condition of the ship, unskilful navigation; while it never appears to have been held that the merchant could be liberated from freight on account of damage by mere accident or irresistible force, which are cases excepted out of the edict.⁶

3. Where the goods have not arrived at their port of destination, the rules are: 1. That if the ship be disabled by sea-damage or hostile force, and the shipmaster offer to carry the goods forward, but is prevented by the merchant, he will be entitled to his whole freight.⁷ 2. That in those circumstances the shipmaster will be entitled to demand his freight [571]

¹ Lord Mansfield said: 'It is nothing to the master of the ship whether the goods are spoiled or not, provided the freighter takes them. It is enough if the master has carried them, for by doing so he has earned his freight.' *Luke v Lyde*, 2 Burr. 888. See also *Hotham v East India Co.*, Doug. 272; and *Lutwedge v Gray* [Abbot, 11th ed. 389, *infra*, note 7].

² Lord Mansfield, as above.

³ 1 Valin 636; Casaregis, Disc. 22, sec. 46.

⁴ Pothier, *Charte-Partie*, No. 59, vol. ii. p. 390. Lord Chief Justice Abbot has translated the controversy of Valin and Pothier on the soundness of the principle adopted in the Marine Ordonnance of France, by which the merchant was not entitled to abandon. *Ord. de la Marine*, liv. 3, tit. 3; *Du Fret ou Nolis*, art. 25. [Abbot, 11th ed. 382.]

⁵ Abbot 384, and the authorities there referred to.

⁶ *Lawrie v Angus*, 1677, where the shipmaster was held liable for damage to goods from 'the spouting of the pump,' not occasioned by sea-risk. M. 10107.

Lamont v Boswell, 24 July 1680, where a shipmaster was made liable for damage to lint by a leak, without any extraordinary accident. M. 10107.

⁷ In *Lutwedge v Gray & Co.*, 1732, Elchies, Mutual Contract, No. 3, two points occurred:—1. Whether the shippers, refusing the master's offer, and abandoning to underwriters who take the goods under their own charge, are liable for freight in full? and, 2. Whether the merchant taking the goods, without insisting on the shipmaster carrying them forward, is liable *pro rata itineris*?

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A ship from Glasgow to Maryland, and back to Glasgow, being on freight to Gray & Co. for the homeward cargo, and having also goods belonging to others on general freight, was cast away on the coast of Ireland, and part of the cargo (tobacco) saved. The owners offered to carry forward the goods, and provided a ship for that purpose. Gray & Co. abandoned their tobacco to the insurers, who shipped it to Bristol. The other tobacco on board in the same condition, belonging to the other shippers, they were willing to have forwarded by the ship provided; but the master would not engage to carry it to Glasgow, and they themselves had it transported thither, where part was found utterly spoiled, and was burned. In an action for freight, the Judge-Admiral held the full freight to be due for the goods saved, since the freighter offered to carry them on. The Court of Session altered this judgment, and, holding the contract of affreightment as dissolved by the loss of the ship, although some of the goods were saved, they found: 1. That the freighters, abandoning to the underwriters, did not thereby subject themselves to freight; and, 2. That freight was due *pro rata itineris* for the cargo carried to Glasgow, though some of it was found unmarketable and burned. The House of Lords reversed this, and 'declared that the merchants were liable for the full freight of such of the goods as were given up to the insurers, and for the freight *pro rata itineris* of such as were brought to Glasgow, notwithstanding some of the tobacco was found damaged and burned there.' 23 Feb. 1733, 1 Pat. 119.

In the case of *Luke v Lyde*, Lord Mansfield stated and

pro rata itineris, if the goods are received by the merchant.¹ This seems to proceed on the footing of a new agreement.² For, strictly speaking, the original contract is left unperformed, and nothing can be claimed unless either the master shall fulfil his contract, or the owners shall agree to take the goods. This seems to be a proper case for abandonment. If the merchant look for advantage in taking the goods, the risk of the loss, if he take them, is his. If the goods be in a situation whence they cannot be extricated, or at least not without an expense beyond their worth, the loss is total, and the freight not due. The goods are held to be received if they are abandoned to the insurer,³ or where, having been captured, condemned, and sold, the proceeds on a reversal and restitution are taken by the insurer.⁴ 3. If, in the course of the voyage, an obstruction shall arise not attributable to the parties, but the owners of the goods shall, on the whole, derive full advantage, as if the voyage had been completed according to the original design, freight will be due, not on the contract strictly speaking, but on the equity between the parties. So, in the case of American ships bound to France or Holland, even during the subsistence of the extensive blockading system against France, the full freight was held to be due, where the owners of the cargoes made their election to sell the goods in England; and where they did not, it was left to them to settle the freight with the master. 'The Court (says Lord Stowell) considered a voyage from America to this country very nearly the same in effect as a voyage [572] to those contiguous countries to which those vessels were originally destined: in all probability, the markets of this country were not less favourable than in the blockaded ports; and no doubt the sale was executed with every attention to the interests of the owners of the cargo.'⁵ 4. If the voyage be divisible, there are practical distinctions and exceptions

relied on the above case, and said that Lord Chancellor Talbot delivered as the reasons of the above judgment in the House of Lords, 'That the whole freight is due upon the goods sent to Bristol, because the master offered a ship to carry the goods to Glasgow, which was the port of delivery. But as the master declined carrying the other goods to Glasgow (the port of their delivery), as to them he ought to be paid only *pro rata*, viz. as much as was proportionable to his carrying them to Youghal, the place where the accident happened.' 2 Burr. 885, 887.

¹ See the above-cited case of *Luke v Lyde*, where fish were to be carried to Lisbon, and the ship was captured on the seventeenth day, and, being recaptured, was carried into Bedford in Devonshire, and the fish sent to Bilbao, where it fetched about a third of the prime cost. In an action for freight, half the cargo was held to have perished, and the owners were allowed freight in the proportion of seventeen days to twenty-one, which would have brought the ship to her port of delivery.

See the *Copenhagen*, 1 Rob. Adm. Rep. 289; *Christy v Row*, 1808, 1 Taunt. 300.

² This further illustrated in the case of *Cook v Jennings*, 7 Term. Rep. 381; *Mulloy v Backer*, 5 East 316; and by the observations of Lord Chief Justice Abbot, 370, and the cases which he has cited.

[It would seem that an agreement to accept the goods at an intermediate port, so as to entitle the owners to freight *pro rata itineris*, may be implied from the merchant's failure to answer a notice sent to him, that the cargo would be sold on his account. The *Soblomsten*, 1 L. R. Adm. and E. 293.]

³ See the preceding note. See also *Luke v Lyde*, 2 Burr. 882.

Wilson v Bennet, 10 March 1809, 15 Fac. Coll. 251. Here

a ship, freighted from Dundee to Bridport with grain, was stranded off Portland Island. The shippers abandoned to the underwriters, who took delivery of the greater part of it, and had it sold. The master did not claim his lien for freight, but an action was afterwards brought against the shippers. The Judge-Admiral decreed for 'such proportion of the stipulated freight as shall correspond to the part of the voyage performed, and the quantity of grain received, in respect that the obligation to pay freight in general only ceases on the total loss of the goods shipped, or on the total abandonment of those goods by the freighter to the master; in respect that although the master did not take advantage of his lien over the cargo, the obligation by the charter-party still remains entire upon the freighter; in respect that the master, where the partial non-fulfilment of the contract does not arise from any fault on his part, is entitled to such proportion of the freight as may correspond to the part of the stipulated voyage which the vessel has performed, and to the quantity of goods delivered, though not at the port of destination; and, finally, in respect that the abandonment of the cargo to the underwriters cannot affect the reciprocal rights of the freighter and master of the vessel.' Affirmed in the Court of Session.

⁴ *Baillie v Mondigliani*, Marshall 728; Park, p. 90.

⁵ *The Friends*, Crighton, 1810, 1 Edward's Adm. 246. This was the case of a British ship chartered at Camperachy for Lisbon. She reached the mouth of the Tagus, where she was warned off by the blockading squadron. She continued some days with the fleet; was blown out to sea; picked up by a Spanish privateer; retaken by a British cruiser, and carried into Madeira, where she was sold for the salvage. The general principle has already been explained (p. 616, note 4). In this particular case the Court held, that 'the loss being unavoidable, if the incapacity of completing the voyage

to the general rule above laid down. Where the parts are entire, and the words will allow them to be so considered, freight may be due for the part accomplished. Thus, the outward and homeward voyage may be so separated, that freight for the former may be due, although the ship is lost during the latter; but the separation must be distinct.¹ But, 5. Whatever doubts may be entertained of the right to abandon the goods to the shipmaster for freight, where the goods have arrived at their destination damaged, yet if they have been stopped short, and the freighters have no means of completing the voyage, the merchant is entitled to abandon them. So, where goods were wrongfully seized, sent to London, and delivered a considerable time, an offer afterwards to prosecute the voyage, but which was refused, was held to discharge all claim for freight.² Again, where a cargo was seized at Naples by the Government, and so prevented from being delivered to the consignee, the merchant was held not liable for outward freight.³ In all these cases, according to the true construction of the contract, the payment of freight was made to depend on an event which never happened.

4. Where part of the goods have perished, if the stipulated freight be proportional to the quantity of goods, freight will, of course, be due only for what is delivered. But if the freight is stipulated generally for the voyage, there is a difficulty. Lord Chief Justice Abbot seems to think, that where the charter-party does not afford a rule, still the owners of the ship are not to lose the benefit of the voyage; and it would seem, that where the loss is not such as to authorize an abandonment, the proportion must be settled rateably.

5. Freight, or a compensation for it, is also due where the goods have been thrown overboard for the general safety, or sold for the use of the ship. The average contribution comes in place of the goods, and the freight is due under deduction of the average [573] falling on it.⁴

6. Freight is also due wherever the merchant demands his goods before the completion of the voyage, without any fault on the part of the ship. And so the master may refuse to deliver them, unless the whole freight is paid.⁵

7. If the ship have been captured, there is no freight due. If after capture, however, there is a recapture, and the ship proceed afterwards with the cargo to the port of delivery, the right to freight revives; or if an embargo have been imposed, and the voyage have afterwards been resumed and completed, freight is due.⁶

8. Where the freight is for time, and the goods have arrived, but after detention by embargo or by capture, the freight is due in the same way as if the ship had been detained

could be exclusively attributed to one of the parties, it would be proper that the loss should fall there; but the fact is, that the calamity is common to both, for both ship and cargo were equally affected by the blockade. The ship could not have entered the interdicted port in ballast, any more than the cargo could in any other vehicle. The loss arises from the common incapacity of the one and of the other. I think, therefore, that what equity would suggest is, that the loss should be divided; and under these circumstances, I shall direct that a moiety of the freight shall be paid.'

¹ In *Taylor & Co. v Hog*, 1802, M. 10113, the voyage out and home were not specifically distinguished, and it weighed much with the Court, 1. That the outward cargo was of coals, little else than ballast; 2. That the proceeds of it were presumed invested in the homeward cargo, and so lost along with it.

The following case and opinion were produced to the Court:—

'The Court of Session, before they pronounce their judgment, wish to have the opinion of His Majesty's advocate as

to the probable decision of such a case in the High Court of Admiralty of England.' Sir John Nichol, King's Advocate, answered: 'I am of opinion that the High Court of Admiralty of England would probably hold that the contract in this case is to be considered as for one entire voyage, which not being completed, and the cargo from Gottenburgh being a total loss, that no part of the freight contracted for is due to the owner of the Agnes.' Action was denied for the freight. 8 May 1802. See *Byrne v Pattinson*. [Abbot, 11th ed. 410 et seq.]

Contrast with this the English case of *Mackrell v Simond*, Abbot 333, where the charter-party was held to recognise an outward and a homeward voyage as two distinct voyages.

² *Smith v Wilson*, 8 East 437.

³ *Stover v Gordon*, 3 Maule and Sel. 308. See also *Gibbon v Hunderz*, 2 Barn. and Ald. 17.

⁴ *Stair* i. 13. 3; *Ersk.* iii. 1. 28.

⁵ *Pothier*, *Charte-Partie*, No. 74, vol. iv. p. 396.

⁶ *The Racehorse*, 3 Rob. Adm. Rep. 101. See above, p. 565.

by contrary winds.¹ So, where a ship is detained by the crowded state of the docks or harbour, the freighter is liable to the owner of the ship for the delay.²

9. The rule already laid down respecting freight (*viz.* that it is not earned otherwise than by performance of the voyage), rests on the same views of expediency which ensure the vigilance and exertion of mariners, by making their wages depend on success. It is competent to the parties, notwithstanding, to stipulate for payment of the freight either on the loading of the goods or at particular points of the voyage; or to bargain for a sum absolute, to be paid independent of the risks of the voyage. But some difficulty has occurred in settling the lines of distinction. It would seem, 1. That where the sum stipulated is in the nature of proper freight, the right to it must depend on the condition which rules the claim of freight; and so, if that condition is not performed, the money, though paid, may be sought back.³ But where the freight is expressly stipulated to be paid by anticipation, a stipulation of repayment has been required to sustain a claim for having it back on failure of the voyage.⁴ 2. That parties may agree thus to pay by anticipation; but it will require a very precise stipulation to make the payment independent of the arrival of the ship.⁵ 3. That where the agreement is to pay a sum absolute for taking the goods on board, action may be maintained for it independently of the fate of the voyage.⁶ In cases of this sort, where there is ambiguity, it is a question for the jury what the agreement truly is;⁷ which may depend either on the bargain or on the usage.⁸

[574] DEAD FREIGHT.—The merchant who freights an entire ship is liable to pay freight for the goods transported, and a compensation for the loss suffered by the failure to supply a full cargo. What is thus paid for the unoccupied space is not, strictly speaking, freight for which the goods may be retained by the shipmaster against the consignee.⁹ It is called DEAD FREIGHT; but it is an unascertained claim of damages or unliquidated compensation for the loss of freight, recoverable in the absence and place of freight.¹⁰ The claim for dead freight is grounded on the covenant in the charter-party, by which the shipper is bound to supply a full cargo. Where the agreement is for freight at so much per ton, according to the ship's measurement, the claim of dead freight is easily ascertained. Where the cargo is intended to be various, and at different rates, it has sometimes been said that usage regulates the proportions; but it will generally be found that this must be referred to a jury or to an arbitrator, and perhaps in the end resolve into a mere inquiry into average gain on such a voyage.¹¹

The right to freight does not commence till the ship has broken ground, and begun the

¹ *Moorsom v Graves*, in 1811, before Lord Ellenborough, 2 Camp. 627. Here a ship freighted for £6300 the first eight months, and at the rate of 47s. 6d. per ton per month afterwards, was captured and confiscated, and detained some weeks. Being liberated, she took in a new cargo, which arrived. Held freight due as on a voyage never discontinued. [Abbot, 11th ed. 370.]

² *Randall v Lynch*, in 1809, before Lord Ellenborough, 2 Camp. 352.

³ *Mashiter v Buller*, 1807, 1 Camp. 84. Here the contract was contained in the bill of lading, which bore, 'Freight for the said goods being paid in London.' The voyage was to Lisbon; the ship lost in the Downs. The action was for a sum to be paid on shipment. Lord Ellenborough held these words only to mean that freight should be paid in London instead of Lisbon, but by no means to dispense with the performance of the voyage. He added, that if the defendants had paid the freight on shipment of the goods, they might have recovered every penny of it back again.

See Lord Chief Justice Gibbs' remark in 5 Taunt. 437.

⁴ *De Silvale v Kendall*, 4 Maule and Sel. 37. [On this

principle freight was held due notwithstanding loss of the goods by shipwreck, where payment was to be made in cash one month after the sailing of the vessel, the ordinary duration of the voyage being six weeks. *Leitch v Wilson*, 1868, 7 Macph. 150.]

⁵ *Gibbon v Mendiz*, 1818, 2 Barn. and Ald. 17, where it was laid down that the parties are to be presumed as bargaining for payment of *freight*, unless they expressly stipulate otherwise. Here the payment was rateably per month, but the period of payment was after the first arrival.

⁶ According to the strictness of English proceeding, however, it cannot in England be sued for as freight. *Blackey v Dixon*, 2 Bos. and Pull. 321.

⁷ *Andrew v Moorhouse*, 5 Taunt. 435.

⁸ *Gillan v Simpkin*, 4 Camp. 241. [Abbot, 11th ed. 364.]

⁹ *Phillips v Rodie*, 15 East 554; *Birley v Gladstone*, 3 Maule and Sel. 205.

¹⁰ That there may be a lien for it by stipulation is true, but there is none by implied contract. See below, Of Liens.

¹¹ See the case of *Thomas v Clarke*, p. 612, note 3; also, p. 613, note 1.

voyage;¹ and therefore, whatever expense in preparation, loading, etc., may have been incurred, the freighters will not have any claim for freight if the ship be lost or captured before the voyage begins.²

If the voyage be subsequently prohibited by the Government of the country, the contract is dissolved, and the goods must be unloaded without any claim for freight arising from it. But neither will the increased danger from hostilities vacate the contract or alter the freight; nor will a temporary embargo have this effect,³ unless it be an embargo by way of reprisal against the country to which the ship belongs.⁴

In arranging a voyage, the slight hope entertained of a freight homeward sometimes leads to the alternative covenant of a *consideration* for freight homeward; or the chance of losing the market for the exported cargo suggests a stipulation that the cargo shall be brought back; or it is agreed to give a greater freight on success, and a smaller freight in case of disappointment. Under such covenants as these several questions have arisen. And, 1. It has been questioned whether a master, who had covenanted to carry out a cargo to St. Petersburg for sale, and, after waiting a certain time, to bring it back to England, was entitled to carry it to another likely market? It was held that by so doing he had substantially fulfilled the purpose of the voyage.⁵ 2. In another case, goods were to be taken to St. Petersburg and sold there, and a home cargo brought back, which was to be provided by the merchant. In that event, £4000 of freight was to be paid; but if no cargo [575] could be obtained, then £2700 was to be paid. The master was held not to have departed from his charter-party in carrying the cargo (which was not suffered to be landed at the stipulated port) to a port where he might reasonably expect a market; and where, not having succeeded in getting a cargo, he took on board goods for which there was full room in the ship, so as to earn a freight without injury to the original freighters. The master was allowed to claim the whole stipulated freight of £2700, without deduction of the freight for the goods taken on board.⁶

3. Of Lay-days and Demurrage.

To regulate the time during which the master shall be obliged to remain with his ship for the purpose of procuring a cargo, or of sailing with convoy, or of unloading at the port of delivery, it is commonly stipulated in charter-parties, 1. That a certain number of days, called LAY-DAYS, shall be allowed; or sometimes the customary time for loading

¹ Molloy, b. 2, c. 4, sec. 3. [Abbot, 11th ed. 407.] See above, p. 614.

² *Curling v Long*, 1797, in Common Pleas, 1 Bos. and Pull. 634, where, according to the usage of the Jamaica trade, the shipowners, at an expense of £310, brought the goods on board, and expended £455 on wages and provisions to the crew; and the loading being completed, the ship cleared, and waiting for convoy, she was cut out of Salt River by French privateers, and afterwards recaptured and carried back to Jamaica. The shipowners claimed in various ways, so as at least to get a part of their expense, but were nonsuited. A rule for a new trial refused, on the ground that there had been no commencement of the voyage, and no advantage gained by the merchant, and therefore neither freight nor recompense due.

³ Pothier, *Charte-Partie*, No. 100; 1 Valin 623; *Hadley v Clarke*, 8 Term. 259.

⁴ *Touteng v Hubbard*, 3 Bos. and Pull. 291; the *Isabella*, *Sovergren*, 4 Rob. Adm. 77. See 4 East 396, 487, 410.

⁵ *Fuller v Staniforth*, 11 East 232. The master carried the cargo to Stockholm (after waiting the stipulated time at St.

Petersburgh), where he sold it, and took in a new freight. He was found entitled to his freight, deducting what he had received for the freight of goods from Stockholm.

⁶ *Bell v Fuller*, 1810, 2 Taunt. 285. The Court held this to be nothing more than the case of a contract to bring back a certain quantity of goods, in which case there is no reason why the master may not earn what else he can by taking other goods on board for his own benefit. Between this case and the one in the preceding note, this distinction was made by the Court: 'There the lead was the property of Messrs. Fuller; but the lead was not brought back: it was sold at Stockholm; and, for aught that appears, the means which the captain had of obtaining any freight at Stockholm might arise from the use he made of the lead there; and on that account, perhaps, the Court of King's Bench might think that the captain, who had not been authorized or directed to act thus, but had done all this for his own benefit, should not be entitled to that profit. But in this case, on the best consideration, we think that the defenders are not entitled to deduct from the £2700 the profit which the captain made.'

and unloading; and, 2. That a further time shall be allowed, called days of DEMURRAGE, during which the ship may be detained on payment of a daily sum as hire during the delay. Two classes of cases may be distinguished: 1. Where there is a special stipulation for lay-days and demurrage; 2. Where the contract is left general, or the customary time stipulated. And,

I.—1. Where there is a SPECIAL CONTRACT for a certain number of lay-days or demurrage, this is an absolute engagement by the freighter not to detain the ship beyond these periods; and if such detention should take place, the owners of the ship will be entitled to indemnification for the delay, not merely on the express contract, but in the nature and on the principles of a claim of damage.¹ To this demand the freighter will be liable, not only where the delay shall have been occasioned by his fault, but where it shall have arisen from circumstances over which he has no control, provided they are not such as to dissolve the contract. His engagement is absolute, that the thing shall be done within the time: he is 'the adventurer, who chalks out the voyage, and is to furnish at all events the subject out of which freight is to accrue.'² So the delay occasioned by the crowded state of the docks, or the order of warehousing the goods:³ so also a merchant covenanting to furnish [576] a cargo at Gibraltar within a limited time, but prevented from doing so by a prohibition of intercourse on account of an infectious disease, was held answerable in damages to the owner.⁴ In such cases, in short, the rule is, that during the loading or unloading of the ship, the merchant runs all the risk of interruptions from necessary or accidental causes; while the shipowners have the risk of all interruptions from the moment the loading or unloading is completed.⁵ Even the unlawful seizure of goods by revenue officers occasioning delay, or detention by port regulations or custom-house restraints, is no defence against demurrage.⁶

2. If the days of demurrage be limited, and the ship be detained beyond them, the sum settled for demurrage will *prima facie* be taken as the best measure of compensation of the damage, both in convenience and in justice; leaving 'it open, however, to the shipmaster to show that more damage has been sustained, and to the freighter to show that there has been less, than this allowance would compensate.'⁷ If delay be occasioned by the merchant, by which expense is incurred, he will be liable for that expense.⁸

¹ The *Corier Maritimo*, where a ship having been captured 13th November, the captors did not come forward to try the question of adjudication. In December, a monition was taken against the captors, but they did not appear till February, when they consented to restitution. Lord Stowell allowed a simple demurrage, referring it to the registrar and merchants to fix the proportion. 1 Rob. Adm. Rep. 287.

The *Triton*, where a ship having been improperly captured, a month's demurrage was allowed. 4 Rob. Adm. Rep. 78.

See also the *Madonna Del Burso*, 4 Rob. Adm. Rep. 169. [*New Steam-Tug Co. v M'Clow*, 1869, 7 Macph. 733.]

² Lord Ellenborough in *Barker v Hodgson*, 1814, 3 Maule and Sel. 270.

³ *Struck v Tenant*, before Lord Mansfield, 1806. [Abbot, 11th ed. 269.]

Randall v Lynch, 1809, 2 Camp. 352, 12 East 179. It was agreed that 'forty days should be allowed for unloading, loading, and again unloading the said cargoes,' and that ten working days of demurrage should be allowed, at £5 a day. In this case the great press of business at the docks prevented the unloading of the vessel for thirty-five days after expiration of the stipulated lay and demurrage days. But Lord Ellenborough held that the merchant was liable, and the jury gave compensation for thirty-one days' detention, after the days of demurrage, at the rate of the demurrage settled. In King's Bench a motion to arrest judgment was discharged.

⁴ *Barker's case*, *supra*, note 2.

⁵ *Barret v Dutton*, 4 Camp. 333. The distinction was curiously brought out by the concurrence of two accidents. After a ship was ready to load, the Thames was so frozen over that it was impossible to continue the loading. After the frost the loading was resumed and completed; but the custom-house having been burnt, there was a delay of a fortnight before the clearances could be obtained. It was in evidence that it was the master's business to get the clearances. Thirty lay-days, which were stipulated, expired during the frost. The action was for demurrage from the expiration of the thirty days. Lord Chief Justice Gibbs held the frost no excuse from payment of demurrage; but the burning of the custom-house he held a defence, as it occurred after completing the lading. [Under a proviso, 'Detention by ice and quarantine not to be reckoned as laying-days,' held by the Exchequer Chamber that the exception would apply whenever there was no access to the ship by reason of ice from any one of the storing places from which merchandise was conveyed direct to the ship. *Hudson v Ede*, 3 L. J. Q. B. 412.]

⁶ *Bessey v Evans*, 1815, 4 Camp. 131. See also *Hill v Idle*, *ib.* below, p. 624, note 4.

⁷ *Moorsom v Bell*, 1811, 2 Camp. 616, before Lord Ellenborough.

⁸ The *Angerona*, Marks, 1814, 1 Dods. Adm. Rep. 382.

3. It is not merely in the case of a ship under special affreightment that the law as to demurrage takes place: it also holds in the case of a general ship.¹ This point is not likely to occur often. But, 1. Where a merchant has engaged freight in a general ship, and unduly delays to bring forward his goods, a claim for demurrage may be grounded either on the general rule of law, as for damage sustained, or on a special stipulation; and, 2. In the delivery of a cargo from a general ship, it may happen that great delay may be occasioned by those whose goods are to be delivered, who are apt sometimes to convert the ship into a sort of warehouse; or there may, on the whole, be delay without fault imputable to any one. And in contemplation of this, demurrage is often stipulated. Under contracts of this nature, it may be doubted on whom the demurrage is to fall. Where a merchant's goods happen to be in the bottom of the hold, and the stipulated lay-days are exhausted before the goods that are above them are delivered, is such merchant, though ready at the first to receive his goods, to pay demurrage? It seems to be settled in England, on the general principle already stated, that the demurrage in such a case falls on the owner of the goods still on board, leaving it to him to seek his redress against those who may have been in fault.² And although much has been said to free the innocent owners of the undermost goods from [577] a claim for demurrage at the instance of a person unable to perform his part of the contract, it has been held a good answer to this, that neither the master, nor the owner of the undermost goods, nor any one else, is in fault, but an accidental loss is to be sustained, which by the connection between the parties is laid on the owner of the goods; and that even on the principles of *locatio conductio*, the ship being detained while the goods are undelivered, the additional hire is due by the owner of the goods which are on board.

4. If demurrage be stipulated during the time the ship shall wait for convoy, the master is not entitled to claim demurrage for a single day after the convoy is ready to depart; and if stipulated while the ship is waiting for a cargo, demurrage ceases the moment the ship is fully laden, and the necessary clearances have been obtained. In either case, further detention by adverse winds, a frost setting in, or an embargo imposed, will not continue or revive the demurrage.³

5. In settling the lay-days, or the days of demurrage, the contract generally specifies 'working days,' or 'running days.' The former stipulation excludes Sundays and custom-house holidays. Under the latter the days are reckoned like the days in a bill of exchange. Where the expression is general, 'days,' the legal construction is for running days;⁴ but if usage should settle it otherwise, it rules the construction.⁵

II. Where there is NO SPECIAL CONTRACT for lay-days or demurrage; nothing said on the subject; or an agreement that the usual time shall be allowed for loading or unloading;

¹ As an authority for this, the case of *Burmester v Hodgson* has been quoted. [Abbot, 11th ed. 274.] But I do not distinctly perceive the point as in Mr. Campbell's report, 2 Camp. 488.

This has been held as law in the Scottish Court of Admiralty.

² *Leer v Yates*, where the owners of goods undermost in a ship, the delivery of which was delayed by the necessity of bonding the goods that were uppermost, were held liable in demurrage at £4 per day. 3 Taunt. 387.

The same point determined in *Harman v Gandolph*, Holt 35.

³ See the case of *Lawrie v Jameson & Co.*, below, p. 624, note 8.

Lannoy v Werry, 2 Brown's Parl. Cases 60, where two ships were freighted, with special directions as to convoy in particular circumstances, and an agreement of £6 per day for the one and £7 for the other while they should 'wait for con-

voy at Gibraltar.' On 27th September the convoy arrived at Gibraltar, and the ships stayed with the convoy a long time, partly detained by tempestuous weather. The determination in the House of Lords was, That demurrage should not be paid for such portion of the detention as was to be attributed to want of wind, or adverse winds, but for all the rest of the time during which the convoy was not ready or able to sail.

See *Liddard v Lopes*, 10 East 526.

⁴ [*Brown v Johnson*, 10 M. and W. 331; *Nieman v Moss*, 29 L. J. Q. B. 206.]

⁵ So held by Lord Eldon in *Cochran v Retberg*, 1800, 3 Espin. Cases 121: 'If it is left to the construction of law, I should be of opinion the plaintiff ought to succeed; if the fact of usage is clearly made out, that the fourteen days mentioned in the bill of lading mean working days—that is, a construction which excludes Sundays and holidays at the custom-house—there must be a verdict for the defendant.' The jury found for the defendant.

the time during which the ship must remain to load or unload will be regulated by what is customary, or reasonable, or (in circumstances not occasioned by fault of the shipper) necessary, to accomplish those acts. After this the master will be entitled to sail, if no demurrage has been stipulated; or to have his allowance for demurrage, if there is an agreement to that effect; or, if still detained, will be entitled to demand damages.¹ Under this rule, the master will not be entitled to demurrage in this case, as where a special contract for days is made, if the delay be occasioned by the crowded state of the docks;² nor [578] where the customary mode of delivery of the particular article requires more time than in ordinary delivery.³ It will be only where the difference in the requisite time of delivery is to be ascribed to the shipper or consignee that demurrage will be due.⁴

The endorsee of a bill of lading taken to assigns, has no defence against the payment of demurrage on account of having got no notice of the arrival of the ship, it being his duty to watch the arrival.⁵ And the same rule has been applied where the goods were, by the bill of lading, deliverable to a well-known merchant in London.⁶ But where the ship's name is entered so incorrectly at the custom-house, that the consignee cannot after due inquiry discover the arrival, that will be a defence.⁷

If the master be detained forcibly after the expiration of the lay and demurrage days, or if he voluntarily stay on request of the shippers, he will be entitled to damage in the nature of demurrage.⁸

¹ *Pary v Yelton*, 28 Feb. 1806, Judge Cay's Notes, vol. D, 569. Here Yelton freighted from Pary, part-owner and ships-husband, the ship *Duchess of Cumberland*, about to proceed to Toningon on a voyage, thence to Memel for timber to Leith, at 33s. 6d. per load, etc. Nothing said of lay-days or demurrage. The voyage was performed, and the ship arrived at Leith. The master, 22d October, wrote to Yelton for instructions, but got no answer; 25th, he protested for six guineas demurrage for every day after expiration of ten days from his arrival. Twenty-one days from arrival passed before the ship was unloaded. Against a demand for demurrage, the chief defence was, that none was stipulated. The Judge-Admiral held 'demurrage due at common law, wherever a ship is unnecessarily detained by the fault of the shipper or consignee, either by not timeously furnishing a cargo, or by not timeously discharging it,—no man being at liberty to convert a lawful contract into an engine of oppression: and that this doctrine was fully recognised in *Lawrie v Jameson & Co.*' (See below, note 8.) The judge allowed three guineas a day for every working day between the ship's arrival and the time when the defenders began to work on her delivery. And in this judgment the parties acquiesced.

² In *Rodgers v Forresters*, 1810, 2 Camp. 483, the freighter was 'to be allowed the usual and customary time to unload the said ship or vessel at her port of discharge.' This, in ordinary circumstances, at London, was proved to be seven days; but, for bonded goods, when the ship can get a berth. The ship entered the London Docks 25th August, and on 31st the goods were bonded, and all ready to receive them into the cellar; but the crowded state of the docks delayed the discharge till 26th October. They might have been landed immediately on payment of the duties, but not sooner with the benefit of bonding. Lord Ellenborough held, that since the bonding system was introduced, the landing of goods on immediate payment of the duties had ceased to be the usual and customary mode of unloading a cargo of wines, and so the implied contract had not been broken. Verdict accordingly.

In *Burmester v Hodgson*, a similar verdict under Mansfield, Ch. J., 1810, 2 Camp. 488, where, if the goods (brandies) were not to be bonded, but the duties paid at once, they might have been much sooner delivered. The universal custom of bonding such goods was held to rule the construction, and to bind the master to wait the turn of the dock.

³ See cases in preceding note.

⁴ *Hill v Idle*, 1815, 1 Starkie 111. In importing French wines from an intermediate port, a special order from the Lords of the Treasury being necessary, delay was occasioned in the delivery of six hogsheads of French wine from Oporto by want of this order. Lord Ellenborough held it incumbent on the importer, whose conduct occasioned the necessity of the order, to procure it, and that he ought to have provided so as to avoid delay.

⁵ *Harman v Clarke*, 1815, 4 Camp. 159; Abbot, 11th ed. 272.

⁶ *Harman v Mant*, 1815, 4 Camp. 161.

⁷ *Harman v Clarke*, *ut supra*.

⁸ *Lawrie v Jameson & Co.* The ship *Bell*, Lawrie owner, and Anderson master, was sent by Jameson & Co. of Leith to St. Petersburg for a cargo of tallow contracted for by Atkins & Co. of that city. There was no bargain as to demurrage or lay-days. The instructions by Jameson & Co. addressed the ship to Atkins & Co., and directed the master 'to get clear and sail before 1st September, N. S., as the premiums of insurance advance greatly after that day.' The ship arrived 22d July 1787, and the master applied to Atkins & Co. The tallow, owing to the dryness of the season, did not come down from the interior of the country till October. The master made a protest against the merchants for not loading by the 1st of September, but waited at desire of Atkins & Co., under an opinion that he was bound to do so. The lading was on board and the ship cleared out 28th October, and actually sailed out of Cronstadt. By contrary winds it was forced to return, and was frozen in till 11th May. The master's claims were—1. Freight; 2. Demurrage from 1st September to 11th May; 3. An indemnification to a

A protest ought always to be made; but it cannot be said to be indispensable where the charter-party settles the lay and demurrage days. Even where no days are fixed, [579] a protest appears not to be indispensable, though useful both to interpellate the shipper or his agent, and to fix the time, and adjust those circumstances about which there can at the time be no dispute.¹

SECTION III.

OF THE INDEMNIFICATION OF LOSS OR DAMAGE SUFFERED IN A VOYAGE.

This subject divides itself into four several heads of inquiry:—1. Collision of one ship against another; 2. Sacrifices for the common safety by general average of loss occasioned; 3. Salvage to those who have preserved the ship or cargo; and, 4. Contracts of Insurance.

SUBSECTION I.—OF THE INDEMNIFICATION OF LOSS FROM COLLISION OF SHIPS.

Evidence as to the true cause of the collision of ships is always of difficult access. The accident generally happens in the darkness of night; or is accompanied with a confusion and agitation, and attended by a feeling of irritation or of self-interest, which poisons the sources of evidence. Where the fact is clear that a fault has been committed, the law is settled that the owners of the ship by whose fault the damage arises must suffer the loss which falls on them, and answer for the damage to the other ship. But where it is impossible to say, on the one hand, that there is a fault proved; while, on the other, the loss obviously has arisen from no violence of the elements, but from some error, or neglect, or want of precaution, of which circumstances preclude all hope of evidence,—the case is of difficult decision, and has in various systems of jurisprudence been disposed of, or the determination at least assisted, by very different presumptions and rules.

There are four possibilities under which such an accident may happen: 1. Where there is no blame imputable to either party; 2. Where both are to blame; 3. Where the suffering party only has misconducted himself; and, 4. Where the ship that has done the damage has alone been in fault. These cases, again, seem to be properly reducible to two principles of decision: one, where pure accident leaves the loss where it lights; another, where the loss follows the fault. It is in the application of this last rule, that, in ambiguous circumstances, recourse has been had to the aid of collateral considerations of expediency and of equity.

I. Pure ACCIDENT, or *vis major*, is plainly to be distinguished from the case of negligence or fault, open or concealed. It proceeds in no degree from the act of man, as to which it never can be certain that there is not some mixture of human passion and self-interest, or some neglect and want of precaution and vigilance. It arises from physical causes alone, from the violence of the winds or seas, the effect of a hurricane, storm, lightning, or other natural calamity: as when a ship, by the violence of a tempest, is driven from her moorings, and, in collision against another vessel, sinks her, or is sunk by the blow.²

merchant for whom he had shipped flax, which he was prevented from delivering. It was admitted on all hands, that, after the protest on 1st September, the master might have returned empty, or taken another cargo. But the owner contended, that the shipmaster having waited at the desire of Jameson & Co.'s correspondents, they were answerable for the effects of the delay. The case was first adjudged in the Court of Admiralty of Scotland, and afterwards carried by appeal first to the Court of Session, and then to the House of Lords. The judgments varied. But by one judgment of the

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Court of Session, which was affirmed in the House of Lords, the shipowner was allowed his freight, and a compensation in the nature of demurrage, for the period from 1st September to 29th October, when it was proved that, by mercantile usage, the ship being clear and ready for sea, demurrage ceased. Determined in H. L. 10 Nov. 1796, 6 Brown Parl. Ca. 474, 3 Pat. 493.

¹ *Charters*, 13 Jan. 1665, M. 12501. The Court held parole evidence sufficient without a protest.

² This is a distinction acknowledged in English law as well

II. Under actual, or possible, or presumed FAULT, may be comprehended cases of actual fault or negligence, in which the proof of the fault gives the manifest and clear rule, that the guilty person shall pay the loss. Cases also may be included under this class where [580] the damage proceeds from the act of man, in circumstances where it is impossible to say to whom blame should attach.

In all the cases which have been mentioned, the first question seems to be, how the decision shall be as between the ships? The next, how matters shall be arranged between the ship and cargo of each vessel?

I. As between the SHIPS.

1. The loss must be indemnified by the ship which is in fault; and the rules by which this is to be judged of, in so far as it depends on the Court, are important to be observed. And, 1. The law imposes upon the vessel having the wind free, the obligation of taking proper measures to get out of the way of a vessel that is close-hauled, and also the obligation of showing that it has done so.¹ And a failure in either point will leave the responsibility on the owners of such vessel. 2. The neglect to furl the sails of a ship in attempting a creek or river in which others are lying; the allowing her to have too much headway to be stopped by the ordinary precautions; the neglect to drop the anchor in due time to stop the vessel's way, and other the like omissions or mistakes, will lay the responsibility on the ship so circumstanced.² 3. If every proper precaution has been taken on the part of the ship which is said to be the assailant vessel, it will next be necessary to inquire, Whether those measures were counteracted and defeated by any improper measures taken by those on board the other ship? In questions of this kind, the assistance of Masters of the Trinity House is generally taken in Admiralty;³ and failing this, and with a jury of unskilful men, it will be necessary to prove the rules of sailing, and the orders that in particular circumstances are fit to be given, that they may be compared with the facts as they appear in evidence.⁴

as in general maritime jurisprudence. Indeed, I believe the expression 'act of God,' as denoting *pure* accident, has originated in England. See below, *Buller v Fisher*, p. 629, note 6.

¹ *The Woodrop-Sims*, Jones, 1815, 2 Dod. Adm. Rep. 83.

The Thames, Drummond, 1805, 5 Rob. Adm. Rep. 345. Here the Thames had the wind free; it was daylight; the course which was taken by the Thames was voluntary; and at least a hazard was unnecessarily occasioned by the fault of those on board. The owners were made liable for the whole loss.

See *Montgomery v Craig*, 1826, 4 S. 719, N. E. 724.

² *Neptune the Second*, 1814, 1 Dods. Adm. Rep. 467; *Burns v Stirling*, in Jury Court, 1819, 2 Murr. 93.

³ See the way in which Lord Stowell disposes of such a case in the *Woodrop-Sims*, *supra*, note 1.

⁴ [Connected with this subject is the question whether the party against which a verdict of damages has been found, is entitled to deduct the amount which the injured party has recovered from underwriters. In the law of England, it is settled that he is not entitled to deduct it. The point was reserved in the First Division case of *Morison v Bartolomeo*, 1869, 5 Macph. 848; but on the pursuer's producing an assignation from the underwriters to their rights as against the defenders, judgment was given for the full amount.

By the Merchant Shipping Act, secs. 296-299, the following rules are laid down as to ships meeting each other:—

Whenever any ship, whether a steam or sailing ship, proceeding in one direction, meets another ship, whether a steam

or sailing ship, proceeding in another direction, so that if both ships were to continue their respective courses, they would pass so near as to involve any risk of a collision, the helms of both ships shall be put to port, so as to pass on the port side of each other; and this rule shall be obeyed by all steamships and by all sailing ships, whether on the port or starboard tack, and whether close-hauled or not, unless the circumstances of the case are such as to render a departure from the rule necessary in order to avoid immediate danger, and subject also to the proviso that due regard shall be had to the dangers of navigation; and as regards sailing ships on the starboard tack close-hauled, to the keeping such ships under command (sec. 296). Every steamship, when navigating any narrow channel, shall, whenever it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such steamship (sec. 297). Power is conferred on the Admiralty to make regulations requiring the exhibition of such lights, and the use of such fog-signals by such classes of ships, whether steam or sailing ships, within such places and under such circumstances as they think fit. The Admiralty may from time to time revoke, alter, or vary the same (sec. 295). This power has been exercised. And it is provided that if, in any case of collision, it appears that it was occasioned by the non-observance of any rule for the exhibition of lights or the use of fog-signals, or any of the above rules, the owner of the ship by which such rule has been infringed shall not be entitled to recover any recompense whatever for any damage sustained by such ship in such collision, unless it is shown that the circumstances of

2. Where the loss arises by pure accident, or the act of God, the rule is, that it falls where it lights. This is the rule of all the codes maritime and municipal. It is the proper case of the Roman law, as laid down by Ulpian; which, on occasion of damage by fault or negligence done by one ship to another, gave action for indemnification, but no remedy if the collision was blameless.¹ So also the rule was settled in the earlier codes of maritime law, both of the south and of the north.²

3. It is in the case which lies between these two extremes that the main difficulty is found, for the resolution of which, rules so different have been resorted to. This is the [581] case where both parties are to blame, or where there is neglect or fault which is inscrutable. By the maritime law this is a case of average loss or contribution, in which both ships are to be taken into the reckoning, so as to divide the loss. And although it may be said (according to Cleirac³) that this rule of division is a rustic sort of determination, and such as arbiters and amicable compromisers of disputes commonly follow, where they cannot discover the motives of parties, or where they see faults on both sides, this impeaches neither the justice nor the expediency of the rule. The rule of the Roman law appears to be against the determination of the maritime codes.⁴ But in the immature jurisprudence of Rome, relative to maritime commerce, the more difficult case which was forced on the attention of subsequent navigators does not appear to have occurred. In distinguishing more scrupulously the cases to which the doctrine is applicable, one case is where there is fault *on both sides*; the other, where there is fault which *cannot be fixed on either*. As to the former, Lord Stowell, the greatest authority on a question of this nature, and under whose peculiar cognizance such questions fall in England, views the doctrine consistently with the rule of the maritime codes. 'A misfortune of this kind,' he says, 'may arise where both parties are to blame; where there has been a want of diligence or of skill on both sides. In such a case, the rule of law is, that the loss must be apportioned between them, as having been occasioned by the fault of both of them.'⁵ In the other case of inscrutable fault, there seems not to have been any example in England requiring decision; while the only authority on the point in the books of Scottish law is to be found in the book which goes under the name of President Balfour, where, as one of the Sea Laws, the rule of equity, as adopted in the maritime code, is laid down as the law of Scotland.⁶ It seems, therefore, to be a

the case made a departure from the rule necessary (sec. 298). And if any damage to person or property arises from the non-observance by any ship of any of the rules, such damage shall be deemed to have been occasioned by the wilful default of the person in charge of the deck at the time, unless it is shown that a departure from the rule was necessary (sec. 299).]

¹ Dig. lib. 9, tit. 2; Ad Leg. Aquil. l. 29, secs. 2 and 4.

² Consolato del Mare, edit. Casareg. c. 197-200, edit. Boucher, c. 200-203; Jus Maritimum Hanseat. tit. 10, art. 3; Kuricke, edit. Heinecc. p. 803. It was different in some codes, and regarded as a case of average (Ord. of Oleron, art. 14; Wisbuy 26). Lord Chief Justice Abbot, speaking of the rule of these latter authorities, by which injury without fault is to be borne equally by the owners of the two vessels, adds that, 'by the law of England, damage happening in this manner either to ship or cargo by mere misfortune, and without fault in any one, the proprietors of the ship or cargo injured must bear their own loss (*Buller v Fisher*). I have already mentioned that such a misfortune is considered as a peril of the sea, and in this respect the civil law agrees with the law of England.' Abbot, p. 354.

In general, says Marshall, 'by the marine law, an injury done by collision to a ship or her cargo, where no blame is

imputable to the master of either, the loss is to be equally borne by the owners of both. But this rule is not adopted by the law of England.' He also refers to the case of *Buller v Fisher*, in 1800. Marshall on Insurance, p. 493.

³ Us et Coutumes de la Mer, p. 68.

⁴ See above, notes 1 and 2.

⁵ *The Woodrop-Sims*, 2 Dods. Adm. Rep. 85.

Le Neve v Edinburgh & London Shipping Co., decided in House of Lords, 15 June 1824, 2 Sh. App. Ca. 395. 'The Lords find that both ships in this case were in fault, and that the whole damage sustained by the owners of the ship Wells, and of the cargo, which were sunk and lost, should be borne equally by the parties; and find, therefore, that the appellants are liable to the respondents in the sum of £1535, 16s., one-half of the value of the Wells and of her cargo, such half not exceeding the value of the Sprightly and her freight. And the Lords further find, that the appellants are not liable to pay interest on the said sum of £1535, 16s., and that they and the respondents ought to bear and pay their own expenses.' [*Clyde Shipping Co. v Glasgow, etc. Steam Packet Co.*, 1859, 21 D. 1327. The rule of equal division of loss obtains, although the fault may have been greater on one side than the other. *Boettcher v Carron Co.*, 1861, 23 D. 322.]

⁶ Sea Laws, c. 52; Balf. Pract. 625.

point still open to consideration, both in England and here. In legal arrangement it belongs to the doctrine of Average or Contribution; and the point is, whether it be not consistent with equity and expediency that the contribution or average of such a misfortune, in the case of inscrutable fault, as well as in the case of obvious fault on both sides, shall comprehend both ships, to equalize the loss as if all were embarked on the same bottom. In point of equity, much undoubtedly may be said on both sides; in point of expediency, there appears to be no sufficient protection, without some such rule, for weak and small vessels against stronger and larger ships, the masters and crews of which will undoubtedly be more careless when they know that there is little risk of detection, and none at all of direct damage to their vessel, by which a smaller ship may be run down without injury to the assailant. But under the rule alluded to, the fear of loss will operate as strongly on the masters of large ships as of small, since the damage is to fall proportionally on both; and if thus equal vigilance and tenderness can be secured on the part of large ships against small, as if they were themselves in danger of direct injury, this rule of maritime law is recommended by very strong reasons of expediency.

It is very true that the laws already quoted from the Consolato del Mare may be construed as not entirely consistent with that rule. But while the cases there stated are at [582] least such as arise out of physical accident, all the northern codes of maritime law accord with the doctrine. The laws of Oleron and those of Wisbuy, the code of the Hanse Towns, the Ordonnance de la Marine of Louis XIV., and last of all, the Code de Commerce, all divide the damage according to the same rule which is laid down by Balfour in his Sea Laws, as already quoted.¹ And the principle of the rule is approved of by the most eminent commentators and jurists of the Continent.²

Taking this, then, in these circumstances as a question not yet settled by any judicial determination, and respecting which any decision to be given would probably be ruled by the maritime law, as grounded on strong reasons of expediency, and established by all the authorities quoted, the question of contribution would on that footing include two points: 1. Whether the ships are to contribute *equally*, or *proportionally to their value*? The laws of Wisbuy made a rateable contribution.³ The laws of Oleron made it a contribution in equal shares.⁴ So did the Hanseatic code.⁵ And the chief authorities seem to favour this rule. Valin, in arguing this matter, after quoting the various authorities, states not only the law, but the principle, to be in favour of an equal division of the loss, without regard to the value of the ships, as not only shorter and plainer, but as better fitted to operate on the minds of shipmasters, who might otherwise be careless of their course.⁶ It will be observed that the responsibility of shipowners is limited to the value of the ship and freight by the laws already taken notice of, both by the general statute relative to liability for losses arising by perils of the sea, and also by the Pilotage Acts. It will also be observed, however, that the Pilotage Acts do not extend to Scotland. 2. The next question would be, whether the cargo of the ship is to suffer contribution as well as the ships themselves? It

¹ Jus Marit. Hanseat. tit. 10, art. 1; Jugement d'Oleron, art. 13; Ordon. de Wisbuy, art. 26, 50, 67, 70; Ordon. de la Marine, l. 3, tit. 7, art. 10, where the rule of partition is laid down as the general rule, the case of damage by fault or negligence being brought in as an exception; Art. 11, Code de Commerce, l. 2, tit. 13, No. 487.

² Kuricke ad Dict. tit. Jur. Marit. Hanseat. p. 220 (edit. Heinecc. p. 801). He adds, that the same rule is followed in the Danish, Lubeck, Prussian, and Hamburgh laws.

In Holland the rule is followed, 'propter bonum publicum et culpæ probandæ difficultatem' (Neostadii Decis. 49).

Cleirac seems justly to place it on a presumption that both are blameable, and their justifications unsatisfactory (Us et Coutumes de la Mer, pp. 67, 68).

Pothier places the rule on the footing of equity and public expediency, 'that shipmasters may be more careful in taking all possible precautions' (Avaries, No. 165, vol. ii. p. 426).

Emerigon gives also his full approbation to the rule as well founded in principle (vol. i. p. 417, ch. 12, sec. 14, No. 3).

Valin justifies the doctrine on reasons of expediency (vol. ii. pp. 165-169).

³ Ord. de Wisbuy, art. 67.

⁴ Jugement d'Oleron, art. 14.

⁵ Jus Marit. Hans. c. 10, art. 1; 4 Kuricke, edit. Heinecc. 801; Vinnius in Peck. 263.

⁶ Valin, vol. ii. p. 166.

ought always to be recollected in this question, that the owners of the cargo cannot possibly be in fault, and that the reason of expediency on which mainly the rule of the maritime code rests cannot therefore apply to them, while no case of proper average can arise where there is not a voluntary sacrifice for the common safety.¹

It is a different question whether a cargo damaged in the collision should be deprived of the benefit of the contribution to be made by the other ship; for this is part of the damage which has been occasioned by the misfortune; and if it were to be considered merely as a peril of the sea, as between the merchant and his own shipowners, he who may perhaps have suffered the most would unjustly be left without a remedy. According [583] to some authorities, the cargo ought in such a case to have the benefit of the contribution.² Valin dissents, and lays it down as law, that the contribution is only between the ships, to the total exclusion of the cargoes from the benefit as well as from the burden.³ The former rule, however, seems to have been adopted by the House of Lords in a case already referred to.⁴

In cases of damage by collision, it is no defence to the owners that the ship in fault is under the direction of a pilot, and that the remedy lies against him. They are liable in the first place, and must seek their remedy against the pilot.⁵

II. As between the SHIP and the CARGO, it can admit of no doubt, that if damage have arisen to the cargo from the fault of the master of the ship in which it is embarked, the merchant will have indemnification against the master and owners, under the limitation of the Acts already referred to.⁶ But if the ship be under the guidance of a pilot at the time, the remedy will be only against him, by the English pilot laws; 6 Geo. iv. c. 125, sec. 55.

If the loss is by accident, it is a peril of the sea, which must fall where it lights, and which is excepted from the obligation in the charter-party.

If the damage should arise in that case of inscrutable fault which we have already treated so much at large, as between the owners of the cargo and the owners of the ship which carries it, the rule appears to be, that it is a mere peril of the sea, and within the exception in the charter-party.⁷

SUBSECTION II.—OF INDEMNIFICATION OF LOSS BY GENERAL AVERAGE; AND OF THE LEX RHODIA DE JACTU.

Among the losses and injuries incident to a sea-voyage, some are of a nature to affect only the subject which directly suffers injury; in others, the loss happening to one subject is relieved by a general contribution on the part of all concerned in the adventure, towards the indemnification of the sufferer. The latter description of injury or loss forms what is properly to be called an average loss, the loss being spread by average allotment over the

¹ See above, *Le Neve's case*, p. 627, note 5.

On this point much difference is to be found in the codes and authorities in maritime law. The Hanseatic Code excluded the cargo from contribution (*Jus Marit. Hans.* art. 2 and 4). The laws of Wisbuy and of Oleron included the cargo (*Ord. de Wisbuy*, art. 26 and 67; *Jugem. d'Oleron*, art. 4; and *Kuricke* (p. 803) and *Vinnius* (in *Peck*. 264) seem to approve of this). But *Cleirac* and *Valin* are against it, and their reasons seem to be good.

² *Kuricke* 803; *Vinnius ad Peck*. 264.

³ 2 *Valin* 167-169.

⁴ See *Le Neve's case*, *supra*, p. 627, note 5.

⁵ *Neptune the Second*, 1 *Dods. Adm. Rep.* 467.

⁶ See *Buller v Fisher*, 3 *Esp. Cases* 67. Here two ships, the *Patriot* and *Matthew*, were sailing in one direction, the *Atlas* in another. The *Matthew* was to leeward when they

saw the *Atlas* coming, and kept close to the wind in order to give the *Atlas* an opportunity to pass. This the *Atlas* mistook, and unable to weather both ships, she and the *Patriot* ran foul of each other, and the *Atlas* went down. Lord Kenyon said: 'That if the defendants have been guilty of any degree of negligence, and it can be proved that the accident could have been prevented, they, the owners, would certainly have been liable on the charter-party; but they are exempt by the condition of the charter-party from misfortunes happening during the voyage which human prudence could not guard against, against accidents happening without fault in either party. I am of opinion that neither ship could be deemed to be in fault, and that the misfortune must be taken to be within the exception of the perils of the sea.'

⁷ See above, *Buller v Fisher*, note 6.

whole. The former is also commonly called *average*, though strictly speaking it is not entitled to the name, but is merely a partial loss. In using the term *average*, however, to express these very different sorts of loss, the words *general* and *particular* are added. A GENERAL AVERAGE is a loss incurred by sacrificing something for the common benefit, towards which the whole concern is bound to contribute *pro rata*, because it was undergone for the general preservation of the whole. SIMPLE or PARTICULAR AVERAGE is one of those incorrect expressions which, though in familiar use, and sufficiently understood by persons [584] versant in the matter, are apt to mislead. It means nothing more than the damage incurred by or for one part of the concern, and which that part alone must bear. The loss of an anchor, the starting of a plank, the leaking of a cask, the accidental loss of part of the ship, or of goods washed from the deck, are examples of simple or particular average, or loss incident to the proprietor that suffers. The loss of masts, or rigging, or goods, cut away or thrown overboard, to ease the ship and lessen the common danger, are examples of general average.¹ It is of the latter, or general average loss, that we are now to treat. The doctrine is important, not only in regulating questions between shipowners and merchants whose goods have been put on board, but in questions of insurance of daily occurrence; for insurers are liable to indemnify the insured against those contributions which are properly denominated general average.

ROMAN LAW DE JACTU MERCIUM.—The doctrine of general average takes its origin from the LEX RHODIA DE JACTU, a part of that code of maritime law which has already been mentioned as the most ancient in Europe, and which was adopted by the Romans and all the nations of the Mediterranean. This law, establishing a partnership or rule of contribution for indemnifying sacrifices made for the common safety, has been praised and commented on in every maritime country in Europe, more perhaps than any other part of the marine law. Commentators have expressed their wonder and admiration that a law so perfect in policy and in justice should be found in the most ancient code of marine law, while it is that very character of manifest equity which most naturally recommended it to early adoption. The justice of contributing after the danger is passed, and the ship and cargo saved, to the repairing of the loss of what has been sacrificed in order to obtain that safety, could not fail to suggest itself to the framers of a code of maritime regulations. The reasons in policy have been engrafted afterwards.

The text of the Rhodian law is to be found in the Pandects, as preserved by Paulus: ‘*Lege Rhodia cavetur ut, “SI LEVANDÆ NAVIS GRATIA JACTUS MERCIUM FACTUS EST OMNIUM CONTRIBUTIONE SARCIATUR QUOD PRO OMNIBUS DATUM EST.”*’²

This law is illustrated and discussed in the Pandects by Paulus, Papinian, and other eminent lawyers. It forms the subject of ample and excellent commentaries in various countries of Europe, of which the most distinguished are those of Peckius and of Vinnius, which forms the third commentary of the book ‘*Ad rem Nauticam*; the short tract of Weitsen;³ the treatise of the learned and judicious Bynkershoek; the treatise of Schomberg; and the dissertations on this subject which are to be found in the works of Valin, Pothier, and Emerigon. The subject is also treated very ably by the English authors on maritime jurisprudence, Abbot, Park, and Marshall. And there is a recent essay in which a practical view of it has been given with great perspicuity and correctness.⁴ Above all, are to be estimated the lights which have been thrown on this subject by the Judge of the High Court of Admiralty in England, whose decisions on this, as on every subject which

¹ 2 Pothier, *Pret à la Grosse*, vol. iv. p. 91, sec. 44. Lord Stowell’s judgment in the *Copenhagen*, 1 Rob. 923.

² Dig. lib. 14, tit. 2; *Ad Leg. Rhod.* l. 1.

³ Quintini Weitsen *Tractatus de Avariis*, on which Van Leewin and De Vicq have each published commentaries. Weitsen’s book was first published in 1563. It was repub-

lished by Casaregis, with the two commentaries now mentioned. Casareg. vol. iii. pp. 3–30.

⁴ Essay on Average, and on other subjects connected with the Contract of Marine Insurance, by Robert Stevens, of Lloyds, of which a fourth edition was published in 1822.

has come under his cognizance, are directed at once to the decision of the cause and the improvement of the general system of jurisprudence.

GENERAL AVERAGE OR CONTRIBUTION proceeds on the principles of a partnership by necessity. Where in the danger of shipwreck or capture it is thought by those on board advisable to sacrifice any part of the cargo, or of the ship, the masts, guns, anchors, cables, and so forth, for the general safety, the loss is to be adjusted by a contribution from all [585] who have partaken of the benefit. But instead of labouring to adjust the dangerous limits of a definition, it is better to describe in a detailed and minute commentary: 1. In what circumstances, or for what losses, a contribution may be demanded; 2. What is liable to contribution; and, 3. What is the mode of reckoning, and the principles according to which the contribution is to be laid on those concerned.

1. *In what Circumstances, and for what Losses, may Contribution be demanded?*

Two things are necessary to ground the right to contribution: 1. That the property shall have been advisedly sacrificed for the common safety; and, 2. That such sacrifice shall have preserved the property of those concerned.¹

1. If unadvisedly, and without due cause, goods have been thrown overboard by a timorous master, he and his owners alone will be liable; and it has been settled as the criterion of a sacrifice sufficient to ground a claim for contribution, that it must have been the result of a consultation among those on board, as grave and deliberate as the urgency of circumstances will fairly admit.² This consultation is to be directed to two points: *First*, The necessity of lightening the ship; and, *secondly*, The goods which it is most advisable to sacrifice.³

Casaregis and the other continental writers distinguish two species of jactus; one, regular and orderly, the other tumultuous and precipitate: the former, a measure of necessary precaution against approaching danger; the latter, from the perturbation and alarm of imminent peril: the former admitting of orderly though rapid deliberation; the latter defying all consultation, where every hand with desperate effort is employed in throwing overboard whatever comes within its reach.⁴ These distinctions are perhaps more curious than useful, more the result of the elaborate study of a favourite subject than the result of practical cases and observation. In this country every such case is properly a jury question; and the distinctions of regular and irregular jactus, though founded in nature, and useful in directing the consideration of those who are to deliberate on the case to the important points, are not fit to be set down as matter of law.⁵ The presumption is, that the case falls under the class of irregular jactus, so as to relieve the master from the necessity of having been too curiously observant of regular forms;⁶ but to this presumption it is necessary that,

¹ 'Duæ res,' says Vinnius, 'concurrere debent ut actio hujus contributionis nomine competat,—1. Jactura rerum ex una parte; 2. Conservatio rerum ex parte altera.' Vinn. in Peck. 206, note a.

² [The requirement of a consultation of the crew is scarcely reconcilable with modern practice, which is founded on the absolute responsibility of the master for the safety of the ship and cargo. Accordingly, in the leading English authority, *Birkley v Presgrave*, 1 East 220, a plea on this ground was expressly overruled. See Lord Kenyon's opinion: 'The rule of consulting the crew upon the expediency of such sacrifices is rather founded in prudence, in order to avoid dispute, than in necessity. It may often happen that the danger is too urgent to admit of any such deliberation.']

³ Ordon. de la Marine, tit. 8; Du Jet et de la Contribution, art. 1 and 3; 2 Valin 175 et seq.; Civitat. Hanseat. Ordin.

Nauticæ, tit. 8; De Jactu Maris et Havaria, art. 4; Kuricke 188 et seq. See also Quæstio 32, Si ex navi, etc.; Weitsen, Tract. de Avariis, sec. 9; Van Leewin, Obs. ad Tract. Q. Weitsen, No. 20; Math. de Vicq, Obs. 21; Casaregis, Disc. 19, vol. i. p. 50; Disc. 45, p. 145, No. 25 et seq.; 1 Emerigon 605.

⁴ Targa, speaking of this irregular jactus, characterizes it as a state of alarm, where 'ogn' un gettació che li vienne alle mani; che perciò é incapace di regola.'

⁵ Any one who wishes to study this matter will find it fully discussed in the 19th and 42d Disc. of Casaregis, already referred to, and Kuricke, tit. 8, art. 4. Emerigon, in his section entitled 'Observations Générales sur le Jet,' has collected the authorities to be relied on, vol. i. pp. 605–611.

⁶ Casaregis, Disc. 45, No. 31; 1 Emerigon 605. Targa says, that during sixty years, in which he had officiated as a

in the first moment of tranquillity, an entry shall be made in the log-book of the circumstances, and a specification of the goods or articles thrown overboard, and that at the first port affidavits shall be made to the fact, to prevent the purloining of goods under the cover [586] of their having been thrown overboard. This is a universal rule.

Questions have been agitated respecting the effect of difference of opinion among those on board. The general rule laid down in all the codes, and by all the authorities, is that the majority shall decide.¹ These provisions have chiefly in contemplation, what seldom happens now, that the merchants are on board. But in every such question the judgment of the master and crew deliberately formed will rule the case; the master's opinion, where he has no adverse interest, being entitled to great weight.

2. The effect of the sacrifice must be to save the ship from the impending danger. Should the ship be wrecked in that storm, and some of the goods be saved; or should she be captured by the enemy who then has her in chase, and some of the goods be restored; those will not be liable to contribution.² But if, after having been preserved from that danger, they encounter another distinct and different, that part of the cargo or the ship which is saved contributes to the first average, according to their value as saved, deducting salvage.³ It does not seem to be laid down, whether the owners of the property so saved are to share the whole average loss with the proprietor of the goods thrown over; or only to bear such proportion as would belong to them had there been no subsequent loss, deducting the contribution of all the rest of the cargo as at the period of safety.

In the detail of particular losses, some questions of great nicety may arise.

1. The proper case is *JACTURA*, or *JETTISON*; or the casting overboard of parts of the cargo or of the ship, or guns, stores, etc., to lighten the vessel in a storm or for flight, or to enable her to float when aground. 1. Goods stowed on deck and thrown overboard are not to be relieved by contribution. They are encumbrances to the navigation, which ought not to have been there; and their ejection is to be ascribed rather to the necessity of clearing away this improper embarrassment, than to the consideration of lightening the ship. A claim for indemnity may lie against the master and owners; or the merchant, if he knew that his goods were so stowed, may be held to have run the risk himself; but the loss is not a proper average.⁴ 2. Goods on board without a bill of lading, are not to be averaged if lost.⁵ But this circumstance can only found a presumption that the goods are beyond the proper cargo, and on board without the master's consent: and this presumption may be refuted.⁶ 3. Where goods are either thrown overboard to lighten the ship, so as to float her from a bank on which she has struck, or to get her over a bar in refuge from a storm or capture, or for necessary repair; or if they be placed in lighters or boats, and lost by the sinking of the boats or lighters; these are considered as proper cases of jettison.⁷ But, 4. The lightening of the ship, in order to get over a bar at the port of destination, does not seem

magistrate at Genoa, conversant with this subject, he had known only five instances of regular jactus, all of which were suspected of fraud, because the forms had been too well observed.

¹ Consolato del Mare, c. 97; Civit. Hans. Ord. Naut. tit. 8, art. 2; Ord. de la Marine, tit. Du Jet, art. 1; Kuricke, p. 186; Weitsen, secs. 6 and 29; Casaregis, Disc. 45, No. 26.

² Ord. de la Marine, tit. Du Jet, art. 15; 2 Valin 194; 1 Emerigon 616. But if any fair distinction can be made between the chance of recovery which is given to the owners of the goods remaining on board, by the sacrifice, and that which the ejected goods have of being recovered, average seems to be due. Weitsen, de Avariis, No. 20; and Casaregis, Disc. 45, secs. 33, 34, 75. Observe in the former the word *postea*, and the case which he puts in illustration. So the case put in the Digest, l. 4, sec. 1, is of the ship having

continued afloat, and wrecked *in alio loco*. So also Erskine should be understood, resting his dictum upon that law (iii. 3. 55). [It is also to be observed that the sacrifice must be made for the general safety. Therefore, where a quantity of dollars were thrown overboard, to prevent their falling into the hands of the enemy, it was held not to be a subject of average. *Butler v Wildman*, 3 B. and Ald. 398.]

³ Ord. de la Mar. Du Jet, art. 16; 2 Valin 193; Pothier, *Avaries*, No. 114, vol. ii. p. 409; Marshall 537.

⁴ 2 Valin 189; Abbot, 11th ed. 542. This regulation of stowage is by special statute enforced in Scotland. See above, pp. 489-90. [Also, 5 Vict. sess. 2, c. 17.]

⁵ Jugem. d'Oleron, art. 8, n. 22; Loccennius 205; Cons. del Mar. 92, 112, 113, 184, l. 54.

⁶ [See *Miller v Tetherington* in Ex. Ch., 31 L. J. Ex. 363.]

⁷ 2 Valin 195; 2 Pothier, *Avaries*, Nos. 145, 146, p. 422.

to be an average loss, for which contribution is to be made, but is a loss by fault of [587] the master.¹ 5. Where goods are sent on shore in lighters for the mere purpose of debarkation, the loss is not average.² 6. The cutting away of masts, sails, cables, etc., is average, when done for the ship's safety. But it has been observed that, in practice, foreigners are apt to fall into a mistake in conceiving that every loss of mast or sail on a lee-shore is average, and particularly that such injury as afterwards requires them to be cut away entitles the shipowner to contribution; whereas these are partial losses proper to the ship.³ 7. The foreign rule, which holds as average the cutting of a cable, or loss of an anchor, in the necessary despatch of joining convoy, is not sanctioned by our practice.⁴ But similar losses occasioned by the danger of running ashore, or upon rocks, or being run foul of by other ships, or for the purpose of getting clear when run foul of, are average losses. 8. The sacrifice of sails, ropes, and other materials cut up and used at sea for the purpose of stopping a leak, or to rig jury-masts, or supply any other requisites towards the general safety, is average.⁵

2. Not only goods or parts of the ship thrown overboard, or otherwise sacrificed, are average, but also damage occasioned to other goods, or to the ship, in ejecting them: as the cutting of the deck or sides of the ship to facilitate the ejection; or the injury that follows upon the cutting down of the mast by its falling on some other part of the ship, or on goods, and occasioning damage.⁶

3. The expense of going into port, and of the operations or detention there, have given occasion to many questions. Thus, where the ship has sustained injury in a storm or hostile encounter, and goes into port to refit; this may be necessary for the general interest and safety. But it has been much questioned whether any or what part of the loss thus accruing is average. Where the injury has been voluntarily incurred as a sacrifice for the common safety (as cutting down a mast), it seems to be clear that both the expense of the repair itself, and the collateral and necessary expense of unloading and warehousing the cargo for the purpose of making the repairs, with the extra expense of maintenance and wages during the detention, are average.⁷ Where the cause of going into port is damage sustained by a peril of the sea, it was decided in the Roman law that the expense of refitting, and the collateral expenses, were not average.⁸ It was held otherwise in Holland;⁹ [588] and in an early English writer the rule is laid down in the same way.¹⁰ In France the

¹ The rule is laid down generally by Callistratus: *Navis onustæ levandæ causa quia intrare flumen vel portum non potuerit cum onere* (Dig. lib. 14, c. 2, l. 4); by Peckius and Vinnius, p. 242; by Weitsen, sec. 17; and by Casaregis, Disc. 46, sec. 29. But the point which I have stated seems rather to be omitted than implied in those authorities. The principles on which contribution may justly be denied are: 1. That the master is in fault by taking a cargo which the port will not admit; and, 2. That each merchant whose goods are on board, takes such risk as in the ordinary course of that voyage may fall on him. Pothier draws the distinction plainly, and satisfactorily shows that the lightening of a ship for gaining access to the destined port is not average, but a loss by the fault of the master. 2 Pothier 423; *Avaries*, sec. 146.

² 2 Valin 195.

³ Stevens on Average, 15, 16.

⁴ Stevens, p. 16.

⁵ Stevens, p. 18.

⁶ Dig. lib. 14, tit. 2; Ad Leg. Rhod. l. 4, sec. 2; Ord. de la Mar. art. 14; Pothier, *Avaries*, No. 115; 2 Valin 190; Marshall 542. [Abbot, 11th ed. 528.]

Casaregis, in Disc. 19, relates a case of the mainmast of a

ship having been broken in a tempest, so that it was necessary to cut the stays and ropes; and in falling, it carried off the stern and part of the side, by which all the goods there stowed were thrown into the sea, and other damage sustained. If in this case the mast had been cut down, instead of having been broken by the tempest, the consequential loss would have been rightly adjudged average.

⁷ Lord Stowell in the *Copenhagen*, 1 Rob. Ad. 249. See also *Plummer v Wildman*, below, p. 634, note 4.

⁸ So Julianus answered in a case where a ship, having met with a violent storm, and having her masts and rigging destroyed by lightning, was forced to go into a port to refit. Having put to sea again, and delivered her cargo safely, the question was, Whether the owners of the cargo were bound to contribute to the loss suffered by the shipmaster? Julianus decided that he was not '*respondi non debere*.' *Hic, enim sumptus instruendæ magis navis quam conservandarum mercium gratia factus est*. Dig. lib. 14, tit. 2; ad Leg. Rhod. l. 6. And conformably with this the doctrine is given by Vinnius ad Peck. p. 266; Kuricke, de Jur. Marit. 774; Roccus, not. 59.

⁹ Ricard, Neg. d'Amsterdam, 280.

¹⁰ Beawes, *Lex Mer.* 166.

same doctrine prevailed: the loss by delay, the expense of unloading, warehousing, and loading, and the maintenance of the crew, were held average; not the expense of the repairs themselves, unless they were of a more than ordinary cost.¹ In England, of late years, the doctrine of Beawes was questioned,² though it seems to have had the assent of Mr. Justice Buller on one occasion.³ In several recent cases the matter has been much discussed; and the result of those determinations may thus be stated: 1. That where the general safety requires a ship to go into port to refit, by whatever accidental cause occasioned, the necessary expense of going into port, of preparing for the refitting of the ship, by unloading, warehousing, reloading, and even the charges of the crew during the necessary detention, are average. 2. That the costs of the repairs, so far as they accrue solely to the ship itself as a benefit, and are costs which would have been necessary at any rate in that port on account of the ship alone, are not average. 3. That, wherever the expense of repairs is such as would not have been incurred but for the cargo on board (as, for example, such as, though necessary for the ship, might have been made with safety to her in a port where they would have been less costly), the extra expense is average.⁴

[589] 4. But it is not enough that benefit has arisen to the cargo or general interest: it must be a benefit proceeding from an act done with a view to the general interest.⁵

¹ 1 Emerigon 625.

² Marshall 539; Abbot, 11th ed. 530. The point is settled by the recent cases. See below.

³ *Da Costa v Newnham*, 2 Term. Rep. 407.

⁴ The doctrine of this paragraph will be proved and illustrated by the following cases:—

1. *Jackson v Charnock*, 8 Term. Rep. 509. But it will be observed, that here there was a peculiarity in the charter-party, by which the ship was to be kept in repair at the freighter's expense.

2. *Power v Whitmore*, 1815, 4 Maul. and Sel. 141. Here the ship encountered a storm off the Isle of Wight, which damaged her bowsprit. This, with the appearance of stormy weather, induced the master and crew to go into port, where the damage was repaired, and they stayed twenty days to avoid the storm. The master claimed the expense of this repair, and the maintenance and wages of the crew during the twenty days' stay, as general average. The Court of King's Bench rejected the claim. Lord Ellenborough said, that here there was no sacrifice of part for the sake of the rest. The damage incurred was by the violence of the wind and weather, and the only sacrifice made by the master was of their time and patience.

3. *Plummer v Wildman*, 1815, 3 Maul. and Sel. 482. Here the ship suffered by collision, so that for the general safety, and in order to prosecute the voyage, she was obliged, after cutting away part of the rigging, to return and refit in a West India port. The particulars claimed as contribution were: pilotage into Kingston; surveying and repairing the damage; wharfage and cooerage on landing, and stowing the cargo during the repairs; the charges of reloading; wages and crimpage for replacing deserters. Lord Ellenborough said, that if the return to port was necessary for the general safety of the whole concern, it seems that the expenses unavoidably incurred by such necessity may be considered as the subject of general average. It is not a question so much what was the first cause of the damage, as whether the effect produced was such as to incapacitate the ship, without endangering the whole concern, from further prosecuting her voyage, unless she returned to port and

removed the impediments. As far as removing the incapacity is concerned, all are equally benefited by it; and therefore it seems reasonable that all should contribute towards the expense of it. But if any benefit ultra the mere removal of this incapacity should have accrued to the ship by the repairs done, inasmuch as that will redound to the particular benefit of the shipowner only, it will not come under the head of general average; but that will be a matter of calculation upon the adjustment. The amount of the expense of repairing, to be placed to the account of general contribution, must be strictly confined to the necessity of the case; and the arbitrator will have to determine how much was expended upon such repairs as were absolutely necessary to the enabling the ship with her cargo to prosecute the voyage; and for so much, and no more, the defendant will be liable to contribute. As to the charge for the captain's expense during the unloading, repairing, and reloading, the shipowner must bear the captain's expenses, and crimpage must be disallowed: it does not come under general average. The other judges concurred.

[The distinction between the two last cited cases is scarcely brought out by the author with his usual clearness. The cases are expressly distinguished by Lord Ellenborough in *Power v Whitmore*. In that case the claim of average was rejected on the ground that the going into port to refit, *although necessary*, was a consequence of accident resulting *from peril of the sea*. In *Plummer v Wildman* the damage to be repaired was *voluntary cutting of the bowsprit rigging*, and the repair of *this damage* was a proper subject of average.]

⁵ See *Power v Whitmore*, above, note 4.

Covington v Roberts, 2 New Rep. 378. This was a case of damage occasioned to a ship by carrying too great a press of sail to effect escape from a privateer which had captured her. The cargo was saved, together with the ship, but the hull and masts were damaged. The benefit to the cargo was held as incidental, not the object and cause of the damage.

Taylor v Curtis, Holt 192, 6 Taunt. 608, 2 Marshall 309. This was a ship separated accidentally from convoy, which defended herself against an American privateer, whom she beat off. She arrived at St. Thomas' almost a wreck, and

5. Where a ship is purposely run on shore to prevent her foundering at sea, or to shun the manifest danger of striking on rocks, and she is got off with damage, this is an average loss.¹

The rule is the same when the vessel is run on shore to avoid capture.²

6. The expense of employing workmen to perform extraordinary service for the safety of the ship is average.³

7. Damage done to ship or cargo during a combat, the issue of which has saved the ship and cargo, and sums expended in curing the wounded, seem fairly entitled to be considered as average. But the point is settled in favour of the opposite opinion.⁴

8. If the whole ship be freighted, and the master on his own account take the goods of other merchants on board clandestinely, the jettison of those goods, if the owner of them had notice of the encroachment, will not ground a claim of average.⁵ If he put his goods on board in *bona fide*, it would rather seem that he will have a right to claim average, the freighter having relief against the master and owners.⁶

2. Of Property liable to Contribution.

The subjects of contribution generally are: the cargo, the ship, and the freight.

I. CARGO.—The common rule is, that what pays no freight pays no average.⁷ But this is not to be strictly taken, so as, according to the old Lubeck law quoted by Langen- [590] beck (as alluded to by Magens), to exempt from average the goods taken by the master

delivered her cargo in safety. The cargo was valued at £21,000, the goods of the defendant £1000, the loss to the ship nearly £3000. An average was claimed against the defendant of £138. But it was held, after full argument, not to be a case of general average; that it was the duty of the captain and sailors to defend the ship, as much as to pump her after a leak. The loss fell where the chance of war directed it.

¹ Cons. del Mar. c. 192, 193; Roccus, p. 62, sec. 165; Beawes 165; Abbot 335; Marshall 542. Stevens says that the practice at Lloyd's has been conformable, and that the opinions of two eminent counsel sanctioned that practice; but he argues strenuously against it, as coming under the head of inevitable loss and partial damage. Stevens on Average, 31, 34; see also his Appendix, 231.

[The doctrine in the text has been confirmed and extended by an important and generally accepted decision of Mr. Justice Story, *The Colombian Insurance Co. v Ashby*, 13 Pet. Sup. Court Rep. 331. In this case, it was found that the ship had been properly run on shore when she was drifting broadside on close to the shore. The vessel was run upon a bank, where after the storm she was left high and dry. The lives of the company and the entire cargo were saved, but the ship could not be got off, and became a total loss. The owners of cargo were held liable in an average contribution, on the ground that an intentional stranding is a sacrifice of the ship for the benefit of the cargo, and that it is unreasonable to say that if a man loses his whole property for the common benefit he shall receive nothing, but if he lose part only he shall receive full compensation. In cases of fortuitous stranding, the expense of discharging the cargo, but not expenses afterwards incurred, constitute general average. *Job v Langton*, 6 El. and Bl. 779.]

² Pothier, *Avaries*, sec. 150, vol. ii. p. 425; 2 Valin 155.

³ *Birkley v Presgrave*, in King's Bench, 1 East 220.

[The cost of extra coal for a sailing vessel with auxiliary steam power, incurred for the purpose of preventing the detention of the vessel for several months had she been repaired for sailing, is not average. *Wilson v Bank of Victoria*, 2 L. R. Q. B. 203. *Secus*, as to expense of transhipment of cargo, and the unloading and reloading cargo for the purpose of repairing the ship that she may be able to proceed on her voyage. *The Copenhagen*, 1 C. Rob. 289; *Hall v Jansen*, 4 Ell. and Bl. 500; *Moran v Jones*, 7 Ell. and Bl. 523.]

⁴ So Pothier decides, *Avaries*, No. 144, distinguishing this from the dangers of the sea.

Emerigon, on the other hand, in a case where a French ship suffered much damage in fight with an English ship, gave his opinion that it was a case of simple average, the exposure to an enemy being as much a peril of the sea as a storm. He supports his opinion by the authority of Cleirac, *sur les Jugemens d'Oleron*, art. 9, tit. 5, p. 50; of Casaregis, *Disc.* 46, No. 43; *Disc.* 121, No. 3; of Targa, 256; Kuricke, tit. 14, art. 3.

Valin says that the damage sustained by the ship and goods in a combat to avoid capture is common average, 'although Kuricke, Targa, and Casaregis are of a different opinion' (2 Valin 156).

In *Robertson v Brown*, 1785, M. 13430, the Court of Session decided against the sufferers, contrary to what had been the prevailing opinion of Scottish merchants, on the strength of certificates that such had been the view taken in London in the course of the American and French war.

This confirmed in England in *Taylor v Curtis*, p. 634, note 5.

⁵ Abbot 355. But he does not distinguish what seems very material, viz. the *bona* or *mala fides*.

⁶ Weitsen, de *Avariis*, sec. 32. His illustration is a little homely, and not very good. Casaregis, *Disc.* 46, No. 40; Kuricke, *Com. ad Jur. Marit. Hanseat.* tit. 8, art. 4, p. 200.

⁷ 1 Magens on Insurance 62.

out of friendship freight-free. The substantial rule is, that goods (or even money as goods), if on board for traffic, whatever may be their nature, or to whomsoever they may belong, and whethêr paying freight or not, provided they be on board at the time of the ejectment, are liable to contribution.¹ 1. That part of the cargo which has been thrown overboard is liable to contribution; otherwise the owners of it would alone be exempted from loss.² 2. Goods stowed on the deck are liable to average if saved; and more justly, perhaps, than if better stowed.³ 3. There is no contribution for the passengers or crew; for it is impossible to put a value on the life of a free man.⁴ 4. The wearing apparel, personal jewels, or money in the purse of passengers or crew, do not contribute:⁵ as accessories of the person, they are by the law or usage of some states exempted;⁶ while in others they contribute, with the exception of the ordinary wearing clothes.⁷ In Scottish practice it seems only to be such luggage of passengers as is put in boxes or chests that contributes.⁸ 5. Although money in a man's pocket may be exempted, as a sort of accessory of his person, money or bills in his possession are said to be liable to contribution: at the same time, bills are not themselves valuable, and the true interest may be held, and the money recovered, without them.

II. SHIP.—The ship contributes to all average losses; but the stores and provisions do not contribute. The correct statement is, that the value of the ship, deducting provisions, stores, wear and tear, and partial loss, is the subject of contribution.⁹

III. FREIGHT contributes to average, but not the seamen's wages.¹⁰ It is not for the general benefit that the seamen should have any motive to oppose a sacrifice in which the safety of the whole is involved; while this exemption from average is no more than a fair recompense for their extraordinary exertions during the storm.¹¹ In reckoning the freight for contribution, the wages are deducted.¹²

3. Mode of valuing and apportioning General Average.

In the practical operation of adjusting the average, the value of what is lost is to be reckoned on the one hand, and on the other the value of the contributory interest, or of what is saved.¹³

I. GOODS are to be valued according to the following rules: 1. Goods jettisoned are to be taken at the market price which they would have brought at the port of delivery; freight, duties, and other charges deducted.¹⁴ 2. To goods saved a different rule is to be applied according to the circumstances. When the voyage is completed, and the average is adjusted at the port of discharge, the universal practice now is, to take the actual value of the cargo

¹ Emerigon 639, 648, sec. 11; Pothier, Avaries, No. 121; Abbot, 11th ed. 549; Marshall 543; Stevens' Essay 48.

² Pothier, Avaries, No. 123.

³ 2 Valin 189; Stevens 53.

⁴ *Corporum liberorum æstimationem nullam fieri posse*. Dig. lib. 14, tit. 2, ad Leg. Rhod. l. 2, sec. 2.

⁵ Abbot 549; Price 4; Taunt. 123. [It has been decided that jewellery and small articles of value must contribute, if not attached to the person. *Peters v Milligan*, Park, 8th ed. 296.]

⁶ 1 Emerigon 645; 1 Magens 62, 63; 2 Molloy, c. 6; Marshall 544.

⁷ Casaregis, Disc. 45, No. 7.

⁸ Ersk. iii. 3. 55.

⁹ Weitsen, Tr. des Avaries, p. 31; Stevens, p. 55.

¹⁰ [A ship was chartered from London to East India, upon condition that if the ship performed her voyage and arrived at London, and not otherwise, the stipulated freight should be paid on goods brought home. In the course of the outward voyage the ship incurred an average loss. Held that the

whole freight was liable to contribute, by reason that the homeward as well as the outward freight was put in peril, and was saved by the sacrifice incurred. *Richardson v Nourse*, 3 B. and Ald. 237. Where a part of the freight is paid in advance, the charterer who made the advance, and not the owner, must contribute in respect of such advance. *Frayes v Worms*, 19 C. B. N. S. 159.]

¹¹ 1 Magens 71; Pothier, Cont. de Louage, No. 126.

¹² Stevens, p. 64.

¹³ [The statement in the text must be confined to the case of average in its primary acceptance, in which case only the right to claim contribution is contingent on the ship or cargo being saved, and is qualified by the obligation on the part of the claimant to contribute *pro rata* along with others. But where average is claimed in respect of the expenditure of money for the general benefit, the person making it must be indemnified whether the ship and cargo are eventually saved or not. See Arnold, Mar. Ins. 3d ed. 802; Benecke 261; Tudor, Merc. Ca. 2d ed. 106.]

¹⁴ [Fletcher v Alexander, 3 L. R. C. P. 375.]

at the market price, stripped of all the charges attaching to it, as freight, duty, and landing charges; and to add the estimated neat proceeds of the goods jettisoned (taken in like manner), to the neat value of the cargo saved.¹ In the charges are not to be included [591] the premiums of insurance, nor the commission which the consignee has on sales.² Where the ship has been put back, the valuation must be at the invoice price.³ If the ship have arrived at a certain port, but unable to complete the voyage, and with no other means of sending on the goods, the value must be what the goods will bring there. 3. If the goods saved are damaged, they must be taken only at the deteriorated value, which alone has been saved.⁴ If goods jettisoned have been recovered after having suffered damage by the jettison, or if damage in the nature of average have been otherwise sustained, the value, as if sound, must be taken in the estimate for their contribution; since by the contribution from the rest they are made good to the merchant.⁵ If the cargo produce nothing, or the charges exceed the gains, or the goods be abandoned to salvors, there will be no contribution from the cargo, for there is no benefit.⁶ 4. When the freight is paid at the loading port, it is added to the value of the cargo, the merchant having then the interest in the freight, by its being converted into a charge on the goods. The loss is to be contributed, not according to the bulk or weight of the property saved, but according to its value. So gems or pearls of inconsiderable weight and bulk, but great value, pay according to the interest which the owner has in the safety of the ship.⁷

II. The valuation of the SHIP for contribution is attended with some difficulty. The wear and tear of the ship during the voyage, and the consumption of provisions and stores, make fair deductions from the value of the ship as contributory interest; and various methods have been taken in the several maritime codes to attain a general rule for this deduction. In one, the ship and freight are both taken, but at half their value;⁸ in another, the ship or the freight is excluded, at the option of the owners of the cargo.⁹ The object is to approximate as nearly as possible to the value of the ship as at the time of the average loss. This seems best to be done by taking the hull, masts, rigging, and stores, as at the time of her sailing, and then deducting the provisions and stores expended, the wear and tear of the voyage, and partial losses sustained. There seems to be another method of coming at the value; viz. to state the deteriorated value, and to add what is made good by general contribution. But the former is generally adopted.¹⁰

III. The amount of FREIGHT which is to be taken as contributory interest is the actual sum received by the shipowner, after deducting the seamen's wages, and a third of the petty average. Those are the charges with which the freight is burdened. The wages are thus saved from contribution, to encourage the easier assent of the crew to the necessary measures of safety, and from a fair consideration of the justice of rewarding their personal [592] exertions by that exemption. This deduction may come to eat up the whole freight where the voyage is very long.¹¹

The freight of the goods sacrificed is paid for by general contribution, and so must con-

¹ Marshall 546; Stevens' Essay, p. 51.

² Stevens, p. 51, note.

³ Abbot, 11th ed. 550; Stevens 52, 53.

⁴ Pothier, *Avaries*, sec. 132, vol. ii. p. 415.

⁵ Pothier, *ut supra*; Stevens, p. 52.

⁶ Stevens, p. 52.

⁷ Dig. lib. 14, tit. 2, ad Leg. Rhod. l. 2, sec. 2; 1 Emerigon 639, with the authorities there quoted; Ersk. iii. 3. 55. Lord Kames has speculated on this subject against the united authority of all the codes and all the commentaries; but with no great force of reason. 1 Principles of Equity 187.

⁸ Ord. de la Marine, du Jet, art. 7; 2 Valin 181.

⁹ Ord. de Wisbuy, art. 40; 1 Magens 57, where he states the authorities and the practice.

¹⁰ Mr. Stevens, who is an arbitrator at Lloyd's of mercantile, shipping, and insurance affairs, says (p. 58), that 'from a mass of ms. adjustments now before me, made within the last thirty years,' the formula to be recommended is the most conformable to practice. It is thus:—

Value of the ship at the outset,	£1000	0	0
Deduct partial loss,	£50	0	0
„ provisions, and tear and wear,	50	0	0
	<hr/>	100	0
		0	0

Value to contribute,	£900	0	0
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¹¹ Stevens, p. 65.

tribute. But if in an intermediate port goods are taken in for those which have been thrown overboard, the freight of them is to be deducted from that of the lost goods, else the master will gain by the loss of the owner of the goods sacrificed.¹

In concluding this subject, it may be observed, 1. That the property of the goods abandoned is still with the owner, if they be saved or recovered; and that they are not liable to contribution for any average subsequent to the jettison. And, 2. That the valuation in a policy of insurance ought not in any manner to affect the value for contribution; this valuation having the indemnity of the insured alone in contemplation, according to an express or implied bargain in the insurance contract; while the value for contribution has relation to the actual state of the property, and the benefit conferred by the sacrifice.²

SUBSECTION III.—OF SALVAGE.

This sort of indemnity, like average loss, may come into question either between the shipowners and merchants concerned in a voyage, and those entitled to a recompense for saving the property; or it may occur with insurers in the consideration of partial losses in settling under a policy.

SALVAGE is a reward or recompense given to those by means of whose labour, intrepidity, or perseverance, a ship or goods have been saved from shipwreck, fire, or capture,—the losses to which this sort of property is peculiarly exposed. It forms one of the most natural burdens on property so saved or recovered, and gives at once a remedy in Admiralty IN REM, and at common law by lien;³ and a personal action or claim against the owner to whom the property is restored.⁴

The subject of salvage is not, however, without its difficulties. How to give, on the one hand, such recompense as may fairly reward the labour and intrepidity of the salvors, and encourage their exertions and honesty; and, on the other, to prevent depredations on ships stranded or in danger, and the oppression of excessive exactions in the moment of alarm—is a difficult problem in legislation. It requires the aid of a vigilant officer, possessed of a large and honest judicial discretion. In all the codes of marine jurisprudence we find that this difficulty has been felt; that while provision has been made for the recompense of those by whose means ships or cargoes have been saved from shipwreck, capture, fire, or other impending loss, it has been found necessary, by two sets of regulations, to restrain the oppression which is too frequently practised by those into whose power accident has thrown the unfortunate. These are, 1. Penal laws against depredation; and, 2. Regulations for settling a fair and reasonable rate of salvage.

In England the provisions by statute relative to salvage make a part of certain laws, enacted principally with a view to restrain depredations on stranded and derelict property; laws which were rendered necessary by the slender aid afforded by the English common law in such cases. There are three several cases provided for, which it will be necessary to consider more fully hereafter: 1. The case of stranded ships, where application can be made to a magistrate; 2. The case of persons falling in with ships abandoned; and, 3. The case of [593] persons engaging, at the request of those interested, without the interposition of a magistrate.⁵ Severe regulations are contained in those laws against depredation, and many

¹ Stevens, p. 66.

² [It may here be observed, that the owner of the jettisoned goods is entitled to proceed at once against the underwriters for the whole amount insured, leaving the latter to recover the average contribution from the persons liable to contribute. *Dickenson v Jardine*, 3 L. R. C. P. 639.]

³ See below, Of Lien.

⁴ See Lord Stowell, in the case of the *Two Friends*, 1 Rob. Adm. Rep. 277.

⁵ 12 Anne, st. 2, c. 18; 26 Geo. II. c. 19; 48 Geo. III. c. 130; 49 Geo. III. c. 122; 53 Geo. III. c. 87. All these are laws made for preventing frauds and depredations. [See the

wise precautions taken against frauds difficult to be restrained in the unprotected or scattered state of property which has suffered shipwreck. The regulations respecting salvage form the encouraging part of those statutes; and they also are framed with humanity and wisdom, for preventing oppression in settling the recompense of salvors.

In Scotland, this matter is left chiefly to the common law. The statute of Queen Anne, indeed, has been held to extend to Scotland;¹ but the other Acts alluded to are confined to England. In Scotland, depute-admirals, and the jurisdiction of the judge ordinary of the shire, are sufficient, in the exercise of our common law, to repress the depredations which are the subject of so many anxious regulations in England.

In commenting further on the subject of salvage, it may be proper to consider, 1. Who are entitled to salvage; 2. For what acts, or in what circumstances, salvage is due; 3. Who is liable for salvage; and, 4. The principles on which the amount is to be ascertained under the common law, and the rules settled in particular cases by statute.²

I. WHO ARE ENTITLED TO SALVAGE.—1. The MASTER and CREW of the ship that is saved have no claim for salvage, however extraordinary their exertions of courage or of labour: for already, by their contract with the owners, their interest and exertions are engaged in the service of the ship and cargo.³ But when their duty as seamen is over (as by capture it is), any exertion subsequently made with success to recover and rescue the ship entitles them to recompense.⁴ One distinction is to be observed between the case of a rescue from an enemy (the crew being discharged from their duty as soon as the capture is effected), and the case of a mutiny quelled, which, however successful, does not discharge the crew. In the former case there is salvage; in the latter there is not.⁵ Another distinction is to be observed between a claim of salvage in a case of successful mutiny, where that claim is made by part of the crew, and where it is made by another vessel coming to the aid of the distressed ship. In the former case there is no claim; in the latter there is the same right as if the ship were rescued from an enemy.⁶

2. The PASSENGERS are so far in a different situation, that although they are bound while on board to labour for the common safety, as persons not on account of the accident coming from a state of safety to a state of danger, but as labouring for their own [594] preservation as well as that of others, yet they are not bound to adhere to the ship; and if a passenger do continue for the purpose of giving aid when he might have left the vessel, and especially if any extraordinary sacrifices be made, or any uncommon exertion of courage, skill, or labour, he will be entitled to recompense as a salvor:⁷ as, where a passenger under-

regulations on this subject contained in the Merchant Shipping Act, 17 and 18 Vict. c. 104, particularly secs. 458, 459.]

The case of *Baring v Day*, 8 East 57, seems to have led to the enactment of the above statute 48 Geo. III.

¹ Bankt. i. 211. 8; Kames' Stat. Law abridged, *voce* Wreck, p. 414. *Commissioners of Customs v L. Dundas*, 25 May 1810, 13 Fac. Coll. 665. [The statute is repealed by 17 and 18 Vict. c. 120.]

² [See the declaratory provision of 17 and 18 Vict. c. 104, secs. 458, 459.]

³ See above, p. 560, as to agreement for extraordinary wages.

⁴ *The Two Friends*, M'Dougall, 1 Rob. Adm. Rep. 271. Here both the captain and crew and passengers had recompense allowed them for rescuing an American ship on a voyage from Philadelphia to London.

In the *Beaver*, Conner, 3 Rob. Adm. Rep. 292, a British merchant ship having been taken by a French privateer, and all the crew except the master and a boy taken out, the master rose on five Frenchmen who had been put on board, knocked down the prize-master, and seizing his pistols, the only fire-

arms on board, drove the rest of the crew down below, and gained possession of the ship. He then steered towards the English coast, and had nearly perished in a storm, when he got help from an English frigate. They all went on board the frigate, the condition of the ship appearing desperate. But the storm abating, the master again went to his ship, and succeeded in bringing her into port. The ship was worth £6000, and Lord Stowell adjudged a salvage to the master and boy of £1000, in the proportion of £850 to the master and £150 to the boy.

⁵ *Governor Raffles*, King, 1813, 2 Dod. Adm. Rep. 14. The claim of carpenter and sailors for rising on certain Malays, who had mutinied and overcome the rest of the crew, and for finally rescuing the ship from them, was very reluctantly refused by Lord Stowell.

⁶ *Trelawney*, Lake, 1802, 4 Rob. Adm. Rep. 223.

⁷ In the case last cited of the *Two Friends*, Miller, a passenger, had a great share in the rescue; and Lord Stowell said, that 'being of opinion that Miller was in reality a passenger, and not the ship's carpenter, and that his services had been very instrumental in effecting the rescue, the Court

took the office of master on the desertion of the proper master, and by skill and labour brought the ship into port, it was held that he was entitled to recompense in the nature of salvage, as having made exertions which he was under no obligation to make, and incurred responsibilities which were not incident to his own proper character. He was held to stand in a different situation from that in which the mate would have stood had he supplied the master's place.¹

3. A PILOT employed to bring the ship into harbour is not entitled to salvage. That there is danger in the occupation of a pilot is true; but having taken up that occupation, he is not entitled to claim as the spontaneous salvors of a ship are entitled; though in the liberal allowance which the Court of Admiralty gives in all cases of danger and distress, 'the safe conduct of a ship into a port under circumstances of extreme danger and personal exertion may exalt a pilotage service into something of a salvage service. And it is held expedient for the general safety of navigation, that persons ready on the water, and fearless of danger, should by liberal reward be encouraged to go out for the assistance of vessels in distress.'²

4. A claim to share as JOINT SALVORS must be supported by proof of an actual necessity, or at least apparent necessity, for the claimants lending their help to the persons already engaged. This is grounded on an equitable consideration of the interest of the merchant on the one hand, and on the other of that of the salvors who have already accomplished the deliverance of the vessel. So, where a third party has interfered with salvors already in the act of saving a wreck, and requiring no aid for that purpose, it will be held officious and unnecessary, unless the necessity shall be shown.³ The proof of the necessity must depend on the circumstances of the case.⁴ Many nice questions have arisen as to cases [595] of joint recapture, and several determinations of the Court of Admiralty of England have thrown great light on the subject. It would appear, 1. That no previous operation on the part of a ship which has not been present at the capture, though it may have had some effect in making the enemy in possession shape the vessel's course so as to fall into the hands of the captors, is sufficient to confer a right to share in the salvage as joint captor.⁵ 2. That a king's ship, being actually in sight at the capture, is entitled to the benefit; the fate of the capture being often determined by the hopelessness of successful defence; and it being, consistently with the duty of a king's ship, the presumption of law that she has the *animus capiendi*.⁶ The rule is different as to a privateer, and even a revenue ship.⁷ 3. That constructive aid by boats not actually engaged in the capture is not sufficient, unless a case can actually be made out of intimidation from these boats.⁸ 4. That actual co-opera-

pronounced that he should be rewarded equally with the master.' And so he had £1250, besides £300 of actual expense in buying over some Danish sailors. 1 Rob. Adm. Rep. 285.

¹ *Newman v Watters*, 3 Bos. and Pull. 612. Here, the captain having abandoned the ship, those aboard applied to a passenger, who had been a naval captain, to take the command, which he did, and saved the ship. The owners offered him £200. He was found entitled to £400. Lord Alvanley directed the jury to refuse the recompense; but on a motion for a new trial, he said: 'I have since been induced to alter that opinion, particularly by what is reported to have fallen from Lord Stowell respecting the claim of a pilot paying salvage.' See next note, the case of the *Joseph Harvey*.

² Lord Stowell, in the *Joseph Harvey*, Paddock, 1 Rob. Adm. Rep. 306. This was a case in which an attempt was made to convert pilotage duty into an act of salvage, which the Court severely reprehended.

In another case, the *Sarah*, where a boat went out to the aid of a ship in distress, Lord Stowell explained the policy by

which the Court is accustomed to direct itself in adjudging rewards in which the benefit of navigation is concerned. *Ib.* p. 313, note.

³ *Maria*, Kelstrom, 1809, 1 Edwards' Adm. Rep. 175. Here two fishing smacks were employed in towing a wreck to port, when a gun-brig came up and joined in the operation, and then ordered the fishing smacks off. One pretence of justification was, that the sailors in the fishing smacks did not know where they were; another, that the wreck might have been seized by a French privateer if towed on so slowly. Lord Stowell, holding the salvors to have a *jus quæsitum*, rejected the gun-brig's claim, and disregarded both the above pleas: the first, because the master of the gun-brig was bound to give all necessary information, if wanted; the other as not made out, and a mere pretence.

⁴ *Blendenhall*, Barr, 1814, 1 Dod. Adm. Rep. 414.

⁵ *Le Niemen*, Dupotet, 1 Dod. Adm. Rep. 16, 17.

⁶ *The Sparkler*, Brown, 1 Dod. Adm. Rep. 359.

⁷ *Bellona*, Voltz, 1 Edwards' Adm. Rep. 63.

⁸ See *La Belle Coquette*, 1 Dod. Adm. Rep. 20.

tion by a privateer, either in the recapture or in the chase, will entitle her to salvage along with the king's ship;¹ and even the being engaged in the chase, and continuing to sail in the direction of pursuit, will give right as joint captor, although darkness should have prevented the sight of the capture.²

5. Whether salvage is due to the convoying ship for recapture of one of the fleet under her protection, seems to admit of very considerable doubt. It may certainly operate as an encouragement to negligence in the officer commanding the convoy, who ought to keep a sharp lookout after ships hovering about the convoy. Lord Stowell has held the point as settled in favour of the convoy, and has proceeded on that footing in subsequent cases.³ But in all those cases special regard has been paid to the question, whether there be any neglect on the part of the convoying ship established before the proper tribunal (the Lords of the Admiralty), to defeat the right of the salvors?

6. King's ships may be entitled to salvage for assistance to vessels in distress where their aid has been very splendid and extraordinary. But where such aid is given in the course of duty, and especially without any extraordinary danger or exertion, such claim is not sustained.⁴

7. The master and crew of a vessel which interferes to save, and does save, another, are alone, strictly speaking, the salvors; but a consideration is generally given also to the owners of the vessel which interferes, on account of the risk of damage, or loss of insurance to the vessel, by the crew so engaging themselves.⁵

8. Of the crew of a vessel lending assistance to a ship in distress, those who remain on board their own ships, but who are willing to go in aid, as well as those who actually are selected to go on board the distressed ship, are entitled to salvage.⁶

II. WHAT ACTS ENTITLE TO SALVAGE.—In general, the cases in which salvage is due are, Shipwreck, Recapture, and Derelict.

1. The simplest and plainest case is that in which a magistrate is called upon to give aid and protection against depredation when a ship is stranded, or in danger of it. The evils to vessels stranded, or in danger on the coast, are not merely those of shipwreck. [596] Those evils are often augmented by the depredations of the idle or the profligate who crowd to such scenes; and the Act in Queen Anne's time, already alluded to (which extends to Scotland), regulated the aid to be given, under the direction of certain public officers. By this law, all sheriffs, justices, etc., shall, on application from those in danger of being, or actually being stranded or run on shore, call together as many men as may be necessary, and require aid from king's ships, or those of his subjects in the neighbourhood, under a penalty of £100 on the superior officer who shall refuse to obey the call. The master of the stranded ship is entitled to repel by force all who shall intrude without leave of the officer of customs, etc. And provision is also made for the orderly proceedings of salvors, and for the settling of the salvage.⁷

2. But aid may be sought by those belonging to the ship without the intervention of a public officer; and this, perhaps, is the more frequent case. At common law, those who give aid are entitled to their reward; and it is the province of the Court of Admiralty in Scotland to regulate the rate of salvage, on a due consideration of the danger and exertion, repressing any oppressive promises, which in the moment of anxiety, alarm, and danger, those in hazard may be induced to give. In England, the settlement of the salvage in this

¹ *Wanstead*, Morton, 1 Edwards' Adm. Rep. 268.

² *Union*, Olmsted, 1 Dod. Adm. Rep. 346.

³ *The Wight*, Ford, 1804, 5 Rob. Adm. Rep. 315. *The Hinchinbrock*, 1786, was a similar case, in which the Court of Admiralty had refused salvage. But the Lords of Appeal reversed the sentence.

⁴ *Belle*, Betts, 1809, 1 Edwards' Adm. Rep. 66; *Francis and Eliza*, 1816, 2 Dod. Adm. Rep. 115. [By the Merchant

Shipping Act, 17 and 18 Vict. c. 104, sec. 484, it is declared that in no case shall a claim be allowed for any loss, damage, or risk caused to a ship of the Royal Navy, or for the use of any stores thereof, or for any expense incurred in order to effect such services.]

⁵ *The San Bernardo*, Laretta, 1 Rob. Adm. Rep. 178.

⁶ *Baltimore*, Baker, 1817, 2 Dod. Adm. Rep. 132.

⁷ 12 Anne, st. 2, c. 18; 1 and 2 Geo. iv. c. 75, sec. 37.

case is regulated by a statute, enacted, like the other statutes on this subject, for the suppression of frauds and depredations committed by boatmen and others, but which does not apply to Scotland.¹

3. Persons voluntarily assisting are often the most meritorious salvors, for it is in situations which preclude all regular proceedings that such aid is most necessary. The danger to be avoided in such cases is the interference of improper persons in the absence of the crew, persons whose aid is given more for the sake of depredation than of humanity. The English statute of George II.² on this subject is also a police Act for enforcing the laws against persons stealing or detaining shipwrecked goods, and for the relief of persons suffering losses thereby. It establishes a reward for persons who save ships which have been abandoned, provided they instantly give notice to a public officer. In Scotland this is left to the common law, and falls under the disposal of the Court of Admiralty.

4. The salvage of cables, packages, and other single articles cast overboard or lost, is in England under regulation of the 49 Geo. III. c. 122. In Scotland this is left to common law, by which the salvors are bound to restore the property to the proprietors, or to give it up to the Admiral-Depute for the benefit of the owner or insurers,³ on receiving a fair and reasonable salvage under the cognizance of the Court of Admiralty.

5. The rescue or recapture of vessels or goods lost by hostile attack, whether of the proper enemies of the country, or of pirates, the enemies of the whole mercantile world, entitles those engaged to salvage. The recapture of British ships is settled by statute.⁴ That of neutrals gives salvage only where the capture is in circumstances which would have justified or led to condemnation.⁵

[597] III. WHO IS LIABLE FOR SALVAGE.—The reward must be given by those who receive benefit, and who would have suffered the loss from which the exertions of the salvors have saved them. And so, in a case where, by recapture, both ship and cargo were saved (but in so far as the merchant was concerned, to no better effect than to make him liable for freight in consequence of the ship's arrival, while the goods were not worth the freight), the Court of King's Bench held the shipowners alone to be liable, in respect of the ship and freight.⁶ In one case the private property of an allied sovereign was held free from salvage.⁷

IV. OF THE AMOUNT OF SALVAGE.—The amount of salvage is in some cases fixed by statute; in others, left to the common law and judicial discretion.⁸

1. On RECAPTURE of any ship, boat, or vessel, or goods taken therein, belonging to any of the king's subjects, they are to be restored, at whatever time the original capture shall have taken place, on payment of one-eighth part of the value, if retaken by a king's ship; or if retaken by a privateer or other ship, etc., one-sixth part of the value; or if jointly by king's ship and privateer, such salvage as the judge of the High Court of Admiralty shall award.⁹ There is an exception, however, of ships which shall have been set forth by the enemy,

¹ 48 Geo. III. c. 130.

² 28 Geo. II. c. 19. [Persons guilty of misconduct, and who run the ship into one danger in attempting to rescue her from another, are not entitled to salvage (the *Duke of Manchester*, 10 Jur. 863; the *Dorset*, 10 Jur. 865). And persons who merely furnish boats, tackle, etc., are only entitled to hire for their use, not to salvage (the *Charlotte*, 12 Jur. 568).]

³ In the case of the *Commissioners of Customs v L. Dundas*, 25 May 1810, 15 Fac. Coll. 665, the question was tried, whether the Act 12 Queen Anne extends to Scotland, so as to regulate the custody, 1. of stranded vessels; and, 2. of wrecks. The contest was between the Vice-Admiral of Orkney under his commission, and the Commissioners of the Customs under the Act, claiming a right to take the exclusive charge of such vessels, without the interference of

the Admiral. But the Act 12 Queen Anne does not apply to such a case as I have stated above, but only to the case where an application has been made to the magistrate for aid.

⁴ 43 Geo. III. c. 166. See below.

⁵ The *Carlotta*, 5 Rob. Adm. Rep. 54. [See *Robinson v Thoms*, 1851, 13 D. 592; *Davidson v Jenkins*, 1844, 6 D. 765.]

⁶ *Cox v May*, 1815, 4 Maule and Sel. 152. [As to the salvor's right of retention, and the substitution of security therefor, see 17 and 18 Vict. c. 104, sec. 497.]

⁷ *Alexander, Crane*, 2 Dod. Adm. Rep. 37.

⁸ [It may also be fixed by agreement at the time. *Buchanan v Barr*, 1867, 5 Macph. 973.]

⁹ The Prize Acts of 33 Geo. III. c. 63, sec. 42; 43 Geo. III. c. 160, sec. 39; 45 Geo. III. c. 72, sec. 7; and 48 Geo. III. c.

while in his possession as ships or vessels of war: these are to be considered as prize. It has been adjudged by Lord Stowell, that the mere act of sending additional men aboard, and forcing the captured ship to act as a privateer, without any commission of war, is not sufficient to bring a ship under the exception.¹ But that eminent judge has held the exception to comprehend the case of a ship which at the time of recapture was acting as a merchant ship, but which in the intermediate period had been fitted out as a privateer.²

It has been well said, that 'the Prize Acts are drawn with no overflowing liberality towards recaptors:' that in forming the first of them, it was justly thought that a greater reward ought to have been held out to recaptors, as an encouragement to exertions of this nature; but that other opinions having prevailed, it is only left to the Court of Admiralty, in cases not within the Act, to exercise its judgment and discretion under the general maritime law.³ It is not enough to make out such a case, that a ship is cut out from a harbour, or from under a battery, instead of being recaptured at sea.⁴ But respecting droits of Admiralty, the Court will exercise their discretion.⁵

2. Rescue of foreign property is not within the Prize Acts, and therefore is left to the discretion of the Court of Admiralty on the general maritime law. It was a case of this sort which opened the discretionary power of the Court to give such a salvage to the master and his boy in the case already quoted,⁶ as the judge thought they eminently deserved.

3. In cases where the accident and the relief are not upon the coast, so as to bring the case within the Acts of Queen Anne or the later Acts, it has been held in England that the jurisdiction of the Court of Admiralty is untrammelled in considering the *quantum* [598] *meruit*. This will hold respecting all cases in Scotland, except those which fall strictly within the statute of Queen Anne; that is to say, where an application is made to a magistrate by those concerned in a ship stranded, or in danger of stranding. And the great principle on which these determinations ought to be conducted, as repeatedly laid down by Lord Stowell, is to give a liberal remuneration, looking not merely to the exact *quantum* of service performed, but to the general interests of the navigation and commerce of the country, which are greatly protected by exertions of this nature.⁷

132, are British Acts, and regulate this matter in Scotland as well as in England.

¹ The *Horatio Nelson*, 6 Rob. Adm. Rep. 320.

² *L'Actif*, Lorrial, 1 Edwards 185. He held the rule of the Prize Acts to form an exception to the general rule, that the *jus postliminii* expires where a ship has been condemned, or is carried *infra presidia*; and that what is stated as an exception to the Prize Act, is a reservation of the general law as still intended to prevail in that case.

³ Lord Stowell in the *Apollo*, Veal, 3 Rob. Adm. Rep. 308.

⁴ See the above case.

⁵ The *Haase*, Dreyer, 1 Rob. Adm. Rep. 286. This was a Dutch ship taken by a non-commissioned captor, condemned as a droit of Admiralty, and the whole was adjudged to the captors.

⁶ The *Beaver*, Conner. See above, p. 639, note 4.

⁷ [*Ascertainment of Amount of Salvage*.—By the Act 17 and 18 Vict. c. 104, secs. 460–5, it is provided that whenever any dispute arises between the owners of a ship, cargo, etc. and the salvors as to the amount of salvage, and they cannot agree as to the settlement of it by arbitration or otherwise, then, (1.) If the sum claimed does not exceed £200, the dispute is to be referred to the arbitration of two justices of the peace, resident, in case of wreck, at or near the place where it is found; or in case of services to a ship, boat, cargo, persons, etc., resident at or near the place where the ship or boat

is lying, or the first port into which the ship or boat is brought after the accident. And they may in either case appoint some person conversant with maritime affairs as umpire to decide the point in dispute. Power is conferred on the justices to call to their assistance any person conversant with maritime affairs as assessor (sec. 461). And if any person is aggrieved by the award of the justices or umpire, he may, in England or Ireland, appeal to the respective High Courts of Admiralty, and in Scotland to the Court of Session; but no such appeal is to be allowed unless the sum in dispute exceeds £50, nor unless the appellant, within ten days after the date of the award, gives notice to the justices of his intention to appeal, nor unless he take such proceeding as, according to the practice of the court of appeal, is necessary for an appeal within twenty days of the award (sec. 464). (2.) If the sum claimed exceed £200, the dispute may either of consent be referred to the arbitration of such justices, or, if the parties do not consent, shall, in England and Ireland, be decided by the respective High Courts of Admiralty, and in Scotland by the Court of Session; and it is provided that if the claimants do not recover a greater sum than £200, they shall not, unless the Court certifies that the case was a fit one to be tried in a superior court, recover any costs (sec. 460).

Retention or Lien and Sale.—Whenever any salvage is due in respect of services in assisting any ship, etc., or saving the lives of the persons belonging to the same, or the cargo, the receiver shall detain the ship and cargo, etc. until payment is

4. DERELICT.—In cases of derelict, by the old law a half was given ; by the French law, a third ; by the modern practice in this country, the recompense is discretionary.¹

5. WRECK.—The cases of wreck which fall under the Act of Queen Anne, are in Scotland to be ruled by the provisions of that Act, as those in England are. The intention of this Act, in so far as it provides for the ascertainment of salvage, was, that an easy and economical process should be placed in the power of the parties for settling all disputes on this head without going from the neighbourhood. With this view, in case of a dispute, the parties were authorized to nominate three neighbouring justices of the peace to adjust the *quantum* of gratuity to be paid to the salvors. When this imperfect remedy is found not to apply, as where the parties cannot agree, recourse must be had to the jurisdiction of the Judge-Admiral. And in general it may be observed, that in England this Act of Queen Anne, and the subsequent Acts of Geo. II. and Geo. III., have not been held to take away the jurisdiction or authority which previously belonged to the Court of Admiralty.²

made, or process has been issued by some competent court for such detention ; and if the salvage is due in respect of any wreck which has not been sold as unclaimed, he shall detain such wreck until payment is made or process issued (sec. 468). If the parties liable to pay the salvage are aware of such detention, then, in cases where the amount is not disputed, and payment thereof is not made within twenty days after the same has become due, or where the amount is disputed but no appeal lies from the first tribunal, and payment is not made within twenty days after the decision of the first tribunal, or where the amount is disputed and an appeal is competent, but is not made within twenty days, the receiver may forthwith sell the ship, cargo, or wreck, etc., or part thereof, and out of the proceeds of the sale pay all expenses, fees, and salvage, and the surplus, if any, to the owners of the property sold, or others entitled to receive it (sec. 469). Whenever salvage is claimed by the commander or crew of any ship, and the salvor agrees to abandon his lien, then, upon the master or person in charge entering into an agreement to abide the decision of the High Court of Admiralty or any Vice-Admiralty Court, and giving security to such amount as may be agreed on, such agreement shall bind the ship, cargo, and freight, and the owners, for the salvage which may be adjudged to be payable, and the salvor shall transmit the agreement and other documents to the Court in which the agreement is to be adjudicated upon (sec. 497). If a salvor elect not to proceed under the Act, he shall have no power to detain the ship, cargo, etc. ; but he may proceed otherwise as if the Act had not been passed (sec. 494).

Payment by Receiver.—When the amount of salvage has been finally ascertained, either by agreement or by the award of the justices or their umpire, but a dispute arises as to the apportionment thereof amongst several claimants, the party liable may, if the amount does not exceed £200, pay the same to the receiver of wrecks of the district, who, if he thinks fit to receive it, shall grant a certificate stating the fact of such payment, and the services in respect of which it is made, which shall be a full discharge to the party paying against the claims of all persons in respect of the services therein mentioned (sec. 466). The receiver shall then proceed to distribute the amount among the persons entitled thereto upon such evidence, and in such proportions as he thinks fit, with power to retain any moneys that may appear to him to be payable to any absent parties ; and this distribution shall be final and conclusive against the actual claimants.]

¹ Examples of the way of considering such a question, by Lord Stowell, will be found in the *Blendenhall*, Barr, 1 Dod. Adm. Rep. 414 ; and *Lord Nelson*, 1 Edwards' Adm. Rep. 79 ; *Elliotta*, 1815, 2 Dodson 75.

See 1 and 2 Geo. IV. c. 75.

² [On the subject of wreck there are the following provisions in the Act 17 and 18 Vict. c. 104 :—

(1.) *Receivers of Wreck.*—The Board of Trade throughout the United Kingdom has the superintendence of all matters relating to wreck, and may, with the consent of the Treasury, appoint any officer of customs, coast-guard, inland revenue, or any other person, to be a receiver of wreck in any district (sec. 439). And no admiral, or other person exercising admiralty jurisdiction, shall interfere with any wreck (sec. 400).

(2.) *What to be done by them.*—Whenever any ship or boat is stranded or in distress, the receiver of the district is forthwith to proceed to the place, take the command of all persons present, and assign such duties to each person, and issue such directions as he may think fit, with a view to the preservation of the ship, lives of persons, and the cargo ; but he is not to interfere between the master and his crew in matters relating to the management of the ship, unless he is requested so to do by the master (sec. 441). He may, for these purposes, summon such number of men as he thinks necessary to assist him ; require the master or person having the charge of any ship or boat near at hand to give aid with his men, ship, or boats ; demand the use of any cart or horses that may be near at hand (sec. 442), and pass over private property (sec. 446).

All cargo and other articles that may be washed on shore, or otherwise lost or taken from such ship, must be delivered to the receiver ; and any person, whether he is the owner or not, who secretes or keeps possession of, or refuses to deliver them to the receiver, shall incur a penalty not exceeding one hundred pounds, and the receiver may take them by force (sec. 443).

If any person plunders, creates disorder, or obstructs the preservation of the ship, etc., the receiver may cause such person to be apprehended, and use force for the suppression of such plundering, etc. He must, as soon as conveniently may be (or in his absence any justice of the peace), examine upon oath any person belonging to the ship in distress, or any other person as to the name of the ship, the services rendered, and such other matters or circumstances as he

SUBSECTION IV.—OF CONTRACTS OF INSURANCE.

Insurance is a contract by which the insurer or underwriter, in consideration of a sum or premium advanced, undertakes to indemnify the insured against risks or perils to which his property is exposed. It is used as the means of security against the dangers of the elements or enemy, to which ships or goods are liable while at sea; against the danger of fire, to which commodities or houses are continually subject at land; and against the chance of death, and the loss which the insured may sustain by the death of others in whose existence he has a pecuniary interest, or that which his creditors or his family may sustain by his own. It is to the first of these sorts of insurance that our attention is now to be directed. Insurance against fire and life insurances will form the subject of a subsequent chapter.

It is needless to insist on the benefits of a contract by which the insurer, dividing the loss with others, contrives on the average of his dealings to earn large gains, while the insured is secured against the ruin which would crush an individual. But the obvious necessity of some such refuge from individual disaster, amidst the perils of such a trade as ours, and the impracticability of proceeding without this expedient now that it is known, afford unquestionable proofs of the narrow limits of ancient commerce in which insurance was not practised.

The contract of insurance is settled by a written instrument called a policy of insurance, which must be stamped and pay a duty to Government, and in which are specified the premium, the risk, the names of the underwriters or insurers, and the name of the insured.

In England, this contract has been made the subject of two treatises, which stand deservedly high in public estimation.¹ In Scotland we have had no work upon this [599] subject since that of Mr. Millar: his book was published forty years ago,² and during that long period the mercantile law of Scotland has been making rapid strides towards maturity.

The chief design of the following commentaries on this subject is to present, in a concise view of the subject, some important cases determined by the Scottish courts, in many of which the judgments of the House of Lords are now to be held as law in both parts of the island.

I.—CLAIMS ON THE BANKRUPTCY OF THE INSURED.

This claim can have for its object only the premium of insurance. But as in every policy there is a clause in which 'the assurers confess themselves paid the consideration due to us for this assurance by the assured,' it is necessary to look into the history and

thinks necessary; which examination is to be taken down in writing, and he is to send one copy to the Board of Trade, and another to the secretary of Lloyd's (sec. 448).

He must also, within forty-eight hours after taking possession of any wreck, cause a description of it, and of any marks by which it is distinguished, to be posted up in the custom-house of the port nearest to the place where the wreck was found or seized; and if the value exceeds twenty pounds, he is to transmit a similar description to the secretary of Lloyd's, who is there to post it up (sec. 452). He is likewise authorized, where any wreck is under the value of £5, or of a perishable nature, or in such a condition that its sale is expedient, to sell the same (sec. 453).

(3.) *Unclaimed Wreck*.—In the event of no owner establishing a claim to wreck before the expiration of a year from the date at which the same has come into the possession of the receiver, then, if any admiral, vice-admiral, lord of any manor, etc., has given notice to, and has proved to the satis-

faction of, the receiver, that he is entitled to wreck at such place, the receiver shall, upon payment of all expenses, fees, and salvage, deliver up possession thereof to such admiral, etc. (sec. 471). But if no owner establishes his claim to wreck within the above period, and if no admiral, etc., other than Her Majesty, is proved to be entitled to it, the receiver shall forthwith sell the same; and after payment of all expenses, and such amount of salvage as the Board of Trade may in each case or by any general rule determine, pay the same into the Exchequer, and the same shall form part of the Consolidated Fund (sec. 475).]

¹ These are by Mr. Justice Park and Mr. Serjeant Marshall. See above, p. 551, notes 4 and 5.

² *Elements of the Law relating to Insurances*, by John Millar, junior, Esq., advocate, Edinburgh, 1787. Mr. Millar was son to the eminent Professor of Civil Law in the University of Glasgow. [See also Sm. Merc. Law, *infra*; Addison on Contracts, 6th ed. 492 et seq.]

intention of this clause, as affected by the usage of trade, in order to see by whom a claim for premium can be maintained.

HISTORY AND USE OF THE RECEIPT IN THE POLICY.—The acknowledgment in the policy is said first to have been intended to preclude the plea of want of consideration in an action for loss.¹ Whether it be so or not, is of little consequence. It is certain that now this clause has come to serve as the groundwork of arrangements, according to which the whole business of insurance is managed in Great Britain. This business is conducted not by the principals, but by means of brokers. Those who insure are generally capitalists, who take no active concern, but are ready to undertake any risks which are presented to them, and recommended by their broker. The merchant, on the other hand, cannot waste time, at the critical moment of effecting an insurance, in seeking out persons willing to enter into this contract with him; but he applies to his broker, who has on his list a number of persons ready at a moment's notice to sign or underwrite a policy. The broker is thus the mutual factor of the parties.² They, in their own persons, never come together, and are perhaps unknown to each other; while he, for a certain allowance by way of commission, undertakes the care of completing the contract, so as effectually to bind the parties to each other. The most effectual way of managing this complicated transaction, was to free the principals of direct intercourse, and to make the broker properly the middleman between them: to arrange it so that the relation of debtor and creditor should not subsist directly between the parties themselves, but between the broker and the several parties respectively; he undertaking the risk of recovering the premiums from the insured, and binding himself directly as debtor for the amount of them to the underwriter. According to this arrangement, mutual accounts are kept, in which the broker states in the underwriter's account all the premiums which he is authorized by the underwriter to draw, as already received, and as articles to the underwriter's credit, against which he places all return premiums or sums received for losses (if he be authorized to recover them); and he settles the account periodically with the underwriter. On the other hand, he, in account with the insured, debits him with the unpaid premiums, giving him credit for any return premiums, or for losses which he may be empowered to recover. This arrangement is accomplished by means of that receipt, which is said to have originated from the system of special pleading, but which serves this occasion so well, that it may be doubted whether it was not devised for the purpose. The receipt for the premiums, signed by the underwriter and delivered to the [600] broker, is a power or warrant to him to receive the premiums so acknowledged, as the delivery to a steward of a receipt for rent is a warrant to him to receive the rent from the tenant. On the other hand, the acknowledgment is not effectual to discharge the insured, since it is not delivered to him as his document of discharge; and thus the broker is enabled to state his accounts in the way already explained.

In England, the origin to which the receipt in the policy has been traced did certainly at one time so far prevail, that the receipt in the printed policy, being confessedly contrary to the fact, was not held to bar the underwriter's claim for premiums.³ But by recent cases it is settled that the receipt is conclusive between the parties to prove payment of the premiums, unless where there is fraud on the part of the insured.⁴

¹ Marshall 341.

² [It is to be observed, however, that he is only their agent for the purpose of effecting an insurance. Accordingly, a communication from the broker to the underwriters stating that an insurance effected by him was a mistake, and desiring that the policy might be cancelled, was held void, and the assured held entitled to recover. *Xenos v Wickham*, 1 L. R., H. L. Ca. 296, reversing judgment of Exchequer Chamber.]

³ Marshall 341.

⁴ 1 Marshall on Insurance, 3d ed. 341-2.

In *Foy v Bell*, 3 Taunt. 493, and *Mavor v Simeon*, *ib.* 497, note, special juries seem to have been strongly impressed with the notion, that to limit the effect of the receipt, as in a question between the parties to the insurance policy, might endanger the whole system of underwriting, and subvert a most important branch of trade.

Dalzell v Mair, 1808, 1 Campbell 532. *Mair* was an underwriter in a policy to *Dalzell* on goods by ship or ships from Berbice to Great Britain. *Reid* was the broker who effected the policy. The action was by *Dalzell*, the insured, against

Although the broker be placed in the relation of debtor to the one party and creditor to the other by means of the receipt for the premiums, this is only as factor, his powers being subject to recall while matters are still entire, and while no *jus quæsitum* has arisen to the insured from the credit conferred on him by possession of the receipt; and so by the recall of the broker's authority, the underwriter may be entitled to claim the unpaid premiums.¹ Bankruptcy of the broker has been held as equivalent to a recall of the man-

Mair, for recovery of the premium, the goods never having been shipped; and the plaintiff gave the policy in evidence, bearing the usual acknowledgment by the underwriters, 'confessing ourselves paid the consideration,' etc. The fact was, that Reid, the broker, was due money to Dalzell, and persuaded him, by way of satisfaction, to accept of policies of insurance underwritten for him at Reid's office. This policy was effected accordingly; and Reid having a running account with Mair, gave him credit for the premiums, but never paid any part of them. Lord Ellenborough said: 'The defendant is bound by the receipt in the policy. If a man acknowledges that he has received a sum of money from a broker, and accredits him with his principal to that amount, he shall not afterwards, as between himself and the principal, be allowed to say that the broker never paid him. It would completely knock up the insurance business if I were to allow this acknowledgment to be impeached. It is well known there are running accounts kept between the insurance broker and the underwriter; and Lord Kenyon held that the former, before paying the premiums to the latter, might maintain an action against the assured to recover the amount of them as for money paid.'

N.B.—It is proper here to observe the circumstance of the effect ascribed to the receipt, of accrediting the broker with the insured, which seems to be the main principle of the decision. [See *Sm. Merc. Law*, 7th ed. 363.]

¹ In England, this doctrine is confirmed by the following case:—

Robson v Wilson. Wilson, an insurance broker at Liverpool, sent policies to Stoddart & Co. of Newcastle, to be underwritten. Robson was an underwriter at Sunderland, who underwrote on policies presented by Stoddart & Co., on the terms usual at Newcastle and Sunderland, viz. that the broker accounts once a year with the underwriter for premiums, paying him by his acceptance at three, six, and nine months, deducting £5 on every £105 of the gross premiums, and 5 per cent. more on the net premium, in consideration of which the broker undertakes for payment of those net premiums. On 13th February Robson settled with Stoddart & Co., and got notes for the premiums due him. Stoddart & Co. failed, and a commission was issued, when there remained of the premiums on policies sent to Stoddart & Co., and underwritten by Robson, £79. A secret agreement subsisted between Stoddart & Wilson to share the commission, and Robson claimed right to have his premiums from Wilson, in whose hands they remained unpaid. At the bar, the case was argued on a ground disapproved of by the judges,—namely, on the ground of partnership between the two brokers. On the bench, the decision went on the principle laid down in the text. Lord Kenyon said, that where a factor has received money belonging to the principal, and it becomes blended with his own estate, and cannot be distinguished from it, the principal must come in with the gene-

ral creditors; but that here the money was clearly distinguishable from the bankrupt's estate, being premiums in respect of policies underwritten by the plaintiff, and remaining in Wilson's hands, to be paid to somebody. Before it is paid, the factor *del credere* becomes bankrupt. Is it not as clear as the sun that the principal may resort to this money, which is ear-marked and distinguished from the general fund of the bankrupt? No man has any lien upon it; no man has contracted debt on the confidence of its being in the defendant's hands. The case states that it was paid to him, and got into his hands as a premium, in consequence of policies underwritten by the plaintiff. Sir S. Lawrence said: The plaintiff underwrites policies in consequence of orders from the defendant. The premiums for these insurances are not remitted, but still remain in the defendant's hands. Is it not most reasonable and just that he should pay them over to the plaintiff? 15 May 1798.

The above is stated from a report in the hands of the attorney in the case, and which was produced in the Court of Session in a similar case. But I find it also reported by Marshall, p. 301, and it is confirmed by the following opinion of Mr. Baron Wood: 'I take it to be clear, that by the law and practice of England the underwriters are entitled to receive from the assured all such premiums as the broker had not actually received at the time when he became bankrupt; and that it makes no difference whether the broker do or do not receive a premium for guaranteeing the premium to the underwriters. The premiums in the hands of the insured, unpaid, are the property of the underwriters, and can only be sued for in the name of the underwriters—neither the bankrupt nor his assignee could sue for them; and consequently they form no part of the bankrupt's estate to be distributed amongst his creditors. His guaranteeing them may give the underwriter an additional security, but does not deprive him of the remedy the law gives him against the insurer who has not paid over the money to the bankrupts. I do not know of any determination reported in any printed collection directly in point with the present case. The principle will be found in a series of cases in Cook's Bankrupt Law, p. 414. The case of *Robson v Wilson* was argued before the Court of King's Bench in May 1798, by Mr. Chambre and myself. Mr. Chambre argued that case on the footing of partnership, and I followed the same line of argument in my answer; but the Court decided in favour of the plaintiff upon the principle above stated, viz. that as the premiums had not been paid over by the defendant to the brokers, who had become bankrupt, the plaintiff—the underwriter—was not bound to come in as a creditor under the commission of bankrupt, but was entitled to recover the whole of the premiums against the defendant. This case is not reported; but Mr. Meggison, who was the defendant's attorney, has a note of the judgment of the Court, which I have seen.'

The same doctrine was held in the Court of Session, in

[601] date, so as to entitle the underwriter to claim the premiums directly against the insured, where no interest of the insured as with the accredited broker, or otherwise, interferes.¹ The receipt will have the effect of laying the *onus probandi* on the underwriter, to show that neither actual payment has taken place, nor such a settlement of accounts between the parties as is equivalent to payment of the premiums.²

The claim, when made by the broker, cannot be met by the receipt on the policy. As between the broker and the insured, the receipt is no evidence of payment of the premium: it is a mere authority entrusted to the broker to recover the premiums from the insured.³

[602] The policy is the proper evidence to be produced in support of the broker's claim for premiums; for which purpose, among others, he is entitled to retain possession of it: nor can the underwriter demand it without indemnifying him.⁴

AMOUNT OF CLAIM.—The premiums in the policy are the measure of the claim. But,

1. This claim will suffer diminution or extinction by the amount of return premiums (if any be under the policy), provided the broker is entrusted with power to settle losses and returns of premium. Special powers, however, are required for that purpose; and the possession of the policy with a receipt, although it confers power to recover premiums, gives no power whatever to settle losses or return premiums. It will undoubtedly be a good answer by the insured to the claim of the underwriters themselves, after the broker's bankruptcy, that return premiums are due to the insured. Return premiums are due: 1. Where the contract is void, as for want of interest, or for illegality.⁵ 2. Where the risk has never been begun.⁶

Bertram v Richmond & Freebairn. Bertram underwrote for Richmond & Freebairn, brokers. The brokers became bankrupt; and the question arose, Whether the underwriters were entitled to get their premiums which remained still unpaid by the assured? or whether the trustee for the brokers and creditors was not entitled to draw those premiums, leaving the underwriters to claim for a dividend on the broker's estate? The Court was unanimous in holding, that although, where a factor has received money belonging to his principal, it becomes blended with his own estate, and cannot be distinguished, yet, when he becomes bankrupt before receiving it, the principal may claim his own money, which never made a part of the factor's estate, but is entirely separate and distinct. 26 Nov. 1802, M. 7122; App. Insur. No. 10, note.

¹ See preceding note, and *Muiress v Barchard*, 4 Taunt. 541, note; *Parker v Smith*, 16 East 382.

See below, Of Lien, and Of Compensation, where several important cases on this branch of law are stated.

² *De Gaminde v Pigou*, 1812, 4 Taunt. 246. De Gaminde sent orders to Larrazabel & Co. of London, to insure goods from Alicant to Britain. They applied to Messrs. Wagstaff, insurance brokers, who effected an insurance with Pigou. There were returns of premium by short interest, etc., and a loss upon one of the ships by salvage for capture and recapture. The premium was, as usual, discharged in the policy, though not paid, but only entered in account between Pigou and the broker. The broker debited the London merchants, and they again debited De Gaminde, with whose concern in the transaction, however, Pigou the underwriter was unacquainted. De Gaminde brought his action for the loss. Pigou pleaded a set-off for the premiums; and the question for the opinion of the Court was, Whether this was a good set-off? The verdict had been for the plaintiff, De Gaminde, subject to the opinion of the Court. The Court held that the receipt in the policy was a good answer to the underwriter, as conclusive evidence that the assured has paid the premium,

unless the underwriter should show that the state of the relative accounts between assured, broker, and underwriter is such as to take the case out of that ordinary rule. [Sm. Merc. L. 7th ed. 363.]

³ Mr. Campbell, in reporting *Dalzell v Mair*, takes notice of this distinction (1 Camp. 334, note); and Mr. Justice Park approves of it (p. 38).

⁴ *Scott & Gifford v Sea Insur. Co.*, 1825, 3 S. 467, N. E. 325.

[In concluding the subject of insurance brokerage, it may be noticed, that if the broker underwrite a policy for a larger sum than he is authorized to do by his employer, the underwriter will not be liable to any extent, as the obligation is held not to be susceptible of division. *Baines v Ewing*, 1 L. R. Ex. 320.]

⁵ See below, as to the Effect of Fraud. See Park 329.

[Under the head of want of interest, *over-insurance* is a ground for claiming returns of premium. Where the over-insurance arises upon a single policy, all the underwriters, whatever may be the date of their subscriptions, must contribute rateably to the return; and this rule is extended to the case where there are several policies of the same date, because a day is *punctum temporis*. But when an over-insurance results on a plurality of insurances effected of different dates, those underwriters who were originally liable to pay the whole amount of their subscriptions are entitled to retain their premiums, while the underwriters in subsequent insurances must make a rateable return for over-insurance. *Fisk v Masterman*, 8 Mees. and W. 165.]

⁶ [The rule is thus stated in a leading case:—(1.) Where the risk has not been run, whether its not having been run was owing to the fault, pleasure, or will of the insured, or to any other cause, the premium shall be returned, because a policy of insurance is a contract of indemnity. (2.) If the risk of the contract of indemnity has once commenced, there shall be no apportionment or return of premium afterwards. Per Lord Mansfield in *Tyrie v Fletcher*, Cowp. 666.]

3. Where an event has happened on which it was stipulated there should be a return ; as sailing with convoy, arriving safe, etc.¹

2. The claim for premiums, when made by the *underwriters* against the insured, will be met by the claim for loss if incurred. But this will not be a good answer to the *broker's* claim ; for he has no authority to settle, nor is he under any obligation to pay for loss, so as to make a *concursus debiti et crediti*.

3. The insured, or his creditors, will not be entitled, while the risk is undetermined, to retain the premiums, or employ them in making a second insurance ;² and action, or a claim in bankruptcy, will be effectual for the premiums, although the loss is not adjusted, and the settlement of it the subject of litigation.³

There may arise a claim, on the bankruptcy of the insured, for repayment of losses settled in ignorance of circumstances which, if disclosed, would have barred the insurer from recovery under the policy. Such a claim will not be sustained, 1. If the loss was settled in the knowledge of the circumstances ; or, 2. If settled by way of transaction or compromise ; or, 3. If the facts were all known, but the law of the case mistaken.

II.—CLAIMS ON THE BANKRUPTCY OF THE UNDERWRITERS.

On the failure of the underwriters, a claim arises to the insured, either as a present creditor for the amount of the loss, if the risk be determined, or as a contingent creditor to be ranked and have a dividend set apart. In England, no claim could be made in bankruptcy where the risk was still undetermined, until 1779, when the assured in a policy for a valuable consideration was suffered to *claim*, and, after the loss, admitted to prove and draw dividends, in like manner as if the contingency had taken place before bankruptcy.⁴ By the law of Scotland, a creditor under such a policy might at all times claim either as a contingent or as an actual creditor.

The evidence to support the claim will consist, 1. Of the policy ; and, 2. Of the proofs of the interest, of the loss, and of the fulfilment of all the conditions.

1. *Requisites of the Policy.*

The policy is a written instrument, containing the only legitimate evidence of [603] the contract.⁵ It requires certain observances which must be correctly complied with. The policy is preceded by a SLIP, which is merely a jotting or short memorandum of the terms, to which the underwriters subscribe their initials, with the sums for which they are willing to engage. But that slip cannot be received in evidence to contradict the policy.⁶ It is

¹ See Marshall 649 ; Park 562.

² *Selkirk v Pitcairn & Scott*, 1805, M. App. Insur. No. 10. See below, Of Lien.

³ *Ferrier v Sandeman*, 29 June 1809, Fac. Coll. 373. Here an action was in dependence for settlement and payment of the loss ; but the Court, in the action for premiums, held that though in practice premiums are not always paid per advance, yet in law it is held that they ought to be so paid ; and a court of law is bound to give action for them.

⁴ 19 Geo. II. c. 32, sec. 2.

⁵ *Liddel & Brunton v Kerr & Spence*, 17 Dec. 1811, was a very strong case, where a broker having concealed the name of the insured, whereby the policy was annulled (see below, p. 652, note 1), he was found liable in damages to the insured. He was then advised to bring an action against the underwriters, in which he endeavoured to turn the responsibility on them, on the ground of their having seen the original

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order to insure, bearing the name of the insured, their having on other occasions accepted premiums on a policy equally defective, and so raised a sort of practice as between them and the broker, and thus having homologated the insurance in this case. The Judge-Admiral held the underwriters liable on these grounds. But the Court of Session were unanimous in reversing that judgment, and holding that, as the policy was null, there was no ground of action against the underwriters, directly or indirectly.

See *Mills v Albion Co.*, 1826, 4 S. 575, N. E. 583. [Add. Cont. 6th ed. 493.]

⁶ In *Rogers v M'Carthy*, 1800, Park 45, Lord Kenyon, in answer to a special jurymen, who stated that in practice they considered themselves as bound by the slip, though they never signed a policy, said, that whatever obligation there might be in honour and good faith, he certainly would not be bound in law ; for, in order to enforce the claims of

nothing more than the proposal of terms preliminary to the contract; and if binding in any sense, it binds only provisionally till the subscription be full.

1. STAMP.—The policy must be stamped in terms of law,¹ otherwise no demand can be made under it; besides a penalty of £500 on the person procuring, the person subscribing the policy, and the broker effecting the insurance.

Parole evidence of the policy when lost is not admissible, if it was on unstamped paper, even though it has been destroyed wrongfully, or has fallen accidentally into the hands of the underwriters. Nor can the want be then supplied; for it is one of the risks to which the want of a stamp exposes a contract, that if it should perish before a stamp be affixed, all remedy by action is gone.²

When an instrument requiring a stamp has once been used, it cannot be altered to another purpose without a new stamp. But by the Act 35 Geo. III. c. 63, sec. 13, insurance policies may, without any additional stamp-duty, be altered after having been underwritten, provided, 1. That it be done before notice of the determination of the risk originally insured; 2. That the premium originally exceed the rate of ten shillings per cent. on the sum insured; 3. That the thing insured remain the property of the original insurers; 4. That the term of insurance shall not be prolonged beyond that permitted by the Act; and, 5. That no additional or further sum be insured by means of such alteration.

Under this provision an alteration of the time of sailing has been permitted without a new stamp.³ An alteration of property is not inferred merely from the mark on the goods [604] being altered; and this, where there is substantially no change of property, requires no new stamp;⁴ but an alteration from 'ship and outfit' to 'ship and goods' was held change of subject.⁵ An alteration of the policy by waiving the warranty of seaworthiness is not an alteration.⁶ The correction of an innocent mistake is no alteration.⁷

the assured in a court of justice, he must produce a stamped policy.

In *Marsden v Reid*, 3 East 572, where one was desirous of showing that another underwriter had subscribed the slip first, although the defender's name appeared first in the policy, Lord Ellenborough and the Court of King's Bench held that the slip, not being stamped, could not be received in evidence to contradict the written contract between the parties.

¹ 35 Geo. III. c. 63; 55 Geo. III. c. 84.

[By 7 and 8 Vict. c. 21, the duties are as follows:—

Policy of insurance upon any voyage whatever, for every £100, or fractional part of £100, charged according to the rates of premium on the sums insured, viz.:

Not exceeding 10s. per cent.,	0s. 3d.
Exceeding 10s., and not exceeding 20s.,	0s. 6d.
„ 20s., „ 30s.,	1s. 0d.
„ 30s., „ 40s.,	2s. 0d.
„ 40s., „ 50s.,	3s. 0d.
„ 50s. per cent.,	4s. 0d.

But if the separate interests of two or more distinct persons shall be insured by one policy or instrument, then the said respective duties, as the case may require, shall be charged thereon, in respect of each and every fractional part of £100, insured for any certain term or period of time:

Not exceeding six calendar months,	2s. 6d.
Exceeding six calendar months,	4s. 0d.

Policy of mutual insurance upon any voyage whatever, and not for a period of time, for every £100 or part of £100, insured to any person or persons, 2s. 6d.]

² *Rippener v Wright*, 2 Barn. and Ald. 478.

³ *Kensington v Inglis*, 8 East 273. Here a policy, originally on goods or specie on board of ship or ships sailing between 1st October and 1st June following, was, by a memorandum, *after the 1st June*, extended as to the time of sailing to 1st August. This was held good without an additional stamp, and not beyond the determination of the risk, there being no notice of loss or safe arrival, or of the final conclusion of the voyage. [Sm. Merc. L. 7th ed. 368.]

Ridsdale v Shedden, 1814, 4 Camp. 107. Here the ship was warranted to sail on or before the 28th October; on an additional premium the warranty renounced. This being before notice of determination of risk, no new insurance, and no new subject, was held good without a new stamp.

Fairley v Christie, 7 Taunt. 416.

⁴ *Hubbard v Jackson*, 4 Taunt. 169.

⁵ *Hill v Patten*, 8 East 373. The alteration having been made in the body of the policy, after the original subscription, an attempt was made to have it sustained in its original extent. But Lord Ellenborough held that the instrument not having been restamped, it was rendered void. His opinion was confirmed by the Court on solemn argument. The contract was held to have been altered, and a new contract made, and it was not considered to be within their power, on seeing an objection of nullity to that their real contract, to resume one which had been abandoned. *French v Patten*, 1 Camp. 73, 9 East 351.

See Park 47, and the cases quoted. [Sm. Merc. Law, 7th ed. 368.]

⁶ *Weir v Aberdein*, 2 Barn. and Ald. 325.

⁷ *Robinson v Touray*, 1 Maule and Sel. 217; *Sawtell v London*, 5 Taunt. 359.

An alteration made contrary to the Act annuls the policy, if made in the body of it; and the Court will not allow the policy to stand as at first.¹

2. NAME OF THE INSURED.—This is required by statute.² By the 28 Geo. III. c. 56 it is enacted, 'That it shall not be lawful for any person or persons to make or effect, or cause to be made or effected, any policy of insurance upon any ship, etc., without first inserting, or causing to be inserted, in such policy or policies of insurance, the name or names, or the usual style and firm of dealing, of one or more of the persons interested in such insurance.' An alternative is then permitted, that 'instead thereof' there shall be inserted the name, etc., 1. Of the consignor; or, 2. Of the consignee; or, 3. Of the person in Britain receiving the order to insure, and effecting the insurance; or, 4. Of the person who shall give the order to the agent immediately employed to negotiate the policy. And 'every policy of insurance made or underwrote contrary to the true intent and meaning of this Act, shall be null and void to all intents and purposes.' The statutes of the 25th and of the 28th of Geo. III. have both in view a remedy for the use of policies blank in the name of the insured. This was at one time a practice very general in Europe; and in each country, as the evil was felt, it was corrected by special ordinances. In England, policies were extremely loose in their form, and generally blank in the name of the assured. The first remedy was in fire insurances, by 14 Geo. III. c. 48. But marine insurances were excepted from the operation of this Act, and continued blank till 1783, when the universal complaints of underwriters led to the statute of 25 Geo. III. c. 44. This statute contains in the preamble a plain statement of the evil; and this preamble is to be taken as the preamble of both Acts: 'Whereas it has been found by experience, that the making or effecting insurances on ships, etc. in blank, and without specifying therein the name or names of any person or persons for whose use and benefit, or on whose account, such insurances are made or effected, hath been in many respects mischievous and productive of great inconveniences.' This statute seems to have been ill digested in many of its provisions, and to have produced so much inconvenience, especially to foreigners, by the minute observances which it required, that the remedy was as bad as the original evil. It required in particular, either, 1. That the party or parties interested should have their names in the policy; and so, unless there was an exact specification of every minute division of interest and right in the ship or goods [605] insured, the claim for a loss was met by formidable or fatal objections; or, 2. It required the name of an agent; but then it must be as agent of the several persons holding the interest, which made the difficulty as great as if the names of the owners had been inserted. It was with a view not to repeal, but to reform the law, without perplexing merchants with the objectionable provisions, that the statute of the 28th of Geo. III. was passed. The original evil of blank policies was not in any shape meant to be re-established or sanctioned; and the enactment was made as strict as ever in this respect. The difference made was this:—It was deemed not to be necessary to have the minute points of interest and ownership settled in the policy, but sufficient if the policy bore the name of one or more of the persons interested, or the name of the consignor or consignee, or of the agent receiving directions to get insurance done, or of him who, being in Britain, should give directions for an insurance. This seemed to meet all cases: no one was any longer in doubt how to fill up that clause in the policy which the Legislature saw wise reasons for ordering to be filled up. Under this statutory provision, confirmed by a clause in the stamp law of 38 Geo. III., it has been held: 1. That the word *agent* is not necessary in the policy where the insurance is effected by an agent. 2. That a policy effected by a broker, describing himself as agent, is good.³ 3. That the name of the master in the

¹ In the above case, p. 650, note 6.

² 25 Geo. III. c. 44; 28 Geo. III. c. 56; 35 Geo. III. c. 63, sec. 11.

³ These points fixed by the cases quoted by Mr. Justice

Park, p. 21. [See *Symers v Glasgow Marine Insurance Co.*, 1846, 9 D. 168, where, although the party was called agent, yet, as he was truly a vendee in security, the policy was held good.]

policy, as descriptive of the ship, is not sufficient to support the policy, though the master have an interest; his name not being set down as the person insured. Nor is the name of the broker sufficient, where it is merely in the statement of the office at which the policy was signed.¹

3. The name of the SHIP and MASTER is necessary to identify the subject-matter of the policy: for whether it be on ship, or freight, or goods, the risk attaches itself to a particular bottom. A mere mistake of the ship or captain's name will not prove fatal, if the proof of identity be clear.² The parties, however, may agree to insure a more general risk 'by ship or ships,'³ provided the ship be afterwards identified on which the risk attaches. It is fatal to introduce one name instead of another.⁴ But the rule is not so absolute, that a proof of [606] identity and the absence of fraud will not support the contract; the more especially as, in order to avoid such a danger from mistake, all policies have a clause, 'or by whatever other name the said ship is or shall be called.' The name is not a warranty, but merely a mark of identity. It may be observed, then, that the above decision of the Court of Session would now probably be held too strict.⁵

4. SUBJECT.—The subject of the insurance is the essential part, or *sine qua non*, of the contract; and must be so stated as to leave no room to question the property that is put in risk, whether ship, or freight, or goods. It is not necessary otherwise to describe the goods, than to afford the means of identifying them, and to prevent the risk from being changed upon the underwriter. It is on this part of the policy, and its accompanying memorandum, that questions of average arise; the memorandum declaring generally that the underwriters shall not be liable, *first*, For any partial loss, on account of corn, fish, salt, fruit, flour, and seed, but only for general average or total loss on those articles; *secondly*, For any partial loss under five per cent. on sugar, tobacco, hemp, flax, hides, and skins; or, *thirdly*, For any partial loss under three per cent. on other goods, or on ship or freight, unless such small loss arise from general average or stranding of the ship.⁶

¹ *Mar and Dolbey v Spence & Kerr*, 27 Feb. and 17 Dec. 1811. Here a broker who engaged to effect an insurance neglected to fill up in the policy the name of the insured. The Judge-Admiral on the above-mentioned statutes annulled the policy. 10 July 1807, Judge Cay's Notes, vol. E, p. 210. In a course of proceeding already stated, p. 649, note 5, the Court of Session was called on to judge of the question, Whether it was not enough to support the policy that the master was the person to be insured, and that his name was in the policy as master, the ship being described as 'the Atlas, Captain Dolbey?' or whether the broker's name was not sufficient, the policy bearing, 'We, the assurers, have subscribed our names and sums assured in Liddel & Brunton's office, Leith,' they being the brokers, and the names being written in by one of themselves? But the Court was clearly of opinion that neither of these expedients was sufficient to save the policy. Lord President Blair said these names are no more a due compliance with the Act than the name of the printer at the foot who prints the form of the policy. The words of the 28 Geo. III. he held to be so clear as to admit of no argument. The name of Captain Dolbey is inserted merely as master. The name of the broker merely indicates the place where the policy was signed. As to the policy, wisdom, and expediency of the Act, he reminded the Court of the words of Lord Mansfield, as fit to be remembered in all questions on the construction of statutes, in *Pray v Edie*, on the Act of 25 Geo. III.: 'Whatever doubts I may have in my own breast with respect to the policy and expediency of this law, yet as long as it continues in force I am bound to see it

executed according to its meaning; and however I may think that this is not a commendable defence in the underwriter, yet that is a matter for his consideration, and not for mine.' 1 Term. Rep. 314. The Court concurred with the Lord President. See above, p. 649, note 5.

² *Hall v Molyneux*, 6 East 385, Park 22; *Le Mesurier v Vaughan*, 6 East 382. [Sm. Merc. Law, 7th ed. 347.]

³ *Kewley v Ryan*, 2 Hy. Blackst. 343. [Sm. 347.]

⁴ *Watt v Ritchie*, 1782, M. 7074. A ship insured by the name of the Martha of Saltcoats was really called the Elizabeth and Peggy of Saltcoats. On a loss the underwriters defended themselves on the name of the ship being different from the real name. And the Court 'held that a sacred strictness ought to be preserved in the interpretation of contracts relative to insurance; and therefore, in respect it is acknowledged by the pursuers that their ship was registered by the name of the Elizabeth and Peggy of Saltcoats, the Court found they had no claim against the defender upon the insurance made by him on the ship Martha of Saltcoats, there being no such ship, at least the true name being concealed or misrepresented, by which the underwriter might have been deceived; and they sustained the defences.'

⁵ See *Le Mesurier v Vaughan*, 1805, 6 East 382, Marshall 313, Park 21.

⁶ [Sometimes there is a separate memorandum by which the underwriters agree to repay a certain proportion of the damages which the ship may become liable to pay in consequence of collision with another vessel. Under such a clause the underwriters are not liable to refund the costs incurred

5. PLACE AND TIME.—The commencement and termination of the risk are indispensable requisites in a policy. If the policy be for time, the commencement and termination of the time must be distinctly specified. If a blank be left for the place of departure or destination, the policy will be void for uncertainty. Care must be taken that the place of departure be not described in terms so ambiguous as to expose the contract to the same charge of uncertainty; and so a policy to any port or ports must be made certain by the addition of time.¹ But any port within a given description of coast or of sea is sufficient. Thus, a policy to any port in the Mediterranean, or in the Baltic, extends the contemplation of the parties to every risk within the known or commonly understood limits of that description.²

6. PERILS OF THE VOYAGE.—These are enumerated in a clause so anxious as to include all conceivable risks. But there are some losses which are not included within these words, however comprehensive they may seem; namely, such as are imputable to the owners, master, or mariners, rather than to the perils of the sea. Such are, injuries from bad stowage, exposure to wet, theft, embezzlement, etc.³

7. SUBSCRIPTION.—The policy must be subscribed or underwritten with the names of the several insurers. It is not required to be subscribed according to the formalities of the statutes relative to the subscription of deeds in Scotland; but it is effectual signed with the name simply, accompanied by the addition of the sum for which the underwriter is to be liable. No witnesses are required. Very frequently policies are signed by procurators, acting either under express or tacit delegation. Doubts may be raised concerning the power of the procurator, either by denying his authority entirely, or by alleging a [607] limitation of his powers to particular acts or conditions. It is held in a claim under this, as under other mercantile contracts, that a power of procuration may be effectually conferred by sufferance, as where the same person has subscribed other policies as procurator for the bankrupt, on which he has received premiums, or under which he has settled losses.⁴ It is also held, that where a special limitation in the power is alleged, the *onus probandi* lies on the person for whom the policy is underwritten.⁵

No proof by parole evidence will alter or control the policy, unless it establish a usage which in mercantile affairs, and when not inconsistent with law, controls the construction of all policies. In proving such usage, *opinion* is not sufficient. It is from a judge only, and in matter of law, that opinion can be received by a jury; other persons must speak only to facts.⁶

2. Proof of the Interest and Loss.

1. INTEREST.—In claiming for the loss, the claimant is bound to prove his interest. This will be *prima facie* presumed; and where denied, is to be established—as to the vessel, by the registry; as to the cargo, by bills of lading, or by invoices and correspondence.⁷

in successfully defending an action of damages for collision. *Xenos v Fox*, 3 L. R. C. P. 630.]

¹ See *Cookey v Atkinson*, 2 Barn. and Ald. 460.

² *Uhde v Walters*, 1811, before Lord Ellenborough. A policy to any port in the Baltic was held, on this common understanding, to cover a port in the Gulf of Finland, although treated by geographers as a separate sea. [In the case of the *Sea Insurance Co. v Gavin*, 1827, 5 S. 525, N. E. 494, it was held that a shipping place not protected by artificial works fell within the meaning of a 'port' in such a clause. Sm. Merc. Law, 7th ed. 343.]

³ 1 Marshall 338.

⁴ *Neal v Ervine*, 1 Espin. Rep. 61. See also *supra*, p. 508.

⁵ Same case. Marshall 716; Park 607, note.

⁶ *Syers v Bridge*, per Lord Mansfield, Doug. 527. See Marshall 716.

⁷ Marshall 718; Park 608, 609; Add. Cont. 495. [See *Alston v Campbell & Co.*, 1779, 2 Pat. 492, as to the interest of a mortgagee. By 31 and 32 Vict. c. 86, policies of marine insurance are made assignable by endorsement in the form given by a schedule to the Act; and the assignee is authorized to sue in his own name, subject to all defences maintainable against the cedent. As a general rule, the interest which an underwriter acquires in the safety of the subject insured is not an interest entitling him to re-insure. Re-assurance, however, is permitted by statute in case of the insolvency, bankruptcy, or death of the insurer. The nature of the interest must be stated in the policy, and the value insured

If the policy is for a mere wager without interest, nothing can be recovered under it. But the insurance of profit on a fishing adventure is not such a policy.¹ Neither is the insurance of future freight objectionable, provided the voyage has actually begun before the loss.

2. LOSSES.—The loss is either TOTAL or PARTIAL. The former consists not solely in the entire destruction of the subject insured, but in such damage as to render it of little or no value to the owner; or to reduce the value to less than the freight; or to frustrate the adventure, the securing of which was the object of the insurance. The latter is a loss or damage not amounting to a total loss.

1. Claims for a TOTAL LOSS must be accompanied by ABANDONMENT, where there is anything remaining actually extant or in hope. Without entering into the speculative question whether the practice of abandonment be quite consistent with the principles of [608] the contract of indemnity by insurance, or the expediency of a practice which is plainly liable to great abuses, the general doctrine as to the description of loss is, that the assured may abandon whenever, by one of the perils insured against, the voyage is lost, or not worth pursuing, or where the object of the adventure is frustrated, or where the subject insured is left in a state which makes it of little value to the owner,—as goods reduced to less worth than the freight, or subjects reduced under half of their value, or so as to require an expense to reinstate them which the insurer will not undertake. But he is not entitled to harass the underwriters, by giving notice to abandon in a case which, in its own nature, is only a partial loss, so as to turn it into a total loss.²

The most important rules relative to abandonment are these:—

1. CAPTURE is *prima facie* a total loss entitling the insured to abandon. Even arrest of princes, or mere embargo, are also held *prima facie* to be total losses; the owners from the moment of capture, arrest, or detention, losing their power over the ship and cargo. The owner therefore *may* instantly abandon, though he is not *bound* to do so.³

2. If the offer to abandon is accepted, the matter is concluded, the loss total, the abandonment absolute and complete.⁴

3. If the captured or arrested ship or cargo be restored or recaptured between the offer to abandon and the acceptance or action, it has been determined in England that an aban-

must not exceed in amount the sum previously insured. 19 Geo. II. c. 37, sec. 4; Sm. Merc. Law, 7th ed. 342.]

¹ *Addison & Sons v Duguid*, 1797, M. 7079. The Leviathan sailed for the whale-fishery in February; and in May, Addison & Sons, who had fitted her out, insured her on a valued policy, by which the underwriters insured that the ship should return with 90 butts of blubber, and to pay for the deficiency £7 per butt. The ship returned with five butts; and in an action in Admiralty for the loss, the defence was rested on the 19 Geo. II. c. 37. The judge held the underwriters liable.

The Court of Session, when the case first came before them, thought it so doubtful as to deserve very deliberate consideration, and passed the bill of suspension. On the discussion of the case they unanimously held the insurance effectual.

The opinion of Mr. Bearcroft respecting the English law upon the question was laid before the Court. He said: 'It is perfectly clear to me that this is not a wagering policy within the meaning of the statute, but insurance of profit on a fishing adventure; in order to take the chance of which, the insured has been necessarily put to great expenses in the outfit of the vessel, purchasing proper tackle for whale-fishing, manning, etc. As for the argument on the ground of public policy, I confess I do not feel it. To entitle the adventurer

to the bounty, he must comply with the requisition of the statute giving it, as to fitting out, manning the vessel, etc.; and notwithstanding any such insurance as is at all likely to be entered into, it will always be the interest of the insured to get as many fish as he can. The underwriters know the bounties given by law, and it cannot be probable that they will underwrite a policy which will tempt the insured to neglect the adventure in order to come upon them; and of this they have as good means to judge as the insured themselves.

'Upon the whole, I am of opinion that this contract of insurance is legal, and the insured entitled to recover against the underwriters.'

² Marshall 593 et seq.; Park 228-9. [Add. Cont. 6th ed. 507. It is quite impossible to compress within the limits of a footnote even the most imperfect summary of the English decisions upon absolute and constructive total loss, and notice of abandonment. Reference is made to the leading case of *Roux v Salvador*, 3 Bing. N. C. 266, and Tudor's Mercantile Cases, pp. 139, 157.]

³ Marshall 567 et seq. [Add. Cont. 510.]

⁴ *Robertson, Forsyth, & Co. v Stewart & Smith*, 10 Feb. 1809, 15 Fac. Coll. 165; and in House of Lords, 2 Dow 474. See below, p. 655, note 2.

donment is only notice of an election, on the supposition of a fact; that it will depend on the truth of that fact whether it is to continue effectual; and that the underwriters are entitled to settle as for an average loss only.¹ In Scotland a case precisely of the same kind occurred, with this difference, that the underwriters accepted the offer of abandonment. On the general question, a view opposite to that which was finally adopted in the above case was taken, and the insured were held entitled to claim the total loss from the underwriters, they taking the benefit of the recapture.² This case, as viewed in Scotland, presented the same question which had been decided by the Court of King's Bench; and the same opinion which seems first to have occurred to Lord Ellenborough at the trial, though afterwards abandoned, is fully and ably delivered by Lord President Blair as the principle on which the case was decided by the Court of Session. When the cause came into the House of Lords, the true point of this case was ascertained to be such as to leave that general question untouched; namely, the effect of the accepted offer of abandonment. In the course of the discussion of the cause, Lord Chancellor Eldon expressed great doubt on the [609] general doctrine, on which the judgment of the Court of King's Bench and of the Court of Session had so entirely differed.³ But the question has been again carefully reconsidered in England, with the benefit of those doubts, and the same judgment has been given which has been already stated.⁴

¹ *Bainbridge v Neilson*, 1808, 1 Camp. 237, 10 East 329. The ship was captured on 21st, and on 30th September the insured gave notice of this, and of abandonment. On 2d October the insured gave intelligence of recapture, with notice that they persevered in the abandonment. The salvage was £15 on ship, and £13 on cargo. The case came first before Lord Ellenborough at Guildhall, where he intimated his opinion in support of the abandonment, but desired to have the point, as a new one, put into a shape for the opinion of the Court.

Afterwards it was argued accordingly on a special case in King's Bench, when all the judges held the abandonment not to be conclusive.

See also *Falkner v Ritchie*, 1814, 2 Maule and Sel. 290. [Sm. Merc. L. 7th ed. 390.]

² *Robertson, Forsyth, & Co. v Stewart, Smith, & others*, 10 Feb. 1809, 15 Fac. Coll. 165. Robertson, Forsyth, & Co. insured the Ruby on a valued policy at £2500. The ship was captured 10th September by a Spanish privateer, and after being plundered was sent to France. It was afterwards recaptured, and carried into Guernsey. When the insured were informed of the loss, they gave intimation of abandonment; and the underwriters, after taking time to consider, gave notice that they were completely satisfied. On the news of the recapture, the underwriters declined to settle as for a total loss, but offered to settle as for an average loss. In an action before the Judge-Admiral for the value in the policy, judgment was pronounced in favour of the insured. The case was then brought before the Court of Session, when this judgment was affirmed.

³ In the House of Lords, Lord Chancellor Eldon, after stating the case, with the import of the judgment in England, said: 'On a subject of this importance it was impossible to leave the law in such a state, that what was a good decision in the one country should be bad in the other, where the decisions on this question of mercantile law ought in both countries to be the same; and it was difficult to say that the same principle might not comprehend and determine the whole of the cases in which there existed these minute shades

of difference. In deciding this case, their Lordships might affect the decisions of their own courts, and it was therefore proper that the case should be argued in the presence of the judges; and then a question might be put which would settle the principle that would decide all the cases that might occur with the variety of facts to which he had alluded.' After the argument appointed upon this suggestion, the Chancellor said, 'that he had been induced to propose the adoption of this course, principally from having regard to a case (*Bainbridge v Neilson*, 10 East 329) decided in the Court of King's Bench, and another case mentioned at the bar (*Falkner v Ritchie*), by which the doctrine in the case of *Bainbridge v Neilson*, as to the effect of the abandonment, was confirmed.

'Since the time when this case was last mentioned to their Lordships, he had had an opportunity of considering it with great attention, of consulting with his noble friend near him (Lord Redesdale), and of discussing the question with different persons whose judgment was entitled to the greatest respect; and the conclusion to which he had come was this, that without intimating in the least what, if the cases of *Bainbridge v Neilson* and *Falkner v Ritchie* had come before their Lordships, would be the judgment of the House of Lords, and protesting against being considered as giving any opinion agreeing or not agreeing with these decisions, it was clear that the present case was out of the principle of these cases. Here it was not made out that the underwriters had any right whatever to refuse to settle as for a total loss: they could not be allowed to say that the loss was not total, after they had admitted that it was, and acquiesced in the abandonment as for a total loss. It was therefore on the effect of the transactions in this particular case, without reference to others, that he thought the decision of the Court of Session right.' Lord Redesdale: 'I concur.' Judgment affirmed.

⁴ *Patterson v Ritchie*, 1815, 4 Maule and Selwyn 393. Lord Ellenborough said: 'Although Lord Eldon is said to have spoken with dissatisfaction of *Bainbridge v Neilson* in the House of Lords, I confess, with all deference, I am unable to see any good reason for receding from that judgment. The

4. If in consequence of the capture, detention, or arrest, the interest which it is the object of the insurance to protect perish, it is a total loss. Where, in the case of a mercantile adventure, the goods insured are by the detention kept from market, and the voyage is lost, this is sufficient to justify abandonment;¹ but it is more difficult to find what shall be total loss in the case of a ship insured. The loss of the voyage may be the loss of the freight, and is therefore total on a policy for freight. But if the vessel is restored, it is not a total loss.²

5. But the circumstances in which a ship may be placed abroad, in consequence of perils insured against, may be such that it may be necessary to dispose of it. In such case, the master has a power to act for the benefit of all concerned; and the assured may abandon, and claim as for a total loss. This power on the part of the master, however, must be exercised under very severe restraint; and it is of great importance to prevent a partial from being converted into a total loss by the unnecessary abandonment of the voyage. Lord Mansfield at one time laid down the rule too broadly in favour of the master's discretion.³ It has been considerably narrowed since his time;⁴ and it is now requisite to show [610] a case of absolute necessity in order to justify such a proceeding.⁵

6. SHIPWRECK is generally a total loss; and where only the *wreck* remains, but the *ship* is gone, it is a case for settling on that footing. But stranding merely is not a total loss, if the vessel can be got off and sent forward on her voyage. Where a ship is insured with one set of underwriters and the freight with another, it has been held a question of great difficulty, in case of an abandonment, what shall be the effect of it as between these several sets of underwriters, if the ship should in the end earn her freight? whether the abandonment of the ship to the underwriters on the ship, carries the freight? or whether the underwriter on the freight has, by virtue of the abandonment to him, right to the freight? This was long a subject of doubt and debate; and Mr. Justice Park, after stating the result of several cases, concludes with saying, that the question must still be considered as open, 'although, as far as opinions may be collected from observations thrown out in the course of argument, the inclination of the Court seems to be in favour of the underwriters on ships.'⁶ A case fit for the trial of the question having occurred in the Court of King's Bench, Lord Ellenborough, Chief Justice, and the present Lord Chief Justice Abbot, and Mr. Justice Holroyd, held that the abandonment of the ship was equivalent to a sale of it, and the right to freight an incident to the ship; and so that the underwriters on the ship are, on abandonment, entitled to recover the freight, when it happens to be earned, against the pretensions of the underwriters on the freight. Mr. Justice Bayley dissented from this opinion, and held that the abandonment of the ship, from the nature of the subject-matter, implies a virtual exception of the freight, where there is a separate insurance and separate abandonment of the freight.⁷

principle of that and of the other decisions is a general one, and it is this: I have a right of action for non-payment of money; the party pays me before action is brought; that takes away my right of action.'

Brotherston v Barber, 1816, 5 Maule and Selwyn 418.

¹ See below. [Add. Cont. 6th ed. 511.]

² *Fitzgerald v Pole*, Willis 641-5, Brown's Parliamentary Cases 131; *Parsons v Scott*, 1810, 2 Taunt. 363; *Falkner v Ritchie*, 1814, 2 Maule and Sel. 290. [Sm. Merc. Law, 7th ed. 385.]

³ *Miller v Fletcher*, Douglas 231.

⁴ *Reid v Darby*, 1808, 10 East 143; *Underwood v Robertson*, 1815, 4 Camp. 138; *Wilson v Millar*, 1814, 2 Starkie 1; *Idle v Royal Exchange Assurance Co.*, 1819, 8 Taunt. 755, 3 Brod. and Bing. 151; *Read v Bontram*, 1821, 3 Brod. and Bing. 147. [Sm. Merc. Law, 7th ed. 386.]

⁵ *Smith v Dreever*, 1823, 2 S. 494, N. E. 436. [M'Corkle v Murison, 1847, 9 D. 1491.]

⁶ Park 267-276.

⁷ *Case v Davidson*, 1816, 5 Maule and Sel. 79. *Brothers-town & Begg*, owners of the *Fanny*, insured her at £7000, and afterwards the freight, with other underwriters, valued at £4000. The ship was captured by an American privateer, and thereupon notice of abandonment was given to both sets of underwriters, of the ship and of the freight. Afterwards the vessel was recaptured by a ship of war and brought to London, and by sentence of the Court of Admiralty was, with the cargo, restored on payment of salvage. The ship arrived at Liverpool and delivered her cargo, and earned her freight. The ship was, by agreement with the underwriters on the ship, sold; and Davidson was appointed to receive the proceeds and also the freight for the benefit of all having inter-

7. **DEFEAT OF VOYAGE.**—It is only in the case of goods or freight insured that total loss can properly be said to arise from the defeating of the object of the voyage. It is now scarcely to be admitted as a doctrine applicable to the case of a ship insured. And a voyage is not defeated by mere retardation, unless the object of the voyage, the purpose of the insurance, be utterly disappointed. Thus, a ship carrying to Quebec a cargo, not of perishable commodities or such as delay would injure, but of copper and iron, having been obliged by disrepair and injury to go into a port in Ireland, where no other means of forwarding the goods that season was to be had, and the delay lost the voyage for the season, it was questioned whether this amounted to a total loss, so as to give the right to abandon. It was held not to be such a loss, on the ground that mere delay and retardation is not a good cause of abandonment.¹ This doctrine was confirmed in a case where, the cargo not being of a perishable nature, but fairly warehoused in an undamaged state, [611] and there being ample means of forwarding it for next season, this was held a partial and not a total loss to authorize abandonment.²

As to the time at which notice is to be given of abandonment, it will be remembered that this is an act which is to throw on the underwriter the whole risk; and that justice therefore requires that he should be apprised as early as possible, in order to take those measures which may be proper for the right administration of his property; while the insured shall not, by delay and hesitation, give himself the chance of benefit, with the power in his hand of throwing the loss on the underwriter. Within the description of a reasonable time for notice, is included the opportunity of fully understanding the condition in which the goods are.³ But the insured has no right to wait for information as to the state of the markets; nor is he to delay the communication till the event of a final survey, when the facts are such as to show manifestly all that is necessary to determine the election.⁴

II. **PARTIAL LOSS** is, in the language of underwriters, also called **PARTICULAR AVERAGE**;

rest. Davidson accordingly paid the proceeds of sale to the underwriters on the ship, who paid the loss to the insured. The underwriters on the freight, and those on the ship, claimed the freight from Davidson as holding it for their interest. The judgment was for the underwriters on the ship. This judgment was affirmed in Exchequer Chamber. 2 Brod. and Bing. 379.

This question has not yet occurred to be tried in Scotland; but the judgment in the above case of *Robertson, Forsyth, & Co.*, goes far to determine it in the same way in which it has been adjudged in England.

[The question is now determined by a judgment of the House of Lords in favour of the underwriters on the ship. *Stewart v Greenock Marine Insurance Co.*, 1 Macq. 328. The ship-owners, by this judgment, having been compelled to surrender the freight received by them from the consignees of the cargo, instituted an action against the insurers of freight, alleging that, as the underwriters on ship had been found entitled to the freight, it must be considered as lost to the assured, and consequently recoverable under the policy. It was held, however, by the House of Lords, reversing the decision of the Court, that the action was not maintainable. *Scottish Marine Insurance Co. v Turner*, 1 Macq. 334; Tudor, Merc. Ca. 187; Sm. Merc. Law, 389.

But where the same person is owner of the ship and cargo, no freight will, upon abandonment, pass to the underwriters on ship (*Miller v Woodfall*, 8 El. and Bl. 493), because at the time of the casualty there is no freight actually pending. As between the owner and the underwriter, it was held to be immaterial that, under the designation of freight, he had

insured with other underwriters the increased value of his goods by reason of their being carried to a more favourable market. Another exception to the rule of *Stewart's* case is admitted, where the freight is earned by a vessel into which the cargo has been transhipped in consequence of the casualty. *Hickie v Rodocanachi*, 4 H. and N. 455.]

¹ *Anderson v Wallis*, 1813, 2 Maule and Selwyn 240. Lord Ellenborough delivered the judgment of the Court. See also *Park* 261.

² *Hunt v The Royal Exchange Assurance*, 1816, 5 Maule and Selwyn 47. This was an insurance on a cargo of pork and flour for Newfoundland. The loading was taken in at Waterford, and convoy joined at Cork; and damage having been suffered at sea too great to proceed, the ship put back to Cork on 13th November. The ship, on survey, was found not worth repairing, and the hull and materials were sold; and no opportunity of transporting the goods being to be had before spring, the pork and flour were landed and warehoused. On 18th December, the insured, residing at Waterford, wrote to the broker to give notice of abandonment, which was done 22d December. There were two questions: 1. Whether this was not a partial loss only, in which the insured were to act as if not insured, and claim for the loss? and, 2. Whether, at all events, the notice was not too late? On both points the Court of King's Bench adjudged the case for the underwriters. [Sm. Merc. Law, 7th ed. 387.]

³ Compare *Allwood v Hinkell*, Park 280, with *Anderson v Royal Exchange Assurance*, 7 East 38; and *Gernon v Royal Exchange Assurance*, 2 Marsh. Rep. 89. See Park 281.

⁴ See above, *Hunt v Royal Exchange Assurance*, note 2.

though it be, in fact, not an average at all, but a loss which must be borne undivided by that part of the concern on which it lights. The expression Particular Average seems to have arisen among underwriters rather than among lawyers; and to owe its origin rather to the operation of adjusting the loss, than to the effect of it as interesting any one but the owner of the article injured. In this operation of adjustment much practical difficulty occurs; and after a few words as to the description of partial loss, it may not be out of place to discuss the principles on which both partial losses and total are settled and adjusted.

Under the description of partial loss are to be included: 1. Damage to the ship by stranding, or striking on a rock or other obstruction. 2. Damage by collision with other ships where it is accidental. Where occasioned by negligence, it is not a peril of the sea, to be indemnified as partial loss.¹ But unless there be proof of such negligence, the insurer is liable, having right, of course, on paying the loss, to sue the party truly liable.² 3. Damage to boat, masts, sails, rigging, etc. by force of the winds or sea. Although this is often held to be the tear and wear of the voyage, the custom is to consider it as a partial loss on the ship; for the underwriters are liable if it exceed three per cent., either alone, or taken along with other damage.³ 4. Loss by lightning or accidental fire, which is a loss that cannot be the subject of a claim of indemnification against the shipowners.⁴ 5. Losses incurred while the ship is running before the wind, or lying to the sea, are losses by perils of the sea, be-[612] cause there is at such times no command over the ship. 6. Plunder or damage during capture. 7. Damage to a merchant ship by defending her against enemies. This seems to be a partial loss, whether the ship escape, or be captured and afterwards retaken.⁵ 8. Damage occasioned by a press of sail to escape an enemy or a lee-shore. But, 9. The repair of a leak sprung at sea is not partial loss demandable against the insurers. The presumption is, either that this is the working and straining of the ship, which is the tear and wear of the voyage, or an inherent vice. The *onus probandi* is laid on the insured, to show it to be the direct effect of accident. 10. It has been held that if a ship be bilged by being laid on the shore within the tide-way to repair, it is not a loss by perils of the sea.⁶ But where a ship in the course of her voyage is in a dry harbour, and there suffers damage by peril within the policy, the underwriters are liable.⁷

The PROOFS OF LOSS in matters of insurance are generally very unsatisfactory. Perhaps no rule can be laid down for all cases. But it may generally be observed:—

1. The underwriters are entitled to insist on the best proof which circumstances admit.⁸
2. The log-book, and protests taken on occasion of the loss, are documents expected to be furnished to the underwriters as supplying the information necessary for directing their inquiries. But they are not proofs on which the loss can be rested, unless they become so by the inevitable loss of other evidence. They may be used to contradict the evidence of

¹ [A clause expressly insuring money which the assured may be liable to pay in consequence of collision, covers the assured's liability under maritime law for the one-half of the damages due to passengers on board another vessel in consequence of a collision. *Coey v Smith*, 1860, 22 D. 955. It does not cover costs of action. *Xenos v Fox*, 3 L. R. C. P. 630.]

² *The Thames*, Drummond, 5 Rob. Adm. Rep. 345. [*Morison and Milne v Bartolomeo*, 1867, 5 Macph. 848.]

³ *Stevens on Average*, p. 151.

⁴ See *supra*, p. 609.

⁵ Yet there are some who hold that to be merely a general average.

⁶ *Thomson v Whitmore*, 3 Taunt. 227. [Sm. Merc. Law, 7th ed. 356.]

⁷ *Fletcher v Inglis*, 1819, 2 Barn. and Ald. 315; *Phillips v Barber*, 5 Barn. and Ald. 161; *Napier v Wood*, 1825, 4 S. 19.

⁸ *Ferrier v Sandeman*, 24 Feb. 1809, Judge Cay's Notes,

vol. E, p. 451. A vessel was insured for £1000 on hull and materials during six months from 1st March to 31st August 1807. Having struck on a rock, she was obliged to go into Christiansand to be repaired. While there, the king of Denmark declared war against Great Britain. This was on 16th August, about a fortnight before the expiration of the insurance. There were several points in the case, but one in particular turned on the defence, that no evidence was produced of the ship having been seized before 31st August, when the policy expired. The Judge-Admiral held the notorious fact of war having been declared, and the presumption that the order contained in that declaration, to seize all British ships, was obeyed, as good evidence of the seizure.

The case having been brought under review of the Court of Session, the judges affirmed the Admiral's judgment, on the ground that the best evidence had been produced which circumstances admitted. 29 June 1809, 15 Fac. Coll. 373.

the master or mate, whose statements they are. The log-book is an essential document to be produced to the underwriters, as a check on the proceedings in the voyage,¹ unless there be evidence of its loss. A protest is not evidence while the master who made it is alive, but may be read to contradict his testimony.² It may also be useful in so far as bearing to be verified by the log-book shown to the judge or notary; it may supply the loss of the log-book.

3. The master, officers, and crew, are good evidence where they have no interest, and are not parties in the cause.³

4. In Scotland the former practice was too loose,—to receive surveys, sentences of condemnation, etc. abroad, properly authenticated; but if challenged, they must now be confirmed and made evidence.

Digression concerning Valuations and the Adjustment of Losses.

The adjustment of losses is perhaps not strictly within the province of a work [613] which professes to discuss only the rules of law. But the information on maritime and mercantile subjects is scanty in Scotland; and it may be useful, in a digest of practical jurisprudence relative to those matters, to give a few of the fundamental maxims by which adjustments are ruled.

Average losses have already been treated of under the contract of Affreightment; and the rules are not different where the underwriter is concerned. But a few points relative to the adjustment of the two descriptions of loss not coming under general average, viz. total and partial losses, may here be considered.

I. ADJUSTMENT OF TOTAL LOSS.—A TOTAL LOSS may happen either under what is called a valued or under an open policy.

1. VALUED POLICY.—In a valued policy, the value of the subject insured is by agreement of the parties stated by anticipation. This is equal to an admission by the underwriters of the amount put in hazard; which, unless challengeable as fraudulent, or exceptionable as a wager, will be held conclusive in the case of a total loss. This proceeds on the principle that, as in the ordinary case, the loss is to be adjusted by the cost on board, and the premium and commission, excluding the mercantile profit which is the object of the expedition, but which is still to be regarded as truly a loss; it is not inequitable, nor to be regarded as a wager policy, that the insured include such profit in the valuation, paying for it an adequate premium. 1. Fraud in the valuation will vitiate the policy, so as to prevent the insured from recovering under it even the actual loss.⁴ 2. To take the case out of the Act respecting wager policies (19 Geo. II. c. 37), it is enough to prove some interest,⁵ and the inquiry will then proceed into the amount of the loss. 3. If the value has been erroneously but honestly stated, it is said that it may be corrected on evidence by the underwriters, but that slight differences will be disregarded.⁶ But the cases quoted below deserve to be attended to before adopting this conclusion, as tending

¹ The log-book used formerly to be produced as one of the proofs. It is not now, however, to be taken as evidence of the facts stated in it, but only of the fact of a log-book existing. It was admitted loosely in the Jury Court, in *Carlton v Strang*, 1 Murr. 32. But in *Cairns v Kippen*, 2 Murr. 248, a more correct view was taken.

² *Senat v Porter*, 7 Term. Rep. 158. See *Thomson v Bisset*, 3 Murr. 297.

³ *Thomson v Bisset*, in Jury Court, 3 Murr. 298.

⁴ *Haigh v De la Cour*, 1812, 3 Camp. 319. Here goods were put on board a ship for Pernambuco to the value of £1400, and false invoices and interpolated bills of lading were produced to the underwriters, representing the goods as

worth £5000. The ship was run away with and carried to the West Indies, where the cargo was disposed of by one whom the insured had sent as supercargo. The plea urged for the plaintiffs was, that there being some goods on board belonging to them, it was a case of short interest. The jury, directed by Lord Chief Justice Mansfield, nonsuited the plaintiff on the ground that, if the intention from the beginning was to cheat the underwriters, the fraud vitiated the contract. [Sm. Merc. L. 7th ed. 344; Add. Cont. 6th ed. 494.]

⁵ *Lewis v Rucker*, 2 Burr. 1170. [Sm. 344.]

So held in H. L., 15 Feb. 1773, *M'Nair v Coulter*, 2 Pat. 297. See below, p. 660, note 1.

⁶ *Marshall* 294.

to show, that where there is neither fraud, nor wager without interest, the value expressed in the policy is to be recovered in a case of total loss, and not merely a sum equal to the loss.¹

[614] 2. OPEN POLICY.—Where a total loss happens under an open policy, proof must be given by the insured of the amount of the loss. The general rules are: 1. That the ship is to be valued at what she is worth at the port where the voyage commenced, including her stores, outfit, and money advanced to the seamen, together with the premium of insurance.² If the charges of recovery in case of loss are to be added, it must be declared in the policy. The evidence of such value, of course, must vary with the circumstances of each case; but the bills of the cost and of repairs at the time the insurance was made, with those for the furnishings, etc., are the most natural elements in adjusting the value. 2. The total loss on freight is the amount of the interest insured by the policy, in so far as still on board at the time of the loss; and if so stipulated, the charges also of recovery. 3. Total loss on the cargo is to be adjusted at the invoice price, with the addition of all charges, and the premium of insurance, with the broker's commission, and (if inserted in the policy) the charge of recovery in case of loss. This is a matter which has been much disputed;³ but the rule as now laid down is settled in Great Britain.⁴

II. ADJUSTMENT OF PARTIAL LOSS.—PARTIAL LOSSES on ships or on goods present two questions for settlement: 1. Whether they are properly losses which the underwriters are to bear? and, 2. How they are to be adjusted? On goods, the loss arising from internal decay, and the condition of the goods themselves, fall on the underwriters. On the ship, those losses which arise necessarily in the ordinary use of the articles, the wear and tear of the voyage, are not to be repaired by the underwriter.

1. SHIP.—In adjusting a particular average, as it is called, or partial loss on the ship, it is usual to deduct one-third from the new materials and labour, unless the ship or the materials injured were perfectly new.⁵

¹ 1. *M'Nair v Coulter*, 13 Feb. 1772, 2 Pat. 297. *M'Nair* insured a ship and cargo from Virginia to Clyde, 'valued at £1000, without further account.' The ship was lost off Bermuda. It afterwards appeared that the information on which the insurance was made was false, the value being not more than a half. The insurance had been ordered by *M'Nair's* son, who was tried as having wilfully sunk the ship. He was acquitted, but found guilty of having sent fraudulent advice with a view to insurance. There were two questions: 1. Whether this was not to be held as a wager policy? This was decided in the negative by the House of Lords, there being a real interest. 2. Whether, there being an over-insurance, the underwriters were liable for more than the real value? On this question the Court of Session held 'the insured not entitled to recover from the underwriters the £1000 specified in the policy, but only a sum equal to the damage he sustained by the loss of the ship.' But in the House of Lords this judgment was reversed; and it was adjudged 'that the appellant (the insured) is entitled to recover from the respondents (the underwriters) the sums by them severally underwritten, and interest thereof from the date of the decree of the Admiralty Court, with a discount of two per cent. in terms of the policy, and of £23, 7s. as the acknowledged value of what was recovered of the wreck.' *Lords' Journals*, vol. xxxiii. p. 515.

2. *Wilson v Wordie*, 1783, M. 7107. *Wilson* and others insured a prize which had been captured by their privateer, and which, judging from the information received, they valued at £20,000, including 20,700 dollars in specie. The prize was

retaken, but not before 4200 dollars had been landed, which was nearly all that was found on board. In Admiralty, and afterwards in the Court of Session, the underwriters pleaded, 1. Concealment or misrepresentation sufficient to annul; 2. Wager, or at least the necessity of abatement to the true value. The Court of Session 'found the underwriters liable in terms of the policy of insurance subscribed by them.'

Millar, in his *Elements of Insurance*, 261, says that 'very eminent English counsel having been consulted upon the case, they advised the underwriters to acquiesce in the judgment of the Court of Session.' [See *Smith v Fleming & Co.*, 1849, 12 D. 138, where it was held incompetent under a valued policy to go into any inquiry as to the actual value, there being no allegation of fraud.]

² The premium of insurance is not allowed by the French *Ordonnance de la Marine*, but it is generally allowed by the practice of all commercial nations. See also *Le Guid.* chap. ii. art. 9, chap. xv. art. 3, 13, 15; *Marshall* 629; *Stevens on Average*, p. 178.

³ *Emerigon* 261.

⁴ *Marshall* 629, 634.

⁵ [The rule, as usually stated, is that the underwriter is not entitled to a deduction in respect of the addition made to the value of the ship by the use of new materials, if the loss happens on a first voyage. *Fenwick v Robinson*, 3 C. and P. 324, per Lord Tenterden. As to what is to be considered a first voyage, see also *Pirie v Steele*, 8 C. and P. 200, and case of *Thompson v Hunter* there cited. See *Add. Cont.* 6th ed. 534.]

2. CARGO.—In adjusting loss on goods there are two methods followed: One is, to take the invoice price, with premium, etc., and deduct the nett proceeds of sale of the damaged goods; another, to compare the amount of sales of the damaged goods with a *pro forma* account of sales of the same articles, if the cargo had arrived in a sound state.¹ 1. The former of these modes of adjustment is technically called a salvage loss, from some supposed analogy to the sort of loss which, but for exertions made to save the goods, would have been total. The goods saved are called salvage; the difference between their amount, after deducting charges and the original value, is called salvage loss. In this sort of adjustment, the principle of a case of abandonment prevails; the goods being sold on account of the underwriters, the charges being borne by them, and the amount of the sales diminishing the total loss which would otherwise be payable by the underwriters. This is the proper mode [615] of adjustment, where there is a necessity for selling the goods short of the port of destination; for it is not possible to refer to the market of the port of delivery at which the goods have not arrived. 2. Where the goods arrive at their port, the other mode of adjustment, by a comparison of the market price of the sound merchandise with the market price of the damaged, is the only just and proper method to be followed, and it appears to be now universally adopted. The problem is, to ascertain what is to be paid on the goods damaged, in order to indemnify the insured, as upon those damaged goods, for the loss which he has sustained; or for the deterioration which these goods have suffered below the value in the policy, or the invoice price and charges? And the mode proposed furnishes a criterion by which the amount of the deterioration on the damaged goods may be ascertained, without involving the underwriter in the effects of a rising or falling market. The merchant, by the use of this criterion, it has been said, makes the market prices of the sound and damaged commodity serve as the scales in which to weigh the depreciation.² On this question these points have been judicially fixed: *First*, That the underwriter is not to be subjected to the fluctuation of the market. *Secondly*, That the loss to be indemnified is that which arises from deterioration of the commodity by sea damage. *Thirdly*, That the underwriter is not responsible for any loss which may be the consequence of the duties or charges to be paid after the goods have arrived at their place of destination. *Fourthly*, That as in a total loss the underwriter pays the whole prime cost, with charges on the whole sum in the valued policy; so, if the thing be only a half, or third, or fourth worse by the injury, he pays a half, third, or fourth of the value in the policy; or, in an open policy, of the prime cost. And, *Fifthly*, That to ascertain this proportion of the prime cost or valuation which is to be paid, it is only necessary to ascertain in what degree the damaged goods are worse than the sound, in consequence of the injury. And this is best done by finding the difference between the gross proceeds and the nett proceeds; or the difference of the price of the sound goods at the port of delivery, as paid by the buyer or consumer, compared with the price to be paid by the buyer or consumer for the damaged goods. This difference gives the ratio or proportion of the prime cost or value in the policy, which is to be made good to the insured.³ This seems to afford a standard of adjustment which will give the same

¹ Stevens' Essay 73. [In the adjustment of partial loss on *freight*, where the sum insured or the valuation on the policy is less than the value of the interest at risk, the underwriter pays the same proportional part of the loss that the sum insured, or the valuation in the policy, is of the value of the freight: if the sum insured, or the valuation in the policy, equals the value of the interest, then he pays the whole loss (2 Arn. Mar. Ins. 3d ed. 848). Where only part of the full cargo included in the valuation is on board or contracted for at the time of the loss, the underwriter will only be liable as for a partial loss upon the basis of the valuation. *Forbes v Aspinall*, 13 East 323; *Tobin v Harford*, 14 C. B. N. S. 528.]

² Stevens' Essay 84.

³ These points are fixed by judgments pronounced in England, which deserve to be minutely studied:—

1. *Lewis v Rucker*, 2 Burr. 1170, in which it was first settled by Lord Mansfield and a special jury, and confirmed by the Court, that the ratio or proportion of loss was to be taken from the comparison of the market price of sound and damaged goods at the port of delivery.

2. *Johnson v Sheddon*, 2 East 581 (which is commonly called at Lloyd's the Brimstone cause), where a judgment of Mr. Justice Lawrence, in delivering the opinion of the Court, fixes the rule that the gross and not the nett pro-

result, whether the markets rise or fall, and whether the charges are heavy or light; and it answers every purpose required, since the object is, not to afford a mercantile indemnity, but indemnity only to the extent of the invoice price and charges.

There are two other questions which deserve attention:—

1. When part of a package is damaged, is the whole package to be sold together, or the sound and the damaged parts to be separated? It seems a safe ground for holding that the goods ought to be separated in the sale, so that each may draw its value, that although there may, on the sound goods, be a consequential loss by the breaking of the assortment, it is not for such losses, but only for the direct or actual damage, that the insurer is liable.

[616] 2. How is a valued policy to be dealt with in case of partial loss? A valuation, it will be recollected, is not merely of the prime cost, but also of the mercantile or expected profits. When this is fixed by the price, yard, pound, etc., the matter is easily arranged; but when valued in the lump, or at so much per bale, chest, etc., there is considerable difficulty. Mr. Justice Park says that the value in the policy can be no guide where the loss is partial,¹ but this has not been adopted; nor has it been held as law, that a valued policy is, in case of partial loss, to be considered as open.² In the case of a valued policy, the valuation in the policy is the agreed standard of value by which the indemnity sought is to be ascertained, the ratio being found by a comparison of the prices of sound and of damaged goods. In the case of an open policy, the invoice price at the loading port, with premiums of insurance and commission, is the standard.³

3. *Defences against the Claim of the Insured.*

Besides the defences arising from any error or illegality in the policy, there are three classes of defences which will be found to comprehend many essential points of insurance law. These are, 1. Breach of warranty; 2. Concealment or misrepresentation on the part of the insured; and, 3. Deviation from the course of the voyage insured, or alteration of the voyage.

I. BREACH OF WARRANTY.—A warranty is an absolute condition, or, as the English lawyers call it, a condition precedent; and if not true, or not complied with, the insurance is ineffectual. It differs from a representation in this, that the breach of truth in a representation is fatal or otherwise to the insurance, as it happens to be material or immaterial to the risk undertaken. This distinction was pointedly laid down by Lord Chancellor Eldon in the House of Lords.⁴

ceeds are to be taken as the basis of calculation in this question.

[In the adjustment of loss under an open policy on freight, it is also held, in deference to established usage, that the calculation is to be made on the gross amount of the freight. *Palmer v Blackburn*, 1 Bing. 61.]

3. *Hurry v R. Exchange Assurance Co.*, 3 Bos. and Pull. 308, confirming fully, in the Court of Common Pleas, the rule laid down by the King's Bench in *Johnson and Sheddon's case*.

See also *Usher v Noble*, 12 East 639, for the application and illustration of the rules. [Sm. Merc. L. 7th ed. 389–91.]

¹ Park 103. See also *Marshall* 631.

² *Usher v Noble*, 12 East 639. [See *Forbes v Aspinall*, cited *supra*, p. 661, note 1.]

³ [Observe, that the valuation in a policy is conclusive between the underwriters and the assured in settling a loss upon it; but where there are several policies upon the same vessel

valued differently, the assured, if he have recovered upon the smaller valued policy, may, in an action upon another policy, recover the difference (but no more) between the amount received and the value in that policy. *Bruce v Jones*, 1 H. and C. 769; and see *Irving v Richardson*, 1 M. and Rob. 153.]

⁴ *M'Morran & Co. v The Newcastle Fire Insurance Co.*, 1815, 3 Dow 255. The question arose in Scotland, on a policy of fire insurance of a cotton mill in the county of Lanark. The insurance was made with the Newcastle Fire Insurance Co. The mill was burnt; and in an action against the insurers, the question was, Whether this mill, which was warranted as in the first class of risks, was not truly of the second class? The Lord Chancellor said: 'If the mill was warranted as of the first class, and was really of the second class, the judgment of the Court of Session was erroneous. For it is a first principle in the law of insurance, on all occasions, that where a representation is material, it must be complied with; if immaterial, that immateriality may be inquired into and

There are not in the Scottish books many important illustrations of the strictness with which warranties are required to be complied with. The rule is held as fixed, and reference may be made to the English books for the doctrine.¹

There are several warranties which thus operate as absolute conditions, of which some are express, some implied. Of the EXPRESS, the conditions are such as these: That the ship is to sail on a particular day;² that she was safe on a particular day; that she is [617] to proceed with convoy; that she is neutral property; and other such conditions as may either be matter of representation, or such as, in order to put a stop to all suspicion of concealment, the insured may agree to make a condition of the contract. The IMPLIED warranties are such as necessarily result from the nature of the contract: as, That the ship is seaworthy; that she shall be navigated with ordinary skill and care; that the voyage is lawful, and so forth.³

The most important warranty, and one of the chief points in the law of insurance, is SEAWORTHINESS.⁴ From the absolute nature of this condition of the insurance, there is no occasion to disclose any previous accident or disrepair as a part of the representation necessary to an effectual insurance; and it has been a great object with courts of law, both for the benefit of commerce and with a view to the preservation of human life, to enforce the necessity of having the ship seaworthy when she sails on her voyage.

In treating of affreightment, something has already been said of seaworthiness, and of the difference between this question in a contract of insurance and in a charter-party. As applicable to insurance, it may be laid down,—

1. That in this, as in all warranties, it signifies nothing whether the insured was himself aware of the ship's condition or not. No ignorance or innocence on the part of the insured will be an answer to the fact that the ship was unfit for the voyage.

2. That, as a part of the same doctrine, the opinion of the carpenters who repair a vessel, however much it may raise or strengthen the presumption that the ship is seaworthy, is not conclusive of the fact of seaworthiness.⁵

shown; but that if there is a warranty, it is part of the contract that the matter is such as it is represented to be. Therefore the materiality or immateriality signifies nothing. The only question is as to the mere fact.' [See *De Hahn v Hartley*, 1 T. R. 43; *Ollive v Booker*, 1 Ex. 423.]

¹ The following Scottish cases, however, may be looked into:—

1. *Dunmore & Co. v Allan*, 1786, M. 7101, where a ship, warranted to sail with convoy, did not sail till several days after, but overtook the convoy, and was a few weeks afterwards separated in a gale and taken. The policy was held bad for non-compliance.

2. *Monteith v Cross*, 1788, M. 7105, where a ship, insured with a warranty to sail with convoy, instead of proceeding to the rendezvous, remained in a harbour at the distance of several miles, but within signal distance. The fleet sailed, and this ship was kept in harbour by a calm, but joined the fleet three days after, and continued with it for a month, when she was separated in a storm and captured. In an action for the loss, the underwriters were freed on account of non-compliance with the warranty. [See *Add. Cont.* 6th ed. 498.]

² *Denniston & Co. v Lillie*, 22 May 1817; affirmed in House of Lords, 5 April 1821, 1 Sh. App. Ca. 22.

³ [There is also an implied warranty that the ship is properly documented, as to which see *Tudor*, *Merc. Ca.* 2d ed. 136.]

⁴ [The discussion in the text must be taken to be confined

in its application to *voyage-policies*. With respect to *time-policies*, it has been decided by the House of Lords that where a time-policy is effected on a vessel then abroad, there is no implied condition whatever as to seaworthiness. *Gibson v Small*, 4 H. L. Ca. 353. It is to be taken as settled (per Lord Campbell, *ibid.* 422) that there is no general exception to this rule in case of a time insurance being effected on a ship about to sail on a voyage; 'but,' said his Lordship, 'I have hesitated more upon the question whether, when a time-policy is effected upon an outward-bound ship lying in a British port where the owner resides, a condition of seaworthiness is to be implied.' Lord Campbell's opinion, however, was against admitting even this exception to a rule which is founded on strong reasons of expediency. It would seem, notwithstanding, that if a ship insured in a time-policy is *knowingly* sent to sea by the assured in an unseaworthy state, and that his fault in so doing has contributed to the loss of the ship, the assured is not entitled to recover from the underwriters. *Thompson v Hopper*, El. B. and El. 1054, per Chief Justice Cockburn.]

⁵ *Seougal & Co. v Douglas*, 29 May 1812. The *North Star* was an old Dutch prize, employed as a whale-ship, and bought for £1200, including £500 of fishing materials. She was repaired at Leith for a voyage to America: she was not stripped nor opened, so as to enable the carpenters to judge of her internal state; but having received repairs to the amount of £280, she, about a fortnight after sailing, encountered a gale and was obliged to go into Greenock. On a

3. That the presumption, *prima facie*, is for seaworthiness. But this will be removed when a ship goes down, or becomes innavigable after sailing, without any apparent or adequate cause, especially if this happens soon after leaving the port. The *onus probandi* in such a case is turned against the insured,¹ who are thus held bound to show such a case as to account for the injury, independently of any unfitness in the ship.²

[618] 4. That any sort of disrepair left in a ship, by which she or the cargo may suffer, is a breach of the warranty of seaworthiness, whether it affect the hull,³ or the rigging, sails, etc.,⁴ or the ground tackling.⁵

5. That a deficiency of force in the crew, or of skill in the master, mate, etc., is want of seaworthiness;⁶ as also is the want of a pilot in the navigation of rivers, firths, etc.; where the master is not familiar with the difficulties as in the ship's own port.⁷ But if a sufficient complement of skilful officers and able seamen has once been put on board, the negligent

survey, she was proved to be materially decayed. The underwriters on this account having refused to repair her, the owners did, at the expense of £1426, and then brought their action for this sum. There was some discrepancy of evidence, the Greenock carpenters having made two reports,—the first less, the second more favourable. The insurance was held good. An appeal having been taken to the House of Lords, the judgment was reversed. Lord Eldon held: 1. That it was not necessary to inquire into the honesty of the insurance, that being of no importance to the issue. 2. That the imperfect survey at Leith left room for fatal mistakes. 3. That 'the ship having sailed, and appearing to have been for two or three days in a violent storm, if she be so damaged as that the damage might fairly be considered as the effect of the storm, that is one view of the case. But if damaged in such a manner as, in common probability, she would not be if she had been seaworthy when she sailed on the voyage, the implied warranty is not observed.' Then, going through the evidence, his Lordship said: 'Having considered the whole of this evidence, I never was more clear about anything than that it is proved to be perfectly manifest, to my entire satisfaction, that this vessel was not seaworthy when she sailed, whatever might then have been the opinion of the owners and carpenters who repaired her; and if the cause could have come, and had come here originally, I would have recommended to give costs to the underwriters. But it is not customary to give costs where a decision of the Court below is reversed.' 4 Dow's Rep. 269. [See *Baker v Scottish Sea Insurance Co.*, 1855, 17 D. 417, as to pleading.]

¹ *Watson v Clark*, 1 Dow 336. The *Midsummer Blossom* was thirty-five years old. She sailed from England to Honduras. On sailing thence she was thought to be seaworthy; but soon after, without adequate cause, became leaky, and returned, struck, and was lost. The risk insured was 'at and from Honduras to London.' The Judge-Admiral held the ship not to be seaworthy, and adjudged the policy to be void. The Court of Session altered this judgment. The House of Lords reversed, and returned to the judgment of the Judge-Admiral. Lord Eldon 'held it to be a clear and established principle, that if a ship was seaworthy at the commencement of the voyage, though she became otherwise only an hour after, still the warranty was complied with, and the underwriter liable. But when the inability of the ship to perform the voyage became evident in a short time from the commencement of the risk, the presumption was that it was from causes existing before her setting sail on her intended voyage,

and that the ship was not then seaworthy; and the *onus probandi* in such a case rested with the assured, to show that the inability arose from causes subsequent to the commencement of the voyage.' With this Lord Redesdale concurred, and said, 'he had always understood it to be a clear and distinct rule of law, that if a vessel in a short time after leaving the port where the voyage commenced was obliged to return, the presumption was that she had not been seaworthy when the voyage began, and that the *onus probandi* was thrown on the assured.'

In *Potts, Cook, & Potts v Parker*, 3 Dow 24, the judgment of the Court of Session was, on the same ground, reversed. Here the insurance had been sustained by the Court of Session. The ship was held by the House of Lords to have become innavigable without any adequate cause, and the proof to satisfy the *onus probandi* was held insufficient.

² [It must be observed that the warranty of seaworthiness (the most important of the implied warranties) applies strictly to the time of sailing. Accordingly, it was held in a leading case to be no defence to an action on a policy, that the vessel after sailing, and before the accident occurred, was rendered unseaworthy by the wrongful, negligent, and improper (but not barratrous) conduct of the master and mariners in throwing overboard so much of the ballast that the vessel was unable to overcome ordinary perils. *Dixon v Sadler*, 5 Mees. and W. 405. See *Bermon v Woodbridge*, Doug. 781. The warranty of efficiency of the master and crew is subject to a corresponding limitation. See the authorities in *Tudor, Merc. Ca. 2d ed. 128*. The case of *Law v Hollingsworth*, 7 T. R. 160, in so far as conflicting, is overruled. See 8 Mees. and W. 900, per Tindal, C. J. As to the application of this warranty to insurance on salvage, see *Knill v Hooper*, 2 H. and N. 277.]

³ *M'Kellar v Henderson*, 15 Nov. 1810, 16 Fac. Coll. 15. An old tree-nail hole imperfectly filled up, and thereby occasioning a leak, will free the underwriters.

⁴ *Wedderburn v Bell*, 1 Camp. 1. [*Cook v Greenock Marine Insurance Co.*, 1843, 5 D. 1379; *Harvey v Smith*, 1818, 1 Mur. 302, 313.]

⁵ *Wilkie v Geddes*, in House of Lords. See above, p. 598, note 5.

⁶ See above, p. 599. [*M'Callum v Sea Insurance Co.*, 1839, Macfarlane's Rep. 269.]

⁷ *Law v Hollingsworth*, 7 Term. Rep. 160. See also above, p. 599 et seq.

Thomson v Bisset, above, p. 600, 3 Murray 297.

absence of the crew at the time of the loss, provided some one was left in charge of the ship fit to be entrusted with her, was not held a breach of the warranty.¹

6. That a vessel may be not seaworthy from being overloaded.²

7. That if the want of seaworthiness, arising from justifiable ignorance of the cause of the defect, be discovered, and the fault be remedied while yet there is no harm done, the policy is binding: as when a ship proves to be too heavily laden, and before sailing is relieved of the excess; or sailing with only one anchor, she is supplied with the other before she has occasion to use it. There may, indeed, be delay and deviation occasioned by such want of seaworthiness, which may prove fatal to the policy. But where nothing of this kind happens, or where the underwriters by a memorandum give permission to deviate so far, the plea on seaworthiness is discharged.³

8. That it is not necessary the ship shall be seaworthy for the voyage from the [619] moment the policy attaches to her. While she remains in port, it is sufficient that she is properly fitted for all the dangers of that situation.⁴

II. CONCEALMENT OR MISREPRESENTATION.—It is fatal to the policy if the insured, or those effecting the insurance, have misled the insurers in any fact material to the risk. The points are these: 1. Misrepresentation; 2. False insinuation; and, 3. Concealment.⁵ On

¹ *Busk v The Royal Exchange Assurance Co.*, 1818, 2 Barn. and Ald. 73. Here the ship was accidentally burnt. The ship was Russian; sailed from Amsterdam with an adequate crew; was forced by weather into a Russian port, and there frozen up for the winter. The crew was then paid off, according to the established custom in those ports; and the captain, leaving the ship in the charge of the mate, went to St. Petersburg to settle the ship's accounts. The mate lighted a fire in the cabin, and without having seen it properly extinguished, went on board another ship, where he remained all night. At four in the morning there was an alarm of fire, and the ship was burnt. The chief question was on the effect of the mate's negligence in freeing the underwriters. There was also a plea of breach of implied warranty, as there was no crew on board at the time of the loss. The Court held the implied warranty to have been complied with once, and that the mate himself was sufficient for the watching of the ship. The underwriters were found liable on the express stipulation in the policy against fire, and from which the negligence of the master or mate will not discharge them.

² [See below, next note. This warranty, as regards the condition of the vessel, is satisfied if she is made as seaworthy as a vessel of her burden is capable of being made, although the capacity of the vessel may not be that which is usual and proper for the particular voyage. *Burges v Wickham*, 3 Best and Sm. 669; *Clapham v Langton*, 5 Best and Sm. 729. As to what constitutes unseaworthiness, and the modern decisions in relation to this doctrine, see *Tudor, Merc. Ca.* 2d ed. 133; *Sm. Merc. Law*, 7th ed. 377-80. This warranty does not extend to lighters employed to land the cargo. *Lane v Nixon*, 1 L. R. C. P. 412.]

³ *Weir v Aberdeen*, 1819, 2 Barn. and Ald. 320. Here, under a policy on the ship, the vessel sailed from London in an unseaworthy state, from being overloaded, and laboured so much that she was forced to put back to the Downs; and the captain applied to the underwriters for liberty to go into Ramsgate to unload part of the cargo, which was given. Having done so, he sailed, and a loss happened. Two questions were left to the jury: 1. Whether the ship sailed from Ramsgate seaworthy? and, 2. Whether the subsequent loss

was occasioned by the previous overloading? The jury affirmed the first, and negatived the second question. A new trial was moved on two grounds: 1. That the ship was originally seaworthy; and, 2. That there was a deviation into Ramsgate; the memorandum being, in fact, a new policy, and without a stamp. The Court held, that there was no avoidance of the policy by non-seaworthiness discovered and corrected before the danger; that the memorandum was therefore a mere discharge of the warranty, and the loss not occasioned by the original defect.

See *Forshaw v Chabert*, 3 Brod. and Bing. 159. The true distinction between this and the above case is pointed out by Mr. Marshall; namely, that in the former the consent to the discharging of part of the cargo at Ramsgate was a waiver of the objection to the unseaworthiness and to the deviation. *Marsh.* 159.

⁴ *Marshall* 147. *Annan v Woodsman*, 3 Taunt. 299. [For example, in the case of a policy on a ship at and from London on a whaling voyage to the north, the warranty is for four gradations: that the vessel is fit for dock in London, fit for river to Gravesend, fit for sea to Shetland, and thence fit for whaling. Per Chief Justice Erle, 6 Ell. and Bl. 181.]

⁵ [The leading English authority on concealment as a defence to an action on a policy of insurance is *Carter v Boehm*, 3 Burr. 1905, 1 Smith L. Ca. 490. Insurance on Fort Marlborough (a British factory) against foreign capture, effected by its governor. The weakness of the fort, and the probability of its being taken by the French, and that the insured knew these facts, but had not communicated them, and also the opinion of an insurance broker as to the materiality of the facts not communicated, were offered to be proved. The plaintiff proved that the office of governor was mercantile, not military, and that the fort was never calculated to resist European enemies. Lord Mansfield rejected the evidence tendered by the defendant, and, on motion for a new trial, delivered an elaborate judgment, distinguishing the *species facti* which an insurer is bound to disclose, from those which, as being either matter of notoriety or matter of opinion, the underwriter is bound to investigate for himself. It is still a controverted question whether the opinion of brokers or

the first of these, few cases are to be expected; or, at least, cases merely of proof, being of little use as precedents. Of the other two classes many illustrations are to be found. In the Scottish cases on this point, however, there is nothing very particular to be observed, either as new in doctrine, or as in any degree departing from the rules laid down by Park and Marshall, and so extensively acted on in English determinations. 1. It is fatal to misstate, though innocently, the day of sailing.¹ 2. It is a misrepresentation to say that a ship is *expected* to be ready to sail between two days named, when the insured has information that she was actually ready to sail on the first of those days;² or to say that a ship is *reported* to have sailed, when it is known that she positively *has* sailed.³ 3. It has been held (though the point has been thought to admit of considerable doubt) that the insured makes a misrepresentation fatal to the policy, if at procuring insurance he says that part of the same risk has been insured already at a certain sum by underwriters likely to have the confidence of those to whom he applies, although, in truth, a higher had been paid. It was held that, although this does not touch any part of the risk, the state of the ship or the condition or nature of the voyage, it induces false confidence.⁴ 4. It is not necessary to give

neutral persons of skill is admissible to prove the materiality of facts not communicated. Opposite decisions were given by Lords Tenterden and Denman in different actions arising out of the same contract; the question being, whether the agent in London of an Australian merchant, who was instructed to effect an insurance on goods, *but not until thirty days* after the arrival of the vessel bringing the instructions, was justified in concealing the condition from the insurance broker. *Rickards v Madock*, 10 B. and C. 257; *Campbell v Rickards*, 5 B. and Ad. 840. In another case, where an insurance had been effected for a voyage 'at and from London to St. Thomas, with leave to call at' Madeira and Teneriffe, a letter was communicated to the insurance broker, stating that the vessel would sail next day 'for the Canaries,' and thence to one or more of the West Indian islands,—say *Barbadoes*, *St. Kitt's*, and *St. Thomas*,—and he was desired 'to do the needful with it.' The broker got the policy altered by adding, 'leave to proceed to St. Kitt's and Barbadoes,' but omitted to obtain leave to proceed to any of the Canary Islands. The vessel was lost at the *Grand Canary Island*. In an action against the broker for negligence in not having procured the proper alterations to be made on the policy, evidence of policy-brokers was admitted to the effect that the alterations made were a sufficient compliance with instructions. The ruling was upheld, on the ground that it was a question of skill what effect the circumstances of the voyage, and especially the circumstance that the original voyage described in the policy comprehended Teneriffe, the most important of the Canary Islands, would operate in the minds of experienced men, in determining whether it was intended that the alteration should include a liberty to touch and stay at the Canaries in general. *Chapman v Walton*, 10 Bing. 57. In favour of the reception of such evidence, we may also cite (in addition to the analogical support derived from the reception of medical evidence as to materiality in actions on life policies) *Elton v Larkins*, 5 C. and B. 392; 3 Kent's Com. 284, note (b), ed. 1844; Judge Story in *McLanahan v Universal Insurance Co.*, 1 Peter's Amer. Rep. 188; and Duer on Representations (Amer.), 184-191.]

¹ *Stirling & Robertson v Goddard*, 3 Feb. 1819, aff. 19 July 1822, 1 Sh. App. Ca. 238. See *Denniston*, *supra*, p. 663, note 2. [Add. Cont. 6th ed. 502.]

² *Stewart v Morrison*. Morrison had letters from Königsberg, that his ship, on 13th September, 'is now quite ready to depart with first fair wind.' Morrison wrote for insurance, saying 'the vessel was expected to be loaded at Königsberg between the 13th and 20th September.' An insurance was also done on this other order: 'Said ship expected to be loaded at Königsberg between the 13th and 20th September.' The ship sailed on 13th, and in two days after was totally lost. The Judge-Admiral dismissed the action, and his judgment was affirmed by the Court of Session. 1779, M. 7080.

³ *Kinloch v Duguid*, 1813, 17 Fac. Coll. 108. The owners of the Kinloch had a letter from the wharfinger, with the manifest, saying, 'She sailed yesterday morning with a fair wind, and I hope will have a speedy passage.' This letter was written 26th February, and arrived at Dundee 1st March. On 9th March a policy was opened on a letter, saying, 'Commission £1000 on ship Kinloch, valued at £3000, from London to Dundee, *reported* to have sailed 25th ultimo.' The ship was captured, and in an action for the loss the Judge-Admiral held this to be a misrepresentation which annulled the policy. This judgment was, in the Court of Session, affirmed by Lord Robertson and by the Court.

⁴ *Hill v Sibbald & Co.*, 16 June 1809, 15 Fac. Coll. 308. Hill had insured on his South Sea whaler Redbridge £3600, at twenty-five guineas, to return five guineas on arrival in company with the *Britannia*. Afterwards he insured £2000 more on part of the voyage, at from 15 to 18 per cent. Two years after sailing, the owner having heard of her safety eight months before, and that she might be expected in about two months, wrote for another insurance to his broker in London, to get £2000 done at Leith, saying, 'I have no objection to give eight guineas, *which is the highest premium I have given*.' The London broker wrote to Scotland that Hill 'had done as much insurance on the ship as the underwriters here are inclined to take at eight guineas.' Insurance was accordingly done at eight guineas, to the extent of £1750. The ship was captured. The Judge-Admiral held the insurance to have been voided by the representation of the London premiums, and that the pursuers had no right to recover. 13 July 1804. This judgment having been appealed to the Court of Session, Lord President Hope, then Lord Justice-Clerk, held, as Lord

information of an accident sustained by the ship previous to the commencement of the [620] risk, as the ship is warranted seaworthy.¹ But if in such a case the necessary repairs are not yet completed, and likely to affect the time of sailing, it then becomes important to disclose the state of the ship, as the ground on which the risk is to be calculated. And in general, all concealment of positive information as to the day of sailing, or of facts which will affect the sailing, will be fatal.² 5. It is important to know whether a ship is to wait for convoy, or to *run* the voyage; and if, in obtaining insurance, the underwriter is misled into a belief that the ship *may* sail with convoy, when the resolution has been taken [621] to send her as a running ship, the policy will be bad.³ 6. Where two ships are to co-operate as tenders to each other, this so far changes the risk from the ordinary one of a single ship, that it must be disclosed; unless it be so established as a custom in the line of trade insured, that it must be presumed to be known.⁴ So, where the destination is expressed to a port,

Ordinary, that 'this was not a misrepresentation as to any circumstances attending the situation or condition of the ship or nature of the voyage, which could affect the nature of the risk,' and therefore he reversed the Judge-Admiral's sentence. The judges were divided in reviewing this interlocutor of reversal. The majority assented to the view taken by the Lord Ordinary. The minority held it to be substantially an imposition, intended for that purpose, and having the effect of persuading the underwriters here that the better informed underwriters of the south had run the same risk.

The case having been appealed to the House of Lords, the judgment was reversed. Lord Eldon, Chancellor, said: 'It appeared to him to be settled, that if one meaning to effect an insurance exhibits a policy underwritten by a person of skill and judgment, knowing that this would weigh with the other party, and disarm the ordinary prudence exercised in the common transactions of life, and it turned out that this person had not in fact underwritten the policy, or at least had done so on such terms as that he came under no obligation to pay, it appeared to him to be settled that this would vitiate the policy. The courts in this country would say this was a fraud, not on the ground that the misrepresentation affected the nature of the risk, but because it induced a confidence without which the party would not have acted' (2 Dow 263).

¹ *Shoolbred v Nutt*, Park 346. The insurance was from Madeira. The ship was leaky on the outward voyage, which was not disclosed. She was fully repaired at Madeira. The loss was by capture. Lord Mansfield told the jury there was no occasion to represent what was covered by the warranty.

See also *Haywood v Rogers*, 4 East 590.

Adam & Mathie v Murray, and *Bogle v Smith*, 1804, M. App. Insur. No. 6; *Marshall on Insurance*, Appendix, No. 6. Here the ship *Concordia* received damage in going into Port Morant in Jamaica, and by letters from the master the owners were informed that the ship was so much damaged as to require a survey; and (4th June) on that survey considerable repairs were found necessary. The master some days afterwards (15th June) wrote that the repairs were finished, and that the certificate of her being fit for sea was expected, concluding with a hope that she would be ready to sail with convoy on the 25th July. From the repairs, however, which were found necessary, and some delay in loading, the ship was not ready till the 22d, when she sailed to join convoy, but from bad weather did not reach the rendezvous till three days after the fleet sailed. By various disasters the ship was kept in the West Indies for many months, and at last was unable

to proceed without such repairs as would amount to more than her worth. The master's letter arrived on the 4th of August, when the owners insured £200 on the freight, giving to the underwriters this information: 'Our letter of 15th June from the master says our cargo is all ready for us; and if the fleet don't sail till the 25th, I hope we will be able to go with them; but it is talked they will leave this the 20th.' The ship was abandoned to the underwriters, and an action brought, to which the pleas were: 1. Concealment; 2. Want of seaworthiness; 3. An average, not a total loss. The Court of Session held it established that, after the damage, the vessel had been made seaworthy, and that the voyage having been lost, the owners were entitled to abandon; and so the question came to turn on the concealment. The Court sustained the action, and repelled the defences.

See also *Smith v Bisset*, 9 March 1810, 15 Fac. Coll. 617.

² *Gillespie v Douglas*, 1803, M. 7095. *Gillespie & Co.* had a letter by the *Fanny* from New York, saying that 'the *Ohio* will sail about twelve hours after the *Fanny*.' Some days after getting this letter they insured £1000 on goods by the *Ohio*, at and from New York, but saying nothing of the day of sailing. The ship was taken, and the insurance held ineffectual, as the information withheld made this a missing ship.

³ *Reid & Co. v Harvey*, 25 June 1813, 17 Fac. Coll. 407. *Reid & Co.* of Glasgow insured a cargo of fruit expected from Lisbon at ten guineas per cent., 'to return five for convoy or arrival.' The letters on which they applied for insurance stated the ship to be a prize going home for condemnation, and said, 'We have determined on running the *Nancy*.' The ship was taken and carried into Vigo. The underwriters defended themselves against a claim for the loss on these grounds: 1. That this was a prize; 2. That it was a running ship: both of which facts, though material, were concealed. The Court of Session first dismissed the action. They afterwards altered that judgment, as the policy itself showed that the case of a running ship was included.

The case having been appealed to the House of Lords, it was there held that a policy of this sort, though it comprehended the case of a running ship, contemplated that as a case of chance, the risk being taken altogether with the chance of the vessel sailing with convoy; whereas here the alternative was entirely cut off, which made a different sort of risk. The judgment was reversed. 4 Dow 97.

⁴ *Henderson & Sellar v Sir W. Fettes*, 20 Feb. 1812, 16 Fac. Coll. 518, 1 Dow 324.

and the real design is to fish off that port, the insurance is bad, unless this be the customary mode of insuring a fishing voyage.¹ 7. The insured is bound, on applying for insurance, to disclose all that he knows or has heard relative to the actual state of the ship, or what leads to direct inference as to her fate.² And it is no justification to support the policy, that the insured did not himself believe what was reported to him. 8. Direct concealment of the actual state of the ship vacates the policy. That even doubtful rumours are to be disclosed, is laid down in the books, and illustrated by many cases.³ 9. Although the order for insurance may have been fairly given, according to the circumstances as known at the time it was [622] sent off, if information material to the risk have come to the knowledge of the insured in such time as to enable him to correct his order before the policy is underwritten, the withholding of that information will be fatal to the insurance.⁴

¹ *Bain v Kippen*, 1783, M. 7087.

² *Kirby v Smith*, 1818, 1 Barn. and Ald. 672. Here Kirby, the owner of the *Ocean*, insured her from *Elsineur* to *Hull*. On 26th July, about six hours after the *Ocean* sailed, Kirby himself left *Elsineur* in another ship; and on his arrival (9th August) at *Hull*, finding the *Ocean* not arrived, he insured, disclosing nothing of the arrival of the other ship, or of her having sailed after the *Ocean*. The average voyage is from eight to ten days, though some ships make it in four or five days. The jury found a verdict for the insured. But a new trial was granted on the ground of the concealment of a material fact. Lord Ellenborough said, that 'the fact of the *Ocean* having sailed six hours before the other ship might have been very material, and might have induced the underwriter to pause before he took the risk.' He was therefore of opinion that it ought to have been communicated to the underwriters. Mr. Justice Bayley held, that the ship having been represented as well at *Elsineur* on 26th July, from whence the natural conclusion was that she was left there on that day, contrary to the fact, this was a misrepresentation not to be got the better of by the custom that ships do not stay at *Elsineur*, for this depends on their state and on the weather. Lord Chief Justice Abbot held also that the concealment was material.

See *Lynch v Hamilton*, 3 Taunt. 37.

³ See *Marshall*, p. 466; *Park* 287. [Sm. Merc. Law, 7th ed. 394.]

Stewart v Dunlop, 8 April 1785, 3 Pat. 14. The ship *Peggy*, belonging to *Stewart*, was captured. Another ship, the *Henrietta*, arrived in *Greenock* with intelligence of the capture. Mr. Boog, who came in that ship, having met an intimate friend of *Stewart*, the owner, asked him in a very particular way whether he knew of any insurance done upon the *Peggy*? This person immediately had a conversation with *Stewart's* clerk, who, after this conversation, was desired by his master to get an insurance effected, although it did not distinctly appear that he reported the conversation to *Stewart*. The Court of Session held the insurance bad, and the House of Lords affirmed that sentence.

Kinloch v Campbell, 14 June 1815, 18 Fac. Coll. 421. Here the vessel sailed from *London* for *Dundee*, 25th February 1810. Another sailed the same day, and arrived 6th March. And another sailed 2d March, and arrived the 7th; by which last ship information was brought that the master of the *Rose of Dundee* had, off the *Nore*, reported that the *Kinloch* was spoken with on the 28th of February north of *Yarmouth*. The *Kinloch* was a schooner-rigged ship; and

on 6th March it was stated in the *Edinburgh newspapers* that a French privateer had on 2d March taken a schooner off the *Tees*. Three days after this information arrived at *Dundee*, an insurance was effected at *Leith* on the *Kinloch*, 'lost or not lost, at and from *London* to *Dundee*; sailed 25th ultimo from *London*, and no account of her since in any respect in *Dundee* up to 9th instant.' The *Kinloch* was, in fact, captured by a French privateer on the 2d March, not far from the *Tees*. The defence was: 1. Concealment; 2. False warranty of there being no accounts. The judgment of the Admiral was, on the whole, in favour of the insured; but the Court of Session reversed this judgment, to the effect of denying action upon the policy. There was a difference of opinion on the bench, Lord Meadowbank holding that there was nothing here concealed, either with regard to the description of the ship, or the arrival of the other vessel, so as to make her a missing ship, of which the underwriters ought not to have been apprised. But the other judges held that, upon the whole, there was here a combination of circumstances kept out of view, which, if disclosed, would have altered the risk.

See also *Murison v Gibbon*, 18 Jan. 1811, 16 Fac. Coll. 148; and *Allan v Young, Ross, Richardson, & Co.*, 1803, M. 7092; *Bowker & Co. v Smith*, 9 Feb. 1810, 15 Fac. Coll. 571.

⁴ *Grieve v Young*, 1782, M. 7086. Here *Grieve of Eyemouth* wrote for an insurance on the *Jean*, which sailed that afternoon for *Alloa*. After having sent off the letter, the ship was on the same evening driven back by a storm, and sank about eight next morning, in sight of *Grieve* himself. The letter ordering the insurance was sent to a post-town, at which it was to be taken up at ten next morning by the *London* post for *Edinburgh*, where it arrived at six o'clock in the evening. The Judge-Admiral found it incumbent on *Grieve* to have sent an express in order to stop the insurance, and therefore dismissed the action. This judgment was brought before the Court of Session, who held that it was not necessary to send an express to *Edinburgh*, but that there being time to countermand the insurance by the ordinary course of post, this ought to have been done; and on this ground they affirmed the Admiral's judgment.

Scougal v Young, 1798, M. 7091. *Scougal* wrote on 30th October 1792 to *Leith*, directing a cargo to be insured from *St Petersburg* to *Leith*. On 2d November part of the cargo was damaged; and of this information might have been sent that evening, so as to go by the very next mail to that which carried the order to insure. *Scougal* did not write by that post. The mails of 30th October and 2d November arrived at the same time, so that the information which ought to have

III. DEVIATION OR ALTERATION.¹—1. Deviation is a voluntary departure, without necessity, from the stipulated or usual course of the voyage. Strictly speaking, deviation takes place during the actual sailing of the ship; and is an alteration of the risk, discharging the subsequent responsibility of the insurers, without requiring any return of premium. Of this doctrine there never has been any doubt. The only points of difficulty are, What shall be held a deviation? and what degree of necessity shall excuse it? And, (1.) It is not the less a deviation that the insured were not privy to it.² (2.) The mere intention to deviate, or an engagement so to do, or instructions to that effect to the master, will not discharge the underwriters if the ship is previously lost, or never has deviated.³ (3.) The deviation actually committed destroys the responsibility, although the ship has returned to her course without any apparent injury or increase of risk. It is not the increase of risk, but the substitution of another risk, that determines the contract.⁴ (4.) Where the ship [623] has liberty to call at a port not named, but generally described as a port in a particular coast or country, it is a deviation if the ship go to such a port out of her usual course.⁵ (5.) Where the deviation is unavoidable, or necessary for the safety of the ship or cargo, or even of a part of the cargo, it will not discharge the underwriters from their responsibility,⁶

been transmitted on the 2d would have corrected the order. He brought an action for the loss; but the Judge-Admiral dismissed it, and the Court of Session affirmed the judgment. [With these cases compare *Stone v Aberdeen Marine Insurance Co.*, 1849, 11 D. 1041.]

¹ See Marshall, pp. 177–206. [*Grahame v M'Nair*, H. L., 1770, 2 Pat. 244; Add. Cont. 520.]

² *Steevens & Co. v Douglas*, 1774, M. 7096. Insurance from Belfast to Greenock and Port-Glasgow. *Defence*: Goods taken in to be delivered at Stranraer, and, after deviation, wrecked near Girvan. *Answer*: The insured ignorant of the deviation. *Court* held it not necessary to vacate a policy, that the assured should be accessory to the deviation; but enough that there was a deviation, or an intention to deviate, partly carried into execution.

This was also a point in the case of *Elliot v Wilson*. See below, note 4.

N.B.—It is not quite correct to speak of *vacating* the policy by deviation, for it is still a good policy though the responsibility subsequent to the deviation is discharged. See Park 474; Marshall 184.

³ Park 470; Marshall 195; Roccus, Not. 20, to be corrected by 2 Emerigon 56, and Casaregi, Disc. 67, No. 24.

⁴ *Wilson & Co. v Elliot*, 1776, M. 7096. An erroneous judgment on this point by the Court of Session was corrected by the House of Lords. A ship was insured from 'Carron to Hull, with liberty to call at Leith.' The liberty had commonly been more extensive, 'to call as usual,' which included all the ports in the Firth of Forth. The insured, without having been informed by their broker of the alteration, called at Morrison's Haven; and the ship, after returning to her course, was overtaken by a storm and lost. The Court of Session sustained action against the insurers, 'on the ground that Morrison's Haven was so near that it could scarcely be called a deviation, and that the vessel actually returned into her proper course, where the underwriters had in reality suffered no detriment.'

In the House of Lords a different view was taken, the House being of opinion that there was here a wilful deviation; and although ships sailing on the voyage have sometimes been allowed by the terms of a policy underwritten at

the same premium to go into Morrison's Haven, that could not avail him, since no permission was given here: that a wilful deviation from the course of the voyage insured is in all cases a determination of the policy, it being immaterial from what cause or at what place a subsequent loss happens; for from the moment of deviation the underwriters are discharged. *Elliot v Wilson*, 7 Brown's Parl. Cases 459, 2 Pat. 411.

⁵ *Robertson v Laird*, 1790, M. 7099. An insurance was made from Virginia to Rotterdam, *with liberty to call at a port in England*. The owner wrote to the broker, that the ship would probably be ordered to discharge at Hull instead of proceeding to Rotterdam, and desiring him to get the policy endorsed with such a permission if agreed to. All the underwriters but one agreed. The ship was cleared for Hull, and in going towards that port was lost. Laird, the non-concurring underwriter, resisted a claim for the loss. The Judge-Admiral decided against Laird. The Court of Session held him liable, on the ground 'that the expression in the policy should be construed to mean any port in England at the discretion of the insured, or of the shipmaster, which would not occasion an unreasonable deviation from the plan of the voyage;' and therefore they refused the bill of suspension.

On an appeal to the House of Lords, this judgment was reversed, and the case remitted for discussion, 20th April 1791.

The cause was discussed before Lord Justice-Clerk M'Queen, who held, 'that a voyage insured from Virginia to Rotterdam, with liberty to call at a port in England, does only entitle the insured to call at such ports on the English coast as lie in the track of the voyage, but not at a port which is so much out of the natural course of the voyage as Hull is;' and therefore he dismissed the action. The Court, in reviewing this judgment, 'held *the voyage to be entirely altered*, and therefore that the policy was *vacated*.' 1793, M. 7100.

⁶ *Dunlop v Allan*, 1785, M. 7097. Goods of Dunlop's were insured from Clyde to St. Christopher's. There were also on board goods belonging to other merchants. St. Christopher's was found in possession of the enemy, but under a capitulation which did not affect Mr. Dunlop's goods, while the others on board would immediately have been seized. The master

provided it be pursued in the shortest and most expeditious course; but there must be no deviation from such necessary voyage.¹ (6.) The *onus probandi* lies on the insurer alleging deviation.² See in Marshall a very ample discussion of the grounds on which a deviation may be justified, under the heads of—Stress of Weather; Want of necessary Repair; the joining of Convoy; the Succouring of Ships in Distress;³ the avoiding of Capture or Detention; the Sickness of the Captain or Crew; and Mutiny.⁴

2. Alteration of the voyage differs from deviation, in being a complete abandonment of the voyage insured, under a resolution to sail upon another. This properly takes place before the voyage insured begins; and the effect of the abandonment is to void the policy either with or without a return of premium. (1.) If the voyage insured be abandoned before the risk have commenced, the policy is void, and, on the one hand, a return of premium may be demanded;⁵ while, on the other, no claim can be maintained against the underwriter for loss, though happening within a course common to both voyages.⁶ (2.) The express determination to alter the voyage is conclusive, although it cannot strictly be said that the new voyage is begun. For there is held to be a difference of risk in time, rapidity of preparation, etc., perhaps inscrutable, but still important, attached to the specific voyage determined on.⁷ (3.) As it is not a deviation where the master is forced by necessity to change his course, neither is it an alteration or abandonment of the voyage insured, that a material change has by necessity taken place in the intermediate voyage.⁸ And, (4.) It is

therefore carried the whole to Antigua, intending to take the earliest opportunity of sending Dunlop's to St. Christopher's; but in the meanwhile they were burned in the warehouse. The Judge-Admiral and the Court of Session held the insurance good.

¹ *Lavabre v Wilson*, Doug. 290, where Lord Mansfield said: 'It is incumbent on the insured to pursue a voyage of necessity directly, and in the shortest and most expeditious manner.'

² *Sheddan & Co. v Logan, Gilmore, & Co.*, 1787, M. 7098.

³ [As to the limits within which deviation is justifiable in the performance of salvage services, see *Kirby v Owners of the Scindia*, 1 Law Rep. P. C. Ca. 241.]

⁴ Marshall, pp. 198–206. [See also the summary of cases on this point in Tudor, Merc. Ca. 2d ed. 124; Sm. Merc. Law, 374–6.]

⁵ See Park, in his chapter on Return of Premium, p. 562 et seq.

⁶ *Cunningham v Tasker*, 16 Feb. 1816, and House of Lords, 7 July 1819, 1 Bligh's Cases 87. Here Cunningham, expecting a ship from Newfoundland at Cadiz, wrote to his agents there to ballast the ship with salt, and freight her to Clyde. The French army having got possession of the salt-pans at Cadiz, this could not be done; and the agent wrote in February that he would send the ship to Liverpool, where they might get salt, which was necessary to be sent to Newfoundland early in spring. On this a policy was effected, at and from Cadiz to port of discharge in St. George's Channel, including Clyde. The ship was detained long; and the danger of further delay, with the retiring of the French from the salt-pans at Cadiz, induced the agents to alter the voyage again, and send the ship direct to Newfoundland. Notice was sent of this, and that the captain had determined to return direct to St. John's. The letter conveying this intelligence arrived the same day with another, informing Cunningham that the ship had, while still at Cadiz, been driven on shore in a storm, and burned by the French. Of the former letter no notice was taken by the insured, who applied to the underwriters for pay-

ment of the loss, and received payment accordingly. The action was for restitution of the money thus improperly obtained. In the Court of Admiralty and Court of Session it was held that there was no abandonment of the voyage insured. In the House of Lords the case was viewed in a different light. The Lord Chancellor Eldon, on occasion of first moving the judgment, intimated his doubts of the judgment pronounced here, and said that he wished to confer with a judge whose attention had been much occupied with these subjects. Afterwards, on delivering judgment, his Lordship stated these points: 1. That the consent of the owners at home was not necessary, the captain and agent abroad having taken the arrangement on themselves, with sanction of the owners. 2. That although the cargo was still unloaded, and there was nothing to alter the voyage but mere intention, this intention made a difference of risk, in respect to the preparation for the voyage. And, 3. That the letter intimating the determination to change was an abandonment of the voyage; and that in this the highest authority in Westminster Hall concurred with him. So the judgment was reversed. [The leading English case is *Woolridge v Boydell*, Doug. Rep. 16; Tudor, Merc. Ca. 109. See, as to the distinction between intention and resolution to deviate, *Kingston v Phelps*, cited 7 T. R. 165.]

⁷ See the above case. See also *Lambert v Liddiard*, 5 Taunt. 480.

⁸ *Driscoll v Passmore*, 1 Bos. and Pull. 200. Here a ship was bound on a voyage from Lisbon to Madeira, from Madeira to Saffi on the African coast, in ballast, and thence back to Lisbon with wheat. An insurance was effected on the previous parts of the voyage. The disputed insurance was on freight from Saffi to Lisbon. This had been effected with difficulty, on account of the distance of time for commencement of the risk; but on a representation of the ship being at Madeira, and about to proceed on her voyage, it was done. At Madeira all the crew deserted but two, on a report of Moorish cruisers off Saffi, and refused to rejoin the ship unless the master would proceed to Lisbon. Compelled to do this,

no proof of alteration that, amidst difficult circumstances, the master writes to know what the opinion of the underwriters would be, if a certain course suggested by those difficulties should be followed, and afterwards, at command of the charterers, proceeds.¹

CHAPTER V.

OF CONTRACTS OF INSURANCE AGAINST FIRE, AND UPON LIVES.

THE great principles which rule maritime insurance are applicable also to insurances [625] against fire, and on lives; intended to provide against the accidents to which property on shore, or human life, is subject. In the security against those accidents, most important interests in a pecuniary point of view may be involved.

SECTION I.—INSURANCE AGAINST FIRE.

This is a contract by which, in consideration of a premium, the underwriter undertakes to indemnify the insured against all losses in his house, warehouse, goods, or stock, by means of accidental fire, within a limited period.

This contract, like that of sea insurance, requires a written policy. But circumstances may occur, out of which an engagement may be inferred, sufficient to sustain an action for completing the insurance.²

The claims which may be grounded on this contract arise chiefly on the part of the insured against the underwriters; for the premium is commonly paid by advance,—the transaction not being managed, as marine insurances, by brokers standing as middlemen between the parties, but directly between the insured and the insurance company or underwriters.

The points of importance to be discussed on occasion of a claim by the insured are: 1. The interest; 2. The nature of the loss insured against; 3. The warranties and representation; and, 4. The adjustment of the loss.

I. INTEREST.—Policies of insurance without interest, which are in marine insurance

the charterers insisted on his going thence to Saffi, which he did, and was captured on his return from Saffi to Lisbon. A special jury gave a verdict against the underwriters. But the case being new, it underwent a great deal of discussion in the Court of Common Pleas, when the verdict was held good. The judgment proceeded on three grounds: 1. That this was a voyage from Saffi to Lisbon. 2. That the commencement was speculative and executory, upon a representation of the intermediate course of the ship. 3. That the representation was true at the time, though the course was altered by subsequent events. And, 4. That the alteration being from necessity, and so justifiable, the voyage insured was not abandoned, but truly entered upon, in the course of which the ship was lost.

Maxwell v Brown, 1822, 1 S. 403, N. E. 378. Reversed 15 June 1824, 2 Sh. App.-Ca. 373.

¹ *Driscoll v Bovil*, 1 Bos. and Pull. 313. This was an insurance on the round voyage mentioned in the above case, from Lisbon to Madeira, from Madeira to Saffi, from Saffi to Lisbon. The only difference, except in the policy, was that, while at Lisbon, the master wrote to the broker that he was waiting

the resolution of the charterers, and wishing to know if it would be agreeable to the underwriters that the ship should proceed to complete her voyage. The broker wrote that he thought the policy at an end, and had effected a new one on the voyage from Saffi to Lisbon. The Court approved of a verdict for the insured.

² *Christie v North British Insurance Co.*, 1825, 3 S. 519, N. E. 360. Here an insurance of a wire mill was proposed to the Phoenix Insurance Co. They were willing to take half the risk, but uncertain what premium to propose; and in the meanwhile a proposal was made to the North British to take the rest of the risk. They consented, and were to be regulated as to the premium by the Phoenix; and the insurance was in the meanwhile to be held as good. No premium was fixed by the Phoenix when the mill was burnt. The Phoenix paid their loss; the North British refused; and the Court of Session held, that there being no premium fixed, there was no contract.

[See *Wylie & Lochhead v Times Fire Insurance Co.*, 1860, 22 D. 1498; Add. Cont. 6th ed. 539-546.]

objectionable chiefly as a species of gaming, are in fire insurance extremely dangerous, and most anxiously guarded against, as holding out temptation to wilful fire-raising, which necessarily is attended with peril of the most deplorable kind to the whole neighbourhood. At common law, therefore, they are exceptionable; and they are also prohibited by the [626] general words of the statute of the late king.¹ It is not, however, strictly necessary, in order to constitute an insurable interest, that the insured should hold the absolute property of the effects insured. A creditor may have a policy on the house or goods of his debtor, over which he holds a security. A trustee or agent having the custody of goods for sale on commission, may insure them, provided the nature of the property be distinctly specified, and that all the insurances taken together upon the same property shall not exceed the full value of it.²

II. OF THE RISKS AND LOSSES INSURED AGAINST.—These are all ‘losses or damage by fire’ during the term of the policy, to the houses, buildings, furniture, or merchandise insured.

1. There must be actual fire or ignition to entitle the insured to recover; and it is not sufficient that there has been a great and injurious increase of heat, while nothing has taken fire which ought not to be on fire.³

2. In general, there is in the policy an exception of fire occasioned ‘by invasion, foreign enemy, or any military or usurped power whatsoever;’ and in some there is a further exception of ‘riot, tumult, and civil commotion.’ Under these exceptions, it was decided in England: 1. That houses set on fire by a mob assembled riotously on account of the high prices of provisions, were not under the exception of usurped power, which could mean only foreign invasion or internal rebellion, when armies are drawn up against each other, when the laws are silent, and when the firing of towns becomes unavoidable.⁴ 2. That under the words ‘civil commotion,’ such burning of houses as took place in 1780 by the Popish mob is comprehended, so as to free the underwriters.⁵

3. The loss must be a loss within the policy. These policies are on time; and it is commonly provided, that the party applying shall make a deposit for the policy, stamp-duty, and mark, and shall pay the premium to the next quarter-day, and from thence for a year more; that the future payments shall be paid annually, within fifteen days from the day limited in the policy; and that no insurance shall take place till the premiums be actually paid by the insured or his agent. These conditions are expressed in the proposals (which are held to make part of the contract); while in the policy, the day at which the insurance begins, and the day to which it is to continue, are set down, and so from year to year, so long as the insured shall duly pay, and the insurers shall accept, the premium. It would seem, 1. That the insurance commences from the moment of depositing in terms of the articles. 2. That there would be no insurance, though an application had been made and agreed to, unless the stipulated deposit had been made.⁶ 3. That the being allowed credit

¹ 14 Geo. III. c. 48, by which, 1. No policy of insurance is valid, where the person for whose use it is made has no interest in the event; 2. No policy shall be valid without inserting the name of the insured; and, 3. No greater sum shall be recovered than the amount of the interest of the insured.

² [Donaldson v Manchester Insurance Co., 1836, 14 S. 601; Dalglish v Buchanan, 1854, 16 D. 332.]

³ Austin v Drewe, 1816, 4 Camp. 360. Here a sugarhouse was insured, in which, for the purposes of the manufacture, heat was communicated to each of the several storeys, eight in number, by a chimney, forming nearly one side of the house, at the top of which there was a register. The neglect to open this register on one occasion caused an excessive heat, which blackened the walls, but did no damage, except by

injuring the sugar in different states of preparation. Lord Chief Justice Gibbs directed a verdict for the defendants, which the jury with great reluctance found.

On a motion for a new trial, the Chief Justice said the damage was occasioned by the unskilful management of the machinery, and not by any of those accidents from which the defendants intended to indemnify the plaintiffs; and Lord Chief Justice Dallas said there was nothing on fire which ought not to have been on fire, and the loss was occasioned by carelessness of the plaintiffs. 2 Marsh. 130. [Sm. Merc. Law, 7th ed. 414.]

⁴ Drinkwater v The London Assurance, 2 Wils. 363, Park 654, Marshall 792. [Sm. 414.]

⁵ Langdale v Masson, Park 657, Marshall 793.

⁶ See above, p. 671, Christie's case, note 2.

with the agent of the insurance company, who again, in his relation to the company, [627] debits himself with the premium as if received, would be equivalent to payment of the premium, so as to make the insurance effectual. 4. That the policy remains in force during the fifteen days. But, 5. That if the fifteen days be allowed to expire without a renewal of the term by payment of the premium, the insurers will not be liable.¹

4. The insurers are liable not only for loss by burning, but for all damage and injury, and reasonable charges attending the removal of articles, though never touched by the fire.

5. It is a more difficult question whether the insurers are liable for the loss of rent, by the destruction of a house tenanted at a rent payable to the insured? or for the rent necessary to be paid for a dwelling-house, to supply the place of that of which the fire has deprived the insured? I insure my house and furniture, for example, at £2000, and perhaps no more than £1500 has been lost by physical destruction. But I must pay £100 for a house to live in until my house is repaired; and this is as manifestly a loss occasioned by the fire as the destruction of my furniture. Am I entitled, then, in estimating my loss, to add to the £1500 the rent of an intermediate residence? Or my house is let to a tenant who pays me £100 of rent; am I entitled to reckon the loss of rent as a part of the amount of my claim? There seems to be reason for including these articles in either case, either by estimating the subject lost as a subject bearing a certain rent to the insurer, or by setting a substantive value on the rent as lost.²

III. WARRANTY AND REPRESENTATION.—It was in a case of insurance against fire that the doctrine of warranties, as contradistinguished from representation, was laid down in the House of Lords, as already referred to.³ A warranty is part of the contract; and if not true, whether material or not, there is no insurance. A representation must be complied with, if material; if immaterial, that may be inquired into and shown.

1. *Warranty*.—The description of different classes of property according to the risk, as contained in the proposals, forms the subject of an implied warranty on the part of the insured. Where the property is given up as corresponding with the description of a particular class of property, and it truly does not so correspond, the policy is void.⁴

2. *Representation*.—In this, as in every case of insurance, there must be the most perfect fairness in disclosing every circumstance material to the risk. And even the reasonable grounds of apprehension on the part of the insured must be stated.⁵

IV. OF SETTLING AND ADJUSTING LOSSES.—The loss by fire is scarcely ever a total loss; and the valuation in the policy is rather the fixing of a maximum, beyond which the underwriters are not to be liable, than the conclusive ascertainment of the value to be re- [628] placed. On the occasion of every fire, accordingly, there is an inquiry into the amount of the loss, the insured being bound to give the most satisfactory proofs he can be expected to

¹ *Tarleton v Staniforth*, 5 Term. Rep. 695; affirmed in Exchequer Chamber, 1 Bos. and Pull. 470. See also *Selwin v James*, 6 East 571. [Sm. Merc. L. 7th ed. 413.]

² [But see *contra*, *Menzies v North British Insur. Co.*, 1847, 9 D. 694. Where the insurance company elects to rebuild, the insured has no allowance for intermediate rent. As to this option, see *Sutherland v Sun Fire Insur. Co.*, 1852, 14 D. 775.]

³ See above, p. 662. [*Maynard v Rose*, 5 D. and Ry. 266.]

⁴ *Newcastle Fire Insurance Co. v MacMorran & Co.*, July 1815, H. L., 3 Dow 255. See above, p. 662. [Sm. Merc. L. 7th ed. 412.]

⁵ *Bufe v Turner*, 1815, 6 Taunt. 338. Here the plaintiff applying for insurance had two warehouses at Heligoland, one of them separated by another building from a boatbuilder's workshop, in which fire broke out at seven in the evening of 11th July. The fire was apparently extinguished almost immediately; but for precaution, the plaintiff, who

was a magistrate, had a watch set all night. In the evening, after the fire was thought to be extinguished, the plaintiff wrote to London for a three months' insurance of £400 on the warehouse near the boatbuilder's, and £3500 on coffee lodged there. The mail was shut; but the master of the packet took the letter to Cuxhaven, and there put it into the post office. The insurance was effected, without any disclosure of what had happened. Early in the morning of the 13th (the second day after) a fire again broke out in the boatbuilder's. The case was tried at Guildhall, before Lord Chief Justice Gibbs, when the jury, acquitting the plaintiff of fraud or dishonest design, held that the circumstance of the fire on the 11th ought to have been communicated to the underwriters, who without this information did not engage on fair grounds with the plaintiff. And accordingly they gave verdict for the defendant; and the Court of Common Pleas refused a rule for a new trial. [Sm. Merc. Law, 7th ed. 411.]

possess of the true amount of the injury. By the printed proposals he is generally required, 1. To give immediate notice of the fire. 2. To deliver in as particular an account of his loss as the case will admit, and to make proof thereof by his oath or affirmation, by books of accounts, and such vouchers as remain. 3. To produce a certificate by ministers and churchwardens, and other respectable persons, of the character and circumstances of the sufferer, and their belief that the damage stated has been suffered by him. These precautions are all good and expedient; and it is a matter in which the public is very materially interested, to repress the temptation to this most dangerous sort of fraud. But, at the same time, it does not seem to be law in Scotland that these are all absolute conditions precedent to the recovery of a loss by fire, so as to have the effect of enabling persons hostilely disposed towards the insured to extinguish his claim for loss. Some ministers or elders might be unwilling, for a violent Dissenter or a Jew, to give testimony to character; or to swear to their credibility respecting a matter of which personally they can know nothing. That the want of those compurgators will raise an unfavourable presumption against the insured is true, so as to require stronger proofs than might otherwise have been sufficient. And this is a legitimate extent to which to carry the condition. But it will at least require exceedingly strong words to make the want of the certificate a discharge of the claim,¹ or to entitle one who has the premium in his pocket to refuse to pay a loss which has fairly taken place.

In a total loss in marine policies, we have seen that there is an abandonment of what may chance to be saved.² In a loss by fire, the settlement is always on the principle of a particular average. Evidence is to be given of the amount of the loss in this case, as well as in a case of partial loss; and the amount of that loss, as nearly as it can be ascertained, is to be paid, without abandonment of what may have been saved from the fire. Thus, a house is entirely burnt down, and nothing left but the materials of the walls, and the area on which it stood; or, if it be a house of one floor, in a large tenement, nothing is left but the mere right of building a storey in any tenement to be erected on the site of that which is burnt. These do not belong to the insurer, nor is the insured bound to abandon them. The loss is estimated on the destructible parts; or the whole value of the house, as it would have sold in the market, is taken, deducting the value of the area, or of the *jus quæsitum* to a share in the building of a new tenement.

The loss is generally settled by arbitration, and a clause of reference is inserted in many policies. If such reference is carried into effect, the referees will proceed, on such evidence as may be laid before them, to settle the loss; including, as it would seem, such loss as directly arises from the fire, although not occasioned by the touch of fire; reckoning, for example, the loss of rents, either by estimating the destruction of the house, as the loss of a subject bearing a certain rent, or adding substantively the rent forfeited as an article of loss.³

[629] The subject may be insured in several offices. This must be stated by endorsement on the policy, and in case of loss the offices pay proportionally.

ASSIGNMENT OF FIRE POLICIES.—Policies of sea insurance are assignable; but the peculiarity of a fire insurance, the temptations to fraud, the reliance in some degree on the

¹ Yet it was so held at law in *Oldham v Bewick*, 2 H. Black. 577, note, where it was said the minister of the parish resided out of the parish, and was wholly unacquainted with the character and circumstances of the insured.

Again, the same judgment was given in *Routledge v Burrell*, 1 H. Black. 254.

And, lastly, in a very strong case, where the minister and churchwardens improperly refused to sign the certificate, this point has been held as settled. *Wood v Worsley*, 2 H. Black. 574, 6 Term. Rep. 710. It may be observed that the

opinions of Lord Loughborough, Mr. Justice Buller, and Mr. Justice Rooke, were against the judgment. Lord Kenyon, and Heath, Ashhurst, Grose, and Lawrence, Justices, were in support of it. [Another condition usually inserted for the protection of assurers, is one declaring the policy void in case of the assured making a fraudulent claim. This condition is strictly enforced by the courts. See *M'Kirby v North British Insurance Co.*, 1858, 20 D. 463. Sm. Merc. L. 7th ed. 413.]

² See above, p. 654.

³ [See above, p. 673, note 2.]

character of the insured, infuse something more of the nature of *delectus personæ* into this contract. In England, by the rule of the common law, strengthened by this sort of consideration, a policy of fire insurance is not assignable; and where by the terms of the contract it is made transferable under certain conditions, or with certain formalities, these must be strictly complied with.¹ In equity, such a policy is assignable, provided the subject-matter of the insurance be also assigned.²

In Scotland, every pecuniary obligation is assignable; and there is scarcely such a peculiarity in this contract of insurance against fire, as to deny to an assignee the benefit of the policy, unless by the terms of the policy, or of the proposals (which are a part of the contract), the power of assignment is put under particular restraints. In the city of Edinburgh there was established, about a century ago, a company for friendly insurance against fire, consisting of a number of private contributors, who agreed to insure each other. The insurance was not personal, like the modern fire insurance; but the interest, and stock, and benefit, were inseparably annexed to the houses insured as long as the contribution was continued. This sort of insurance, and the right to the share in the society, is transferred with the house; and the value of the stock at last rose so high, that it has long made a considerable addition to the right of property, and as such is paid for in bargains and sales.

On bankruptcy, there can be no doubt that the creditors will be entitled to the full benefit of the policy, provided the premium has been duly paid up.

SECTION II.—INSURANCE ON LIFE.

The uses of insurances on lives are various. They are frequently made a part of the creditors' security in loans of money; but the usual purpose is to provide a fund for creditors, or for a family in case of death. By this contract, the insurer, for a certain premium paid in gross, or periodically, undertakes to pay a certain sum, or an annuity, upon the death of a person whose life is to be insured.³

The important points are: 1. The interest; 2. The warranty; 3. The risks; and, 4. The settling of the loss.

1. INTEREST.—A man may not only insure his own life, for the benefit of heirs or creditors, and assign the benefit of this insurance to others having thus or otherwise an interest in his life; but he may insure the life of another, in which he may be interested. By statute, no insurance on lives can be made without an interest in the life;⁴ and the sum to be recovered is restrained to the amount or value of the interest. A creditor has an insurable interest in his debtor's life, not if the debt be a gaming debt,⁵ but if it be a fair and legitimate debt.⁶

It has been said, that where a creditor has opened a policy on his debtor's life, the interest appears to vanish in proportion to the collateral securities by which the debt may be fortified.⁷ This seems very questionable. So long as a creditor has not received [630] payment, he is entitled to hold by all his securities, each as covering the whole debt; and where an insurance forms one of those securities, he is interested to the extent of the whole debt, although he may have the means of obtaining payment by following another course of proceeding, and taking his remedy upon another security. The case which Mr. Serjeant

¹ *Lynch v Dalzell*, 3 Brown's Parl. Ca. 497; *Saddlers Co. v Badcock*, 2 Atk. 554.

² See Marshall, p. 800. [See *Pollock v Marnock*, 1859, 21 D. 1210.]

³ [Add. Cont. 6th ed. 547. The insurance is completed by delivery of the acceptance of the proposal to the insured. *Rose v Medical Invalid Insurance Co.*, 1848, 11 D. 151–8.]

⁴ 14 Geo. III. c. 48, secs. 1, 2, 3. [*Dalby v India & London*

Life Insurance Co., 15 C. B. 365. As to the insurable interests of husband and wife in the life of each other, see *Reid v Royal Exchange Assurance Co.*, 2 Peake 70; *Wight v Brown*, 1849, 11 D. 459.]

⁵ *Dwyer v Edie*, Park 639, Marshall 778.

⁶ *Anderson v Edie*, Park 640, Marshall 776. [*Lindsay v Barmcotte*, 1851, 13 D. 718.]

⁷ Marshall 777.

Marshall has quoted as an exemplification and proof of his doctrine, does not appear to go so far; and to be more correctly stated by Mr. Justice Park, as establishing only, 'that after the death of the debtor, if his executors pay the debt, the creditor cannot afterwards recover upon the policy, although the debtor died insolvent, and the executors were furnished with the means of payment from another quarter than the estate of their testator.'¹ In that case, the interest had indeed expired by the extinction of the debt;² but while the debt subsists, no plea of want of interest seems pleadable: otherwise, in every case there would be an inquiry into the amount and value of the collateral securities, or even of the dividend to be drawn from the estate of the debtor.

There seems never to have been any doubt that this sort of policy is assignable; and, indeed, without such power the insurance on lives would lose half its usefulness.³ Where the debtor himself has opened a policy on his life, and assigned it in security, there can be no ground for pleading the extinction of the policy by the payment of the debt: for the benefit of the insurance belongs to him whose life is insured, after the burden of the security is extinguished; and he may make it the means of credit on another occasion, or dispose of it by settlement or otherwise. Insurances of this sort, differently from all other insurance, become more valuable the longer they subsist, because the life is running out, and the premium of a new insurance would of course be higher. The reversionary right of the policy, after it has served its purpose as a security, is therefore valuable.⁴

[631] The assignment in sequestration, or under a commission of bankruptcy, carries a policy of life insurance; and if the debtor has secretly disposed of it after his bankruptcy, the person to whom it has been assigned will be bound to return any money drawn under it for the use of the creditors.⁵

¹ Park 641.

² *Godsall v Boldero*, 9 East 72. This was an action by the coachmaker of the late Mr. Pitt, who, in security of a debt of £500 due by him, held a policy of insurance on his life. The material plea in defence was, that after Mr. Pitt's death, and before the exhibiting of the plaintiff's bill, the debt due to the plaintiffs was paid to them by the executors of Mr. Pitt's will. On the trial, it appeared that Mr. Pitt died insolvent, and that the debt was afterwards paid out of the money allowed by Parliament for payment of his debts. Lord Ellenborough delivered the judgment of the Court.

[After having been treated as an authoritative decision both in this country and in the United States for a long time, during which it was frequently referred to by judges of eminence without disapprobation, the case of *Godsall v Boldero* was formally overruled by the unanimous decision of six judges sitting in the Exchequer Chamber, in the case of *Dalby v India & London Life Assurance Co.*, 15 C. B. 365. This was a claim by a trustee of one insurance company against another company, in respect of a sub-insurance on the life of the late Duke of Cambridge. It was admitted that the person effecting the insurance had an insurable interest at the time the policy was issued. The question was, whether the loss of that interest vacated the policy. Lord Wensleydale observed: 'The contract commonly called "life assurance," when properly considered, is a mere contract to pay a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity for his life, the amount of the annuity being calculated in the first instance according to the probable duration of the life; and when once fixed, it is constant and invariable. . . . This species of insurance in no way resembles a contract of indemnity.' With regard to the case of *Godsall v Boldero*, their Lordships were of opinion that,

as the point had never been again expressly raised, as it had never come before a court of error, and as the insurance companies had uniformly declined to take advantage of the decision, it could not be regarded as a case which had been accepted as decisive of the question. See the statute 14 Geo. III. c. 48, and the summary of English decisions in Smith, L. Ca. 6th ed. vol. ii. pp. 237 et seq.]

³ [See the provisions of the Act 30 and 31 Vict. c. 144, for enabling the assignees of life policies to acquire a valid title by intimation, and to sue in their own names.]

⁴ [It forms part of the executry estate of the assured. *M. of Queensberry v Scottish Union Insurance Co.*, 1839, 1 D. 1203; *Shand v Blaikie*, 1859, 21 D. 878; and see *Craig v Galloway*, 1861, 4 Macq. 267, 23 D. (H. L.) 12; *North British Insurance Co. v Tunnoek*, 1864, 3 Macph. 1. See also 16 and 17 Vict. c. 51, sec. 17, as to incidence of succession duties.]

⁵ *Schondler v Wace*, 1 Camp. 487. Here the bankrupt held a policy on his own life, which after bankruptcy he sold to Wace for a lottery ticket. He died, and Wace received the sum insured. The assignees under the commission brought an action for money had and received; and Lord Ellenborough told the jury that this was a possibility of benefit to which the assignees were entitled, as part of the effects of the bankrupt,—the defendant having a right, however, to deduct so much as the plaintiffs must have laid out in the payment of arrears, etc., had the policy been regularly delivered up by the bankrupt. Verdict accordingly.

[It is to be observed that the trustee takes the policy subject to preferential rights affecting it. Where a policy is held by the insurance company in security of advances, the trustee is entitled to delivery of the policy; but the company may refuse implement of their obligation under it until their

In assigning a policy for the benefit of wife or children, the policy itself is comparatively nothing towards their security, without continued and regular payment of the premium. While the insured continues solvent, the premiums may lawfully be paid by him; but the benefit of the policy may be affected materially by insolvency, since the premiums paid by him subsequently may be held as alienations to the prejudice of creditors.

2. **WARRANTY.**—The insured is bound, as by a warranty, to the truth of the representation of the age and state of health contained in the declaration made previous to the policy being issued; which is always referred to in the policy, and which is to be taken as a part of it. In this declaration it is stated, that he whose life is to be insured ‘has no disorder tending to the shortening of life;’ but this does not imply that he is free from all complaints, provided he be in a reasonably good state of health, in so far as belongs to the calculation of his probable existence, so that his life is fairly insurable on the common terms.¹ Nor does it seem to be sufficient evidence of the tendency of the disorder to shorten life, that the person had it at a former period, and afterwards died of it, if free from disease at the time of insuring.²

3. **THE RISK.**—In almost every life policy there are several exceptions, some of them applicable to all cases; others to the case of insurance of one’s own life. The exceptions are: 1. Death abroad or at sea. 2. Entering into naval or military service without the previous consent of the company. 3. Death by suicide. 4. Death by duelling. 5. Death by the hand of justice. The three last are not understood to be excepted where the insurance is on another’s life.³

4. **ADJUSTMENT.**—This is always a total loss, and the full sum insured must be paid.

advances are repaid. *Borthwick v Scottish Widows Fund*, 1864, 2 Macph. 595. From this case it would appear that the insurance company are not entitled, without the consent of the trustee, to close the transaction by setting off their claim against the surrender value of the policy.]

¹ *Ross v Bradshaw*, 1 Black. 312. Sir James Ross had been wounded in the loins, which occasioned a partial palsy, and this was not mentioned. He died of a malignant fever. Medical men swore that his wound could have no sort of connection with his death; and that his wound, and its consequences, could have no effect in shortening life. Under the direction of Lord Mansfield, a verdict was given against the insurers.

Willis v Poole, Park 650, Marsh. 771, where the same judgment was given in a case of spasms and cramps. [*Hutcheson v National Life Assurance Co.*, 1845, 7 D. 467.]

² *Watson v Mainwaring*, 4 Taunt. 763. The complaint here was in the bowels. The jury found it neither organic nor excessive, and gave verdict for the insured.

³ [The statement in the text is correct, when limited to claims by creditors or assignees. *Amicable Assurance Co. v Bolland*, 4 Bligh N. S. 194; *Clift v Schwabe*, 3 C. B. 437. But it is more doubtful whether the objection will not annul a policy effected by a third party interested. Lord Mansfield, in *Ross v Bradshaw* (p. 506, *d*), said, when a man makes insurance upon a life generally, without any representation of the state of the life insured, the insurer takes all the risk, unless there

was some fraud in the person insuring, either by suppressing circumstances which he knew, or alleging what was false. But, says Mr. Addison, by the term ‘all the risk,’ is to be understood all the risk to which the life of man is ordinarily exposed, but not unusual and extraordinary risks voluntarily incurred by the life assured; and therefore if the person whose life forms the subject-matter of the insurance wilfully encounters extraordinary hazard (*Vyse v Wakefield*, 6 M. and W. 442; *Wainwright v Bland*, 1 Mood. and Rob. 486), if he fights a duel or commits suicide (*Clift v Schwabe*, 3 C. B. 476; *Dormay v Borro-daille*, 16 L. J. Ch. 337), or dies by the hand of the public executioner (*Amicable Society v Bolland*, 4 Bligh N. S. 194), the insurer will be discharged. If the life is insured for one year from the day of the date of the policy, and the death occurs that very day twelvemonth, the insurer will be liable, for ‘from the day of the date excludes the day’ (*Holt, C. J.*, in *Sir B. Howard’s case*, 2 Salk. 625, Lord Raym. 480). But the word ‘from’ may mean either inclusive or exclusive, according to the apparent intention of the parties, to be gathered from the general context of the written instrument. (*Pugh v D. of Leeds*, 2 Cowp. 714.) If the amount insured is made payable in case of the death of the party within a certain limited period, and the latter receives his death-wound before the expiration of the term, but does not die until after it has expired, the underwriters will not be liable on the policy (*Willes, J.*, in *Lockyer v Offley*, 1 T. R. 260). Addison on Contracts, pp. 661–2.]

CHAPTER VI.

OF CLAIMS BY WIVES AND CHILDREN.

OF all the claims which arise on occasion of bankruptcy, those of the wife and children are the most distressing. Not only where those provisions are left to the disposition of the law, but even where the most anxious solicitude has been shown, by special contract, to [632] protect the wife and children from the extravagance of the husband and father, or from the risks of his trade, the law frequently refuses to recognise the claim of those persons, even so far as to acknowledge them as creditors. It is therefore an interesting inquiry, What are the circumstances under which a wife or children may claim in bankruptcy? In this inquiry, after a short introductory view of the legal rights of wives and children, it may be proper to consider, 1. How far wives or children are entitled, on the ground of those legal provisions, to claim as creditors. 2. The claims of wives and children under special contract and obligation.

MARRIAGE has in contemplation the rights of three several parties—the husband, the wife, and the children; and the first effect of it is to raise a community in all things of present use, which are formed into a common fund under the husband's administration, for the use of the family during the marriage, and for rateable division on its dissolution. The husband's right of administration is so uncontrolled, that he may be called not improperly the *dominus* or proprietor of this common fund, while the marriage subsists. His acquisitions augment the fund, his debts diminish it; and the benefit which the wife and children derive from the one operation, is counterbalanced by what they suffer from the other. The *communio bonorum* comprehends moveables; bonds personal in particular circumstances; and generally the whole personal estate, with two exceptions: *first*, of such effects as have been given to the wife, expressly excluding the *jus mariti*; and, *secondly*, of paraphernalia, in regard to which the *jus mariti* is by implication excluded.

The respective shares of the common stock contributed by the husband and wife return, on the dissolution of the marriage, to them or their representatives, if the marriage has been dissolved within year and day, and without a living child.¹

If the marriage have subsisted during year and day, or if a living child have been produced, the common fund, from whatever source derived, is divided into two or into three shares, as children exist or not at the dissolution of the marriage.

The *JUS RELICTÆ* is the wife's share of the goods in communion. Besides the paraphernalia, and such effects or moneys as may be secured exclusively to the wife, this right extends to half of the common stock, if there be no children alive at the dissolution of the marriage; to one-third, if there be children. To this share the wife is entitled, although she should also have a conventional provision from her husband, provided she has not, in accepting such provision, bound herself to renounce her legal provision.²

The *LEGITIM* is the share which belongs to the children of the father's free moveable estate at his death; and so, although the father cannot by will divest the children of this right, in which they are *quasi* creditors, yet they have not a *jus crediti* to the effect of standing in competition with the debts of their father, which must be paid before the legitim is demandable.

The nature of the interest which the wife and children hold by operation of law in the common fund is such, that this fund is chargeable with all the debts of the husband and father, and that both the present subsistence and the future provision of the wife and children are to come out of the fund, only after the debts are paid.

¹ Stair i. 4. 19; Ersk. i. 6. 38, 39.

² Ersk. iii. 6. 16; Riddell v Dalton, 1781, M. 6457; Tod v Wemyss, 1790, M. 6451.

The heritable estates of the parties are respectively subject to a legal liferent for the survivor ; which has already been considered.¹

SECTION I.

CLAIMS BY WIFE OR CHILDREN WHERE THERE IS NO SPECIAL CONTRACT.

There are two situations to be distinguished : one where the marriage has been [633] dissolved within year and day without issue ; another, where the connection has been more permanent, or has produced children. This is a distinction which it is not very easy to justify. It seems to be peculiar to Scotland, but it has been established by long usage ; and although the Court has refused to extend the principle to questions not already settled,² the distinction to a certain extent is now unquestionable.

SUBSECTION I.—OF MARRIAGE DISSOLVING WITHIN YEAR AND DAY WITHOUT ISSUE.

When it happens that the marriage has been dissolved within year and day, and without a living child, the relationship is not by the law regarded as of a character so permanent that the terce or courtesy, the *jus relictæ*, or the *jus mariti*, are to have effect. All things return, in this event, as much as possible to their former state. The wife can claim neither terce nor *jus relictæ*. The husband yields up the possession of his wife's heritage, and is bound to restore to the representatives of the wife (and his estate on his death or insolvency will be liable to the claim) the tocher, and all the wife's moveable funds which he has received on occasion of the marriage, whether by the mere operation of law or by convention and marriage contract.³ The general rule, even as to conventional provisions, is, that they become void on the dissolution of the marriage within the year, and without issue. But, 1. It may be effectually stipulated otherwise ; 2. It is a *quæstio voluntatis* whether such be truly the intention of the parties.⁴

But, in particular cases, the husband, or his estate, will, in accounting to the wife or her representatives, be entitled to deductions. 1. What has *bona fide* been consumed of the wife's moveable estate, will be allowed to the husband or his estate.⁵ Yet it is not easy to conceive a practical example of this, if it be true that there is no deduction given for sums by which the tocher has been diminished for the wife's maintenance during the marriage.⁶ 2. Deduction will be allowed of the expense of the wife's marriage clothes, or other debts of hers before marriage, paid by the husband ; and of her funeral.⁷

On the other hand, the wife is entitled to claim the expense of mournings on her husband's death, as being one of the husband's family,⁸ to whom, in decent respect, mournings should be furnished ; and this holds not only where the husband dies solvent, but also [634] against his creditors. For although there is in the Dictionary a short note of a case finding

¹ See above, p. 56 et seq.

² *Lowther v M'Lain*, 1786, M. 435, Hailes 1012. M'Lain of Lochbuy died within a year after his marriage with Miss Lowther, and without issue. There was no tocher, and no marriage contract. She claimed neither terce nor *jus relictæ*, but aliment against her husband's heir, a distant relation. The Court refused to extend the principle of the customary rule to a case not already subjected to it, and sustained the claim of aliment.

[The distinction in question is abolished by 18 Vict. c. 23, sec. 7 ; and it is declared that the whole rights of the survivor, and of the representatives of the predecessor, shall be

the same as if the marriage had subsisted for the period of year and day.]

³ *Stair* i. 4. 21.

⁴ *Hunter v Brown*, 1776, M. 16641, Hailes 120. This was a settlement on a betrothed wife, and regarded on the whole as a *quæstio voluntatis*, in which the manifest intention was, that the deed should be effectual at all events.

⁵ *Ersk.* i. 6. 39 ; *Dirleton and Stewart*, voce *Jus Mariti*.

⁶ *Ersk. ut supra*.

⁷ *Gordon v Inglis*, 1681, M. 5924.

⁸ *Gordon v Stewart*, 1743, M. 6161.

a claim for widow's mournings not good against the husband's creditors,¹ and Mr. Erskine lays it down that none of these articles can be claimed if the husband have not left a fund sufficient for payment of his onerous debts, this doctrine was afterwards denied, and widow's mournings not only admitted, but held a privileged debt upon the funds of the deceased husband, in a competition with creditors.²

SUBSECTION II.—OF MARRIAGE SUBSISTING FOR A YEAR, OR PRODUCTIVE OF A LIVING CHILD.

In this case the law considers the connection as having taken full effect on the status and rights of the parties. In that situation it is held, that in respect of their rights at law (independently of marriage contract or special contract of separation), a man's wife and children have no title to claim in competition with his creditors; that they follow his fortunes during his life, and are entitled to partake only of that fund of subsistence which his debts may have left him; and after his death they can demand no more than a share of what remains after satisfying his creditors.

1. As to the interest of the WIFE, it is held: 1. That during the husband's life she can make no claim in bankruptcy for an aliment, independently of special contract.³ The common fund under the husband's administration being insolvent, the wife, as a partner, can claim nothing till the creditors be paid; and even where the wife has a land estate, the rents of which are taken by the husband's *jus mariti* as part of the goods in communion, the wife's aliment is not a burden on that common fund, to the effect of entitling her to claim exemption from the diligence of his creditors for any part of the rents of her own estate.⁴ 2. That if the marriage should be dissolved by the death of the husband, or by divorce, after insolvency, the wife can no more claim her *jus relictæ*, than she can in the case of his survivance claim an aliment. In both cases her share of the goods in communion has perished. 3. That if the husband, while solvent, shall be divorced for adultery, such dissolution of the marriage gives the wife a right to demand back her tocher; to insist for her conventional provisions, or for her *jus relictæ*; and to enjoy her terce, or locality, or jointure.⁵ For these claims she will be entitled, on his subsequent insolvency, to rank with other creditors. On the other hand, by dissolution of the marriage in consequence of the divorce of the wife, the husband, and of course his heirs, will be entitled to retain the tocher, and the wife's share of the goods in communion, and to enjoy the benefit of the courtesy. But it may be observed, in the *first* place, That the divorce being the dissolution of the society, no right afterwards arising to the guilty party can be claimed by the innocent.⁶ *Secondly*, That it may thus happen that a guilty husband, or his creditors, may be benefited by a share of moveable funds, which ought to belong solely to the innocent wife; and yet there seems no means of escaping from this unhappy consequence. And, *thirdly*, That the creditors of the husband may be exposed to injury by collusive proceedings for divorce, with a view of conferring on the wife, during the husband's life, what she otherwise could not have [635] insisted in against the creditors of her husband.⁷ 4. That if the wife should die during the husband's solvency, her representatives, whether her children or others, will have a *jus crediti*, which on his future insolvency will entitle them to compete with his other creditors for her share in the common fund extant at her death. This stands altogether on another footing from that on which the legal claims of the existing widow and children rest. From

¹ Neilson, 1776, M. 6165.

² *Sheddan v Gibson*, 1802, M. 11855. In this case the marriage had subsisted beyond year and day; but that does not seem to be of importance to the question, the claim for mournings to the widow standing on the same footing, whether the marriage has subsisted for a year or during a shorter period.

³ See below, for the Effect of a Separation, p. 688.

⁴ See above, the cases of *Turnbull*, *Robb*, and *Lisk*, p. 125.

⁵ Ersk. i. 6. 46.

⁶ *E. of Elgin v Nisbet*, 1827, 5 S. 243, N. E. 226.

⁷ *Greenhill v Ford*, 1824, 3 S. 169, N. E. 114. This case suggests the circumstances in which such a question may be raised.

the moment of the wife's death, the husband is a proper debtor for her share; it remains with him as debtor: so that, though not claimed by the children or representatives of the wife, it will, on the husband becoming afterwards insolvent, entitle them to a dividend on its amount.

2. As to the interest of CHILDREN, they have no right whatever to claim as creditors of their father, on account of the legitim. This, at all events, is a provision which does not open till their father's death; and he has it fully in his power, in the meanwhile, to disappoint their *spes successionis*, the contraction of debt being a legitimate diminution of the fund of which the legitim forms a share. But even where he has died and left effects to be the subject of competition among his creditors, his children are not entitled to claim. They may claim as creditors in the case already observed, where their mother has died during the father's solvency, and left them her heirs; for, in her place, they are proper creditors of their father. But their legitim is not a *jus crediti*: it is nothing more than a right to share in the free fund left by the father. They cannot compete with creditors for their legitim.

In some degree, upon the same distinction, depends the difference between the claim for aliment of a lawful child and that of an illegitimate one. The mother of a lawful child can claim nothing for its aliment, for they have both combined their fortunes with the bankrupt. But in the case of an illegitimate child, there is a direct obligation on the part of the father towards the mother, to contribute to the support of their child. The mother must otherwise, from her own funds or earnings, maintain the fruit of their illicit intercourse, while she has not by marriage united her fortunes with those of the father of her child. It may be said that the same principle might entitle the mother of a legitimate child, who out of her own *peculium* has supported that child, to claim the aliment from the husband's estate. But the difference is this, that there is no contract or obligation, as in the other case, that the father shall relieve the mother of this spontaneous or charitable aliment; and that where she maintains the child, she does so on her own account alone, and from no hope of reimbursement out of a fund which is already dissipated.

SECTION II.

CLAIMS BY WIFE OR CHILDREN UNDER SPECIAL CONTRACT.

Such claims may be grounded on the following deeds: 1. A contract of marriage. 2. A contract of separation. 3. A bond of provision.

SUBSECTION I.—CLAIMS UNDER CONTRACTS OF MARRIAGE, AND BONDS OF PROVISION.

The first question that naturally occurs on such a deed, relates to its effect in superseding those provisions which the law itself confers. And, *first*, As to heritage, the legal [636] provision of terce is superseded by a settlement made and accepted of.¹ But the same rule does not hold as to the courtesy: it must be expressly excluded.² *Secondly*, As to moveables, express provisions in a marriage contract do not exclude the *jus relictæ*.³ Another question may arise, in respect to marriage contracts, where the parties were minors at entering into them. A minor is by the law of Scotland capable of marriage; and the marriage, with its legal consequences, will stand good against all challenge on the head of minority and lesion. Redress may on this ground be obtained against special stipulations in a marriage contract, if hurtful to the interests of the minor.⁴ But this will not entitle the party to relief from

¹ 1681, c. 10. See above, p. 56 et seq.

² *Primrose v Crawford*, 1771, M. App. Courtesy, No. 1. See, in Hailes 458, the opinion of Lord Pitfour respecting the universal acquiescence in this as a point settled in practice.

³ *M'Auly v Bell*, 1712, M. 3848.

⁴ *Carmichael v Lady Castlehill*, 1698, M. 8993; *Byres v Reid*, 1708, M. 6045; *Chalmers v Lyon's Crs.*, 1710, M. 8994. In these cases the wife disposed her heritable estate while

the effect which would follow as the legal consequence of marriage,¹ nor against a rational and fair contract or settlement.²

Marriage contracts are either antenuptial or postnuptial; and the former stand on a very different footing, relatively to creditors, from the latter.

I. ANTENUPTIAL CONTRACTS OF MARRIAGE.—The great motive to the executing of a contract of marriage, in circumstances in which questions with the husband's creditors are likely to occur, is distrust of the husband, or dread of the risks to which he is exposed. The chief object is to stipulate an exception to that rule of the common law, by which the wife, for herself and her children of the marriage, adopts the fortunes of the husband; and to provide against extravagancy or insolvency, either by an absolute security, which shall exclude creditors, or by constituting a *jus crediti* which shall entitle the wife or children to rank with other creditors upon the common fund in bankruptcy. The principle on which such contracts are effectual against creditors is, that they are onerous contracts, as forming essential conditions of the marriage; that the wife is held on no other terms to have conveyed, as by marriage she does, all her moveable property in possession or in possibility to the husband, nor even to have made him master of her person; and that the children would not have existed, but on the faith of the provisions made for them. But the onerosity of the consideration is not enough to give to the wife or children the character of creditors. In order that the contract may be effectual against creditors, there must be a real security constituted, or a *jus crediti* raised, by means of a distinct obligation. No part of conveyancing is more difficult than this. The terms are so various in which such contracts have been conceived, that to frame a marriage contract so as to protect a wife and children against the folly, extravagance, or insolvency of the father, requires much discrimination. The several kinds of provision by which this is attempted to be accomplished, as they appear in competitions of creditors, deserve particular attention; but only a few general cases can be taken notice of in this work.

1. Antenuptial provisions in favour of the WIFE, to come in place of her legal provisions, may be either with real security, or by personal obligation merely. 1. By marriage contract, the wife's terce and *jus relictæ* may be excluded, and the husband may assign to her particular lands, either for her possession, or to afford her a certain annuity. Where the wife is infeft in lands for her liferent use and possession, her right is a proper liferent; and [637] the lands are called her LOCALITY LANDS.³ Where she has an annuity heritably secured, either by HERITABLE BOND and infeftment, or by an infeftment on a BOND OF ANNUITY, it is called a JOINTURE. Sometimes the husband binds himself to invest, and afterwards, in implement of the contract, does invest, money in land or real security, taken to himself and his wife, in conjunct infeftment, according to the great variety of distinctions already spoken of.⁴ In all those cases, the infeftment in favour of the wife, either proceeding on the contract of marriage or on a separate deed, if not objectionable under the bankrupt statutes, confers on her a real right, which excludes creditors and gives her a preference.⁵ 2. If the husband's titles be not made up, or if any other impediment prevent the completion of the real right under the contract, the wife may by marriage articles be made a creditor, to the effect of ranking with the other creditors, and to the effect of sustaining any deed made in implement of the obligation, which shall not be exposed to objection on the bankrupt statutes. 3. Although it may not be intended that the wife shall have the benefit

the husband was secretly insolvent and unable to fulfil the counter provisions.

¹ *Anderson v Abercromby*, 1824, 2 S. 662, N. E. 557.

² *Young v Robertson*, 1769, 1 Hailes 265.

³ See above, p. 53.

⁴ See above, p. 54.

⁵ *Buchanan v Ferrier*, 1822, 1 S. 323, N. E. 299. Here a

reciprocal conveyance by marriage contract of the liferent of the husband and of the wife's estates, was found, on the husband dying insolvent, and on a judicial sale of his lands, to give the wife a right to the rents from the husband's death down to the sale, and to the interest of the balance of the price afterwards.

of a real security, or although the husband may not have the means of giving such security, she may still have constituted in her favour a *jus crediti*, so as to entitle her to rank as a creditor for her eventual liferent after her husband's death, provided the provision be precise and clear. The most usual provision is of a certain yearly sum or annuity, to be paid to the wife on her husband's death, with a renunciation of her legal provisions. This in England makes a contingent debt, depending on the wife's survivance, and cannot therefore be made the ground of an effectual claim in bankruptcy;¹ insomuch that even where the contingency has been purified by the death of the husband after bankruptcy, the courts have found themselves constrained to refuse the claim, as the debt did not arise till the husband's death after bankruptcy, though before distribution.² In Scotland there is no obstruction to the ranking of a contingent debt; and a wife holding a provision importing a *jus crediti* in her favour, will be ranked along with the other personal creditors for the value of her survivance, so as to have the dividend set aside; the intermediate profits of it to be paid to her husband's creditors, and the dividend itself secured for her use in the event of her survivance. At one time it was contended that, considering the embarrassment under which a wife is placed in doing diligence to secure her *jus crediti*, she was entitled to a preference or privilege over other creditors; but this was solemnly argued, and a wife found to have no preference but such as she may have established by diligence;³ and such claim of preference was rejected, even with regard to the wife's liferent of the whole or part of the household furniture.⁴

Even in antenuptial contracts, if the husband is at the time insolvent, the provision to the wife will not be sustained beyond the limits of a reasonable and moderate allowance. On this ground, a husband having in his second marriage contract given an exorbitant jointure to his second wife, the Court held it to be restrictable in a question with the heir of the first marriage.⁵ But it would seem that this rule must be restricted to the case of a manifestly exorbitant provision: for a man, though truly insolvent, may appear to be in a situation where the provision made is moderate, and where on that belief the [638] marriage has been contracted. In judging of this matter, the wife's situation and fortune are chiefly to be regarded; but they are by no means to be taken as the sole grounds on which to proceed.⁶

The greatest difficulty is to provide for the wife's subsistence during the husband's survivance in a state of bankruptcy. The only precaution absolutely to be relied on against the insolvency of a husband, and in virtue of which a wife can claim the benefit of a subsistence during the husband's life, is the appropriation of special estates or funds to the use of the wife, with an exclusion of the *jus mariti* in case of insolvency. Thus, 1. The wife's father may settle on her either heritable or moveable property, with an exclusion of the *jus mariti*; and this will effectually protect the property, and the rents of it, from the husband's creditors. 2. The father may constitute a trust, and convey to the trustee his property, heritable or moveable, with an exclusion of the *jus mariti*, in case of the husband's insolvency. And in such a case, even if the wife herself be named as trustee, the creditors of the husband will not be entitled to attach the property as his.⁷ 3. The wife herself may

¹ *Ex parte Groome*, 1 Atk. 114; *ex parte Caswell*, 2 P. Wms. 497; *ex parte Barker*, 9 Ves. 110; *Tully v Sparkes*, 2 Lord Raymond 1546, 2 Strange 867.

² *Ex parte Greenaway*, 1 Atk. 113; *ex parte Mitchell*, *ib.* 120; *ex parte Groome*, 1 Atk. 118.

³ *Keith v Keith*, 1688, M. 11533; confirmed by *Allan v Creditors*, 1713, M. 11835.

⁴ *Forbes v Knox*, 1714, M. 11850.

⁵ *Duncan v Sloss*, 1785, M. 987.

⁶ *M'Lachlan v Campbell*, 1824, 3 S. 192, N. E. 132.

⁷ *Annand v Chessels*, 1774, M. 5844. Archibald Chessels

executed a settlement after his daughter's marriage to James Scott, whereby he disposed his whole property to her in trust, for behoof of herself in liferent, for aliment and support of herself and her numerous family of children during her life, and after her death for behoof of her three sons, etc.; and he provided, that in case of James Scott her husband's insolvency, his *jus mariti* should be debarred and excluded, and his administration of the said estate, heritable and moveable, and of the rents, annualrents, and other produce and profits of the same; and that the same should neither be liable nor subjected to the payment of his debts, implement of his deeds, or

before marriage constitute a trust, which will preserve for her use the fund so set apart.¹

4. It seems not incompetent for the husband so to dispose of a part of his estate, as to secure to the wife and family a fund of subsistence effectual against all debts subsequent to the transaction. Thus, in implement of a stipulation in the marriage contract (or while he is solvent), a husband may grant a lease, taking the rents payable to a trustee, who shall bind himself to pay a certain sum to the wife as an alimentary provision, excluding the *jus mariti*.

5. By antenuptial marriage contract, the *jus mariti* may be excluded with regard to any particular subject belonging to the wife, although it cannot be excluded *per aversionem*. Thus, lands may be let and the rents conveyed to the wife, for her and her children's aliment, excluding the *jus mariti*; or a sum may be set apart, and invested, or lent out on bond, etc. to the wife, excluding the *jus mariti*; or an annuity may be purchased to the wife for her aliment, with an exception of the *jus mariti*; or a sum may be secured, or a bond may be taken jointly to the husband and wife, in liferent alienably for her alimentary use, the interest and rents not to be affectable by the husband's debts.² These provisions, however, cannot be effectually made by a postnuptial deed, which not having the character of an onerous contract, the provision, though made during solvency, is revocable as a donation, and is held by the contraction of debts to be revoked.³ But, 6. It is quite incongruous to attempt to give to the husband the command of his funds, and at the same time secure the wife and [639] children against the effect of his insolvency. It is impossible, for instance, to convey or pay over to the husband any debt or sum of money, leaving him in the full administration of it during his solvency, and at the same time effectually to provide that on bankruptcy the *jus mariti* shall, in relation to such fund, stand excluded.⁴ At least such declaration certainly would not give preference on the general fund, or qualify the right even to the particular sum, unless by the very nature or import of the conveyance it stood limited. If, however, a bond were taken to the husband, as trustee for his wife and children, excluding his *jus mariti* on insolvency, there seems to be reason for holding that his right would be qualified with that condition. 7. There can be no legal objection against a provision to a wife before marriage, or in the marriage contract, by which, to the extent of a moderate and reasonable aliment, she shall be entitled to rank as a creditor on the estate, to the effect of securing a fund for her aliment. But in order to accomplish this, it would be requisite to bind the husband either to aliment the wife; or failing thereof, to pay to her a certain annuity, or to invest a certain sum sufficient to produce the stipulated aliment; or perhaps to declare, that on failure to aliment the wife, she, or the trustees in the marriage contract, should be entitled to redemand payment of the tocher. 8. It may be important to secure a future provision by means of insurance, when the husband's funds are not sufficient to give direct security. It would seem that an effectual obligation may be constituted, by antenuptial contract of marriage, to pay annually the premium of a life insurance for securing such a provision to the wife; at least to the effect of making the premium

affectable by the diligence of his creditors. On Scott's bankruptcy his creditors attached some of the moveable funds which had come from the father; and the Court held, that A. Chessels' heritable subjects, and also his moveables and executry funds, were vested in Helen Chessels, his daughter, in trust, for the purposes mentioned in the deed of settlement, and were not affectable by James Scott or his creditors; and that when James Scott became bankrupt, his right of administration of the said subjects ceased, and that the rents and annualrents that fell due thereafter belonged to Helen Chessels and her children, in terms of A. Chessels' settlement, and were not affectable by James Scott's creditors. Affirmed in the House of Lords, 23 March 1775, 2 Pat. 369.

¹ *Murray's Trs. v Dalrymple*, 1745, M. 5843. [*Carphin v*

Clapperton, 1867, 5 Macph. 797. Reasonable provision made by wife out of that which vested in her at marriage, held not reducible under the Act 1621, c. 18, at the instance of creditors in debts contracted by the lady before marriage. As to settlements by wives of *acquirenda*, see *Napier v Orr*, 1864, 3 Macph. 57; *Diggins v Gordon*, 1867, 1 L. R. Sc. App. 136, 5 Macph. (H. L.) 75.]

² *Dickson v Braidfute*, 1705, M. 10396.

³ See below, p. 687.

⁴ [Hence, when a fund is conveyed by a husband to marriage contract trustees for behoof of himself in liferent, and after his death to secure provisions to his widow and children, the husband's life interest is not protected against creditors by virtue of a clause declaring it an alimentary fund. *Ker's Tr. v Justice*, 1866, 5 Macph. 4.]

during the husband's life a debt claimable on the principle of an annuity, so that a dividend may be drawn for it. But no security can be given for the regular payment of the premium, unless the obligation be fortified by heritable bond or other security. If a policy were opened in name of the wife and children, and the premium regularly paid under such antenuptial contract, the benefit of the insurance would certainly not be demandable by the creditors as part of the husband's estate; while a claim would lie for the future premiums at the instance of the wife.

2. Provisions in favour of CHILDREN, by antenuptial contract of marriage, are, on the principle already stated, onerous deeds. But it will depend entirely on the conception of the provisions, whether they shall be effectual to confer a preference, or even to entitle the children to rank as creditors. In relation to the provisions to children, the infinite variety of marriage contracts may be reduced to two classes: one, in which the children have the character merely of heirs of the marriage, with a *spes successionis* defeasible by onerous deeds only; another, in which they have vested in them the character of proper creditors.

(1.) In the ordinary marriage contract, the children are heirs, not creditors. The common course is, to invest the estate or money to be settled in favour of the husband and wife in conjunct fee and liferent, and to the children to be born in fee; or certain provisions are settled on the children, payable at the first term after the death of the father. In these cases the children are not properly creditors, *i.e.* they cannot stand in competition against the onerous debts or deeds of the father, though they may reduce gratuitous alienations to their prejudice.¹ 1. A *jus crediti*, in opposition to a *spes successionis*, requires the children to be clothed with the character and the right of creditors during the father's life, and is not conferred unless by an obligation to pay during his life, either the principal, or at least the interest.² This doctrine, laid down by our older authorities, has been held as fixed in certain cases to be immediately stated; and in a very recent and very strong case, it has been [640] directly confirmed, and may now be held as settled law.³ 2. It has no effect in conferring a *jus crediti* on the children, that instead of the husband being simply bound to pay a sum to the children, he engages to provide and secure a sum so payable. 3. When he actually lends out the money, or constitutes a trust, or grants heritable security to the wife, or any other person, in the name of the children, and binds himself in absolute warrandice, he constitutes a fee in the children, which will prevail against creditors.⁴

Although such provisions are not effectual against creditors, it may sometimes be an important question, what effect they shall have against the voluntary acts of the father. And, 1. The father has no right gratuitously to disappoint the heir of the marriage, if the

¹ Ersk. iii. 8. 38 and 39. See below.

² See particularly *Strachan v Crs. of Strachan*, 1754, 5 Brown's Sup. 274.

³ *Brown v Govan*, 1 Feb. 1820, 20 Fac. Coll. 94. Here a marriage contract was prepared, but not extended nor signed till some months after the marriage, when it was signed, and the wife's tocher paid. By the draft of the contract, the husband bound himself to pay to the child or children to be procreated, at majority or marriage, the sum of £1200, in certain proportions, with the lawful interest of the said sum from the time at which the same shall fall due, and thereafter during the non-payment; and in implement of this obligation, he further conveyed certain subjects to the wife, as trustee for herself and the children, with procuratory and precept. In the testing clause of the deed, awkwardly introduced, and subscribed only by the husband and wife, is a declaration that the £1200 before provided shall not be payable till twelve months after the said R. Lang's decease, notwithstanding any prior declaration to the contrary, and shall

only bear interest after that period till paid. Lang failed after the infertment had been taken on the deed; and the children, who were infants, claimed on his sequestrated estate alternatively, *first*, a preference under the infertment; or, *secondly*, at least to be admitted as creditors to draw a dividend along with the rest. The Court ordered the question to be heard in presence, and decided against the children, finding, 1. That the declaration in the testing clause was ineffectual to control the expressions in the body of the deed; 2. That the provision not being payable during the father's life, and interest being made to run only from the term subsequent to his death, the children had no *jus crediti*, but were merely heirs, having a *spes successionis* defeasible by the contraction of debt; and, 3. That the heritable security, with the warrandice, partook as an accessory of the nature of the principal right, and was not to be held as indicating a *jus crediti*.

⁴ *Seton v Seton's Crs.*, 1793, M. 4219; *Bushby v Renny*, 1825, 4 S. 110, N. E. 112.

destination be to heirs of the marriage, and the subject be heritable.¹ 2. With consent of the heir of the marriage, the father may gratuitously alter the destination, although it may by possibility happen that the heir may predecease his father.² 3. If the provision be conceived in favour of the children of the marriage; or if, being a moveable estate, it is taken to the heirs of the marriage; the whole children have right, but subject to a reasonable power of distribution by the father.³ 4. If by the marriage contract the right of the heir or children be in any point or respect free from restraint, the father cannot gratuitously burden and restrain it.⁴

(2.) The other class of cases is, where due care is taken to invest the children with a preferable right, or to clothe them at least with the character of creditors. This is to be done by giving to the children a proper right of fee in the land estate,⁵ or by granting to them, or some one for them, an obligation prestable during the father's life. Thus the father's [641] right may be restricted to a mere liferent; or he may bind himself not to contract debt to the prejudice of the children's right; or to infest them at a certain term which may happen during his life; or to pay money at a term which may exist during his life; or to pay interest from a certain term which may be during his life.⁶ In several cases this doctrine has been well settled. In one case the children were held to have a *jus crediti*, in circumstances where it rather appears that the debt was not due till after the father's death.⁷ But in so far as that case may be held to rest on the above ground, it was expressly disapproved of in the next case that occurred. Here the father had bound himself and his creditors 'to pay to the younger children certain sums, the whole to be divided, in certain events, by such proportions as he should appoint by a writing; or, failing such division, equally.' They were payable to the respective children 'on their marriage or majority, the father being bound to maintain them until one or other of these events should arrive;' but although some of the judges were much influenced by the decision in the case above referred to, the children were, by a great majority, held not entitled to enter into competition with their father's creditors.⁸ In a still later case, the circumstance of the father being bound

¹ *Hyalop v Maxwell*, 1 June 1804, 16 Fac. Coll. 192, in note to *Dykes v Dykes*; *Dykes v Dykes*, 9 Feb. 1811, 16 F. C. 187; *E. of Wemyss v Trs.*, 28 Feb. 1815, 18 Fac. Coll. 240.

² *Moodie v Stewart*, 6 Feb. 1730, in H. L., 1 Cr. and St. App. Ca. 20. *Majendie v Carruthers*, 25 May 1819, F. C.; 5 June 1820, H. L., 2 Bligh 692.

³ *Campbell v Campbells*, 1738, M. 6849; and same parties, 1739, 5 Brown's Sup. 214.

⁴ *M'Neil v M'Neil's Trs.*, 1826, 4 S. 393, N. E. 396.

⁵ *Falconer v M'Arthur*, 1825, 3 S. 455, N. E. 317. Here the words were sufficient to constitute a fee in the children; but in taking infestment on the contract of marriage, the infestment in favour of the children was forgot. In a competition with the father's creditors, the children were held to have a personal right only, and so entitled to rank as creditors merely, without any preference.

⁶ *Ersk.* iii. 8. 40.

⁷ *Henderson's Crs. v his Children*, 1759, M. 10179. Here the decision may be reconciled with the doctrine of the other cases, by the circumstance that the judges seem to have held the provision as payable during the father's life. In so far as it was not so held, and yet the children considered as creditors, the decision is not to be relied on.

⁸ *Children of Mactavish v his Crs.*, 1787, M. 12922. In this case Lord President Dundas, Lord Justice-Clerk Millar, Lords Braxfield and Eskgrove, were for the judgment. The President said that, independently of Henderson's case, there

seemed to be good ground for rejecting the pretensions of the children to rank as creditors; and that this being a single case, decided by a small majority, it could not bind the Court against the true principle. The Justice-Clerk, who was a great lawyer, said that every man being *sui rei arbiter*, he may bind down his property, but he must do so in very clear terms; and where it is in favour of children *nascituri*, the obligation must be absolute, unconditional, and to a day—such as can be put in force against himself. But in the case under consideration, the contract was not such as could have been put in force against the father, and therefore the children cannot be held as creditors. Lord Braxfield concurred in this opinion, and, considering the object of the provisions in the contract, he did not find them such as either could or were intended to subject the father during his own life, which always requires strong words. He was clear that it never was intended to give a claim against the father; and therefore that the pretensions of the children to the character of creditors could not be supported. He said he would have been against the judgment in Henderson's case. Lord Eskgrove said that he had drawn up the report of Henderson's case, which was certainly intended to fix the law, but was decided by a small majority. He added that he would in that case have voted with the minority, and that this case is not different. MS. Notes of Mr. Ross, Dean of Faculty. See *Strachan's case*, *supra*, p. 685, note 2. [See also *Browning v Browning's Trs.*, 1837, 15 S. 999; *Goddard v Stewart*, 1844, 6 D. 1018.]

to pay interest, was held to make the children creditors.¹ This question may be further illustrated by the cases cited below.²

The principle on which the engagements of the parties to an antenuptial contract of marriage are held onerous, extends to the case of parents providing sums or estates in the marriage contract of their sons or daughters. A provision of this kind by a father will confer an effectual *jus crediti*, although made payable during the father's life.

II. POSTNUPTIAL CONTRACTS OF MARRIAGE.—These stand in a different situation from antenuptial contracts. In the latter, the provisions to the wife make it an essential condition of the marriage that she shall not follow entirely the fortunes of her husband, but be entitled to rely on those provisions; and the provisions to the children are the [642] conditions on which alone those interested in their future existence have consented to that contract from which they were to spring. In postnuptial contracts the wife and children are already wedded to the condition of their husband and father, and can take nothing against his creditors, unless what he during his solvency can legally give away.³

1. As to the WIFE's provisions under a postnuptial contract, it has been held: 1. That if granted while the husband is solvent, an allowance to her will be effectual to the extent of a moderate provision.⁴ 2. That even if granted after the contraction of debt, and in circumstances which would expose a merely gratuitous deed to challenge, the natural obligation to aliment a wife will sustain the provision to a moderate extent. This, perhaps, does not quite accord with the principle by which this sort of case should be ruled. 3. That where an antenuptial provision has been made, and afterwards a postnuptial, followed by insolvency, the wife may avail herself of the postnuptial provision as in implement of the first one.⁵ 4. A provision to be restricted on the existence of children may occasion a competition between the creditors and the children for the sum arising from the restriction. The rule seems to be, that where the original provision would have been effectual had there been no children, such children as hold a *jus crediti* are entitled to it; and that the creditors are to be preferred only where the provision is exorbitant.⁶

2. Postnuptial provisions to CHILDREN are, like those to wives, either in implement of

¹ *Crs. of M'Kenzie of Redcastle v his Children*, 1792, M. 12924; aff. 3 Pat. 409, 417, Bell's Cases 417.

² *Crs. of Napier v his Children*, 1696 and 1697, M. 12898; *Children of Mactavish*, p. 686, note 8; *Sir J. Stanfield v Brown*, 1696, M. 954; compare *Sir Robert Preston's Children v his Crs.*, 15 July 1691; *Mrs. Lyon v the Crs. of Easterogle*, 1724, M. 8150; *The Crs. of M'Kenzie v his Children*, *supra*.

³ *Wood v Fairly*, 1823, 2 S. 549, N. E. 477. Had the second contract of marriage in this case been antenuptial, it would have been effectual as an onerous deed to disappoint the rights of the first wife's representatives: as it was postnuptial, it was not effectual further than to the extent of a reasonable provision. *Erskine* iii. 8. 41.

⁴ *Lady Campbell v Crs. of Sir James Campbell*, 26 July 1744, *Kilk.* 51. Sir James Campbell, after contracting debts above the value of his estate, married with an antenuptial contract; but some months afterwards granted to his wife a liferent heritable bond of annuity for £100, on which she was infeft. In a question with the creditors, the Court restricted the annuity to £50. 'Some of the Lords were of opinion that when a woman marries without a contract, upon the faith of the legal provision, any postnuptial provision is a gratuitous deed, and as such reducible at the instance of prior creditors; and that, were it otherwise, there were nothing to hinder any man who had married without a contract, after he knew himself insolvent, to settle a provision on his wife preferable to all his personal creditors.' But the opinion which

prevailed was, 'That marriage itself is an onerous cause, which yet will not be sufficient to sustain the provision any further than what may be a moderate subsistence; for so far only the husband is under obligation. And as to the case supposed of a husband's settling a provision upon his wife after he knew himself to have become insolvent, even in that case it was thought the provision might be sustained to the effect of a subsistence.' 'But be that as it may,' continues Lord Kilkerran in his report, 'the present case was thought different. As in the supposed case there is more an appearance of fraud than in the present case, where there was no change of the husband's circumstances between the marriage and the time of granting the provision; and as it was not controverted but at the marriage he might have granted a provision; it was thought to be straining too hard to say he could give none thereafter, although no change had happened in his circumstances.' *Kilk.* 51. See *Walker v Polwart*, 1635, M. 953; *Robertson v Handyside*, M. 957; *Jeffrey v Campbells*, 1825, 4 S. 32, N. E. 33. [A postnuptial provision to take effect in husband's lifetime is revocable. *Dunlop v Johnston*, 1 L. R. H. L. Sc. 109.]

⁵ *Sir Rod. M'Kenzie v Monro*, 1738, M. 958. In *Campbell v Sommervil*, 1778, M. 1000, the wife having claimed both provisions, the Court held the liferent right to be, in a question with creditors, a security merely for the previous provision.

⁶ *Erskine v Carnegie*, 1679, M. 968; *Reid v Whiston & Rutherford*, 1703, M. 971.

the natural obligation of a father, or in fulfilment of a prior obligation. 1. A provision subsequent to debts is not supported by being in implement of the natural obligation. The children can claim only according to the father's ability.¹ 2. It will depend on the [643] nature of the obligation, or its date, whether the provision in implement is onerous. As, in order to vest a child with the character of creditor, the deed must precisely bind the father himself during his life, and not merely give a hope of succession; so, unless the previous deed be of this nature, it will not be held as a just and necessary cause of a specific postnuptial provision. A father, if solvent, may after marriage bestow upon his wife or children the character of creditors, so as to support a conveyance made after insolvency. But the *onus probandi* of solvency will lie on the claimant.²

The aliment of a natural child is not properly speaking, perhaps, a debt to the child; but a debt arises to the mother of the child, who must maintain it if she is able, and who is entitled to relief against the father for one-half. It would seem, therefore, that this is a debt which would, in a competition of creditors, serve as a justification of any bond or security granted for the child's aliment.³

SUBSECTION II.—CLAIMS IN CONSEQUENCE OF CONTRACTS OR DECREES OF SEPARATION.

SEPARATION is different from divorce. The marriage subsists; and it is doubtful whether the aliment assigned to the wife be in the nature of a debt for which she can rank on the husband's estate.

Separation is either voluntary, by contract between the parties, or judicial. It may also be by decret-arbitral, partaking both of the voluntary and of the judicial character. Considered as a departure from the contract to consort together, and to unite stocks for present use, and as a division in future of the common stock, so as to afford a separate subsistence to the wife, a judicial separation during solvency (which is not revocable at the pleasure of the husband), or a separation by decret-arbitral (which is on the same footing), will effectually give the wife a *jus crediti* or a preference, according as her aliment may have been secured by real right, or left on the personal obligation of the husband.⁴ Even a voluntary separation, or separation *bona gratia*, as it is called, has been held to produce the same effect; voluntary contracts of separation, though revocable, not being, like a mere donation, presumed to be revoked by the contraction of debt inconsistent with its subsistence. They can, during the marriage, be revoked only by a return to the married state: for that proper purpose the law allows either party to revoke, but not where they are still to live apart.⁵

¹ Falconer, 1736, Elchies, Aliment, No. 3. It was found that even where a contract of marriage bore an obligation on the father to aliment his daughter till the time stipulated for the payment of her provision, this obligation being only exegetical of his natural obligation, could produce no effect against creditors.

Mr. Erskine expresses the rule in this way: 'Provisions to children already existing are, in the judgment of law, gratuitous, and, of consequence, may be annulled in a competition with creditors if the granter was not solvent.' Ersk. iv. 1. 34. Perhaps it would have been more correct had he said, that 'postnuptial provisions to children are, in the judgment of law, gratuitous,' etc.

² Mausewell's case, 1677, M. 961.

³ Ballantyne v Dunlop, 1814, 17 F. C. 569, where the father seems to have been solvent.

⁴ Brown v M'Gregor, 22 Jan. 1820, 20 Fac. Coll. 56. Here M'Gregor and his wife agreed to a voluntary separation for

all the days of their joint lives, unless they shall afterwards agree to live together again, and to refer to arbitration the aliment to be paid for the wife, and the sum for buying furniture, etc. The arbiter, on an inquiry into the husband's circumstances, awarded £80, under condition that, if security were given for £50, the award for £80 should cease. This seems to have been merely a mode of enforcing the giving of security. The £80 were paid for several years, and then an heritable bond for £50 was granted, on which the wife was infert. M'Gregor failed, and a question arose with the creditors, in the shape of an action of reduction by the trustee under the sequestration. Lord Reston, and afterwards Lord Pitmilley, held the bond effectual, and the Court affirmed this judgment.

⁵ See preceding note. See the opinion of the Court in Palmer v Bonnar, 25 Jan. 1810, 15 F. C. 535.

After dissolution of the marriage, the contract may, as a donation, be revoked. Dickson v Hunter, 1827, 5 S. 266, N.

Against creditors these contracts are effectual only if the husband be solvent, and if there be no fraudulent use of this power; for it is a device obvious to be followed by [644] one about to break, in order to provide an effectual livelihood to his wife and children.

CHAPTER VII.

OF CLAIMS OF WARRANTICE.

WARRANTICE is an obligation or engagement accessory to transference, by which the person who transfers undertakes that what is conveyed shall be effectually transferred, and shall not be taken away or evicted by any one having a preferable right.

1. Although there be no express stipulation of warrantice, there is an implied convention, which varies in its force and extent with the nature of the conveyance to which it is accessory. 1. Where a full onerous consideration is given for the conveyance, the granter of the conveyance by implication undertakes absolutely that the transference shall be effectual; and this not merely to the effect of restoring the consideration given, but of indemnifying the grantee in all respects for the loss, who, in reliance on the efficacy of the conveyance, has employed in the purchase of it money which might profitably have been bestowed elsewhere.¹ 2. Where the right has been bestowed gratuitously in donation, or otherwise, the implied obligation is no more than that the granter shall do nothing inconsistent with the grant. 3. There is a middle case, in which the consideration given is not the full and adequate equivalent for an absolute transference, but still is onerous; and here the implied convention is, that whatever may be the uncertainty of the conveyance in other respects, at least no impediment or disappointment shall proceed from any past or future act of the granter.² The subject of transference being conveyed, as it truly is at the time, with all its risks and benefits,³ it follows: *First*, That loss arising from legislative acts, or legal responsibilities, fall not within the implied engagement.⁴ *Secondly*, That a debt is not warranted by implication against the debtor's solvency, the implied warrantice here being *debitum subesse*.⁵ *Thirdly*, That against rights affecting the subject, arising from vicinity, etc., there is no warrantice without special stipulation.⁶

2. Implied warrantice is superseded by express,⁷ which may be varied infinitely,

E. 248. [An annuity conditioned to be paid to a wife during the subsistence of the marriage is not forfeited by separation, or even by the wife's desertion. *Smith v Smith*, 1866, 4 Macph. 279. In this case the wife was held to have a title to sue her husband for the arrears.]

¹ So strong has this obligation been held, that where one had granted a disposition with conveyance to a procuratory and precept, as contained in a disposition to himself, and the donee had for ten years neglected to take infestment, which would have given him absolute security,—eviction having taken place by the completing of an heritable bond of the first seller, who had remained all this time unknown,—the disponent was found liable. *Downie*, 31 Jan. 1815, Fac. Coll.

² [*Strong v Strong*, 1851, 13 D. 548; *Kelly v Macindoe*, 1858, 20 D. 773.]

³ See above, certain limitations to this rule, p. 367.

⁴ *Ersk. ii.* 3. 29; *Plenderleath v E. of Tweeddale*, 1800, M. 16639; *Alexander v Dundas*, 9 June 1812, F. C.; and *E. of Hopetoun's Trs. v Coplands*, 8 Dec. 1819, F. C., denying the

authority of *E. of Hopetoun v Jarden*, 3 July 1811, F. C.; *Hamilton v Calder*, 1823, 2 S. 403, N. E. 357. Rule settled, that augmentations must be specified in the warrantice to give any relief. In the note to the late edition of *Erskine*, p. 274, the case of *Elphinston* in 1663 is stated as contrary to *Auchintoul's*, on which *Erskine* relies. But on the effect of a subsisting law it is conformable, although on the effect of a subsequent law a hearing was ordered. *Watson's* case in 1667 is also said to be opposite, but erroneously; for that merely decided that against a supervenient law warrantice gives no relief, for which *Erskine* correctly quotes it. *Bonar's* case in 1683 was a case of special warrantice against all evictions, dangers, perils, and inconveniences whatsoever. Pres. Falconer, p. 28. [*Scott v Edmond*, 1850, 12 D. 1077.]

⁵ *Ersk. ii.* 3. 27, and cases there quoted. [As to such warrantice when granted by one bondholder to another, on receiving payment of his debt, see *Russell v Mudie*, 1857, 20 D. 125.]

⁶ *Reid v Shaw*, 1822, 1 Shaw and Dunlop 334, N. E. 311.

⁷ [*Macalister v Macalister's Exrs.*, 1866, 4 Macph. 495.]

according to the agreement of the parties. Occasionally questions arise relative to the [645] deeds to be granted in fulfilment of articles of roup, or other contracts of sale, as to what warrandice shall be specified. This must depend either on the implied warrandice, or on the express stipulation of the contract which is to be implemented by the conveyance; and in order to avoid future disputes, the Court will interfere to direct the express clause which is to be granted.¹ It may, in particular, be a warrandice merely personal; or it may be real.²

The right of action on warrandice arises only on eviction.³ This, however, admits of exceptions: 1. Where the granter has made a second conveyance, which manifestly will be entitled to a preference, an action of warrandice will lie before eviction.⁴ 2. Where the person bound in warrandice is *vergens ad inopiam*, or real security has become unavailing, action seems to lie to corroborate the warrandice. 3. Where the eviction is saved by the expiration of the right warranted, but a claim still remains for damage or violent profits, action lies on the warrandice.⁵

The claim on eviction extends not merely to the restitution of the price or consideration paid, but to all loss sustained by the grantee, from a defect in his right, to the effect of making good the value of the right at the time of eviction, and repairing the injury suffered by want of it subsequently.⁶

When the claim of eviction is made, the grantee ought to give notice. If he do so, he is not bound judicially to defend the right.⁷ If he do not give notice, he takes the risk of the omission of any relevant defence.⁸

CHAPTER VIII.

OF INTEREST OF MONEY, OF DAMAGES, AND OF PENALTIES.

IN closing this inquiry concerning the nature of personal debts, there are certain claims that may be considered of an accessory nature, the foundation and effect of which it may be proper to explain.

Under this head may be considered: 1. Interest; 2. Damages; and, 3. Penalties.

SECTION I.

OF CLAIMS FOR INTEREST, SIMPLE AND ACCUMULATED.

The most obvious ground of a claim for interest is breach of engagement, in consequence of which the person who is to receive money suffers a loss, or fails to procure an expected and possible gain. Other grounds of a claim for interest arise from positive statute, or from contract, express or implied.

[646] I. OF INTEREST, NOMINE DAMNI.—In observing the difference between a claim for

¹ *Forbes' Trs. v M'Intosh*, 1822, 1 S. 497, N. E. 462, where absolute warrandice by the truster and his heirs, and from fact and deed by trustees, directed to be inserted. [Under the Titles to Land Consolidation Act, a general obligation of warrandice imports absolute warrandice as to the lands and writs, and warrandice from fact and deed as to the rents.]

² See the doctrine of Real Warrandice, in treating of Voluntary Securities, below.

³ [The rule applies to sales of moveables. *Swan v Martin*, 1865, 3 Macph. 851.]

⁴ *Smith v Ross*, 1672, M. 16597.

⁵ *Bell v D. of Queensberry's Exrs.*, 1824, 3 S. 416, N. E. 292. See also *Hyalop v the Duke's Exrs.*, 1822, aff. 10 March 1824, 2 Sh. App. Ca. 63.

⁶ *Ersk. ii.* 3. 30.

⁷ *Downie v Campbell*, 31 Jan. 1815, F. C.

⁸ *Clerk v Gordon*, 1681, M. 16605.

damage on breach of a pecuniary obligation, and a claim for damage on breach of an ordinary contract, it is obvious that the general principle upon which both depend is the same. Wherever one suffers loss by breach of contract, he by whose failure in his engagement the loss comes is bound to indemnify the suffering party; and the difference between DAMAGE in ordinary contracts, and INTEREST in pecuniary obligations, arises from the nature of the injury which the party in those several contracts may be supposed to have in contemplation at entering into the contract, as the inevitable consequence of failure. In contracts of Sale, Hire, Mandate, and others of that class, there are certain immediate consequences of breach of the engagement, which present themselves to the party as inevitably following such breach of contract. If a man engage to furnish to another, as purchaser, an hundred quarters of wheat, and fail in performance, he knows that the difference between the price at which the buyer was to be supplied by the contract, and the price at which he can purchase the corn elsewhere at market, is a direct damage or injury which the seller must repair; and therefore, in all such contracts, the damage forms a jury question, according to the circumstances necessarily incident to the contract. In pecuniary obligations there is not necessarily any particular injury or damage presented to the debtor, which he is to lay his account with as the inevitable consequence of breach of contract; but the evil suffered is the extent of the loss sustained, by not gaining the ordinary legal profits of money, or what is necessary to be paid in order to replace it from another source. This claim for interest on account of damage suffered is not repugnant even to the canon law; and where damage could be shown actually to have arisen from breach of engagement, a claim for it seems to have been allowed under that system. But according to the juster principles of Roman jurisprudence, not only an express breach of contract, but also an inconvenient delay in payment, gave a claim for interest.—*Minus solvit qui tardius solvit nam et tempore minus solvitur*. Since the prejudice against the taking of interest expired on the Reformation, the law of Scotland has been settled, that breach of contract, or *mora* in payment, raises this claim without any inquiry into actual damage, and estimating all losses arising from this cause by the same rule, viz. according to the legal rate of interest.¹

1. Interest on this ground is due, 1. On all bonds and obligations for the payment of money on a precise day, if that day should pass without payment.² 2. Where no precise term is fixed, and the day of payment is optional, a judicial or notarial demand raises thenceforward a claim for interest. 3. In debts not of precise obligation, but which are still illiquid, or on which interest is not originally due, the claim to interest lies as from the date of citation,³ or of decree establishing the debt.⁴ But an exception has been admitted in the case of the aliment of a bastard child defrayed by the mother while the father was abroad.⁵ 4. Where there is, by mercantile usage, a particular term of credit fixed, as in the sale of commodities, interest is held to be due from the expiration of the credit. And on the same principle, an underwriter has been held liable for interest on the amount of loss, which by usage ought to be settled within four months of the loss.⁶ A different rule has been [647]

¹ [As to interest on money awarded as damages, see *Hurlet Co. v. El. of Glasgow*, 1850, 13 D. 370; *Lenaghan v. Monkland Iron Co.*, 1858, 20 D. 848; *Denholm v. London and Edinburgh Shipping Co.*, 1865, 3 Macph. 815.]

² [Interest is not due upon feu-duties (*Napier v. Spiers*, 1831, 9 S. 655; *Wallace v. El. of Eglintoun*, 1835, 13 S. 564; *Wallace v. Crawford's Exrs.*, 1838, 1 D. 162), nor on ground-annuals (*Moncrieff v. L. Dundas*, 1835, 14 S. 61). But it was allowed in special circumstances on a composition for an entry (*Mags. of Edinburgh v. Horsburgh*, 1835, 13 S. 571), and on arrears of feu-duties from the date of action for payment (*M. of Tweeddale v. Aytoun*, 1842, 4 D. 862; *Pollock v. Mags. of Edinburgh*, 1862, 24 D. 371), and on arrears of stipend,

but doubted if due on teind-duties (*Drummond v. Lady Montgomerie*, 1842, 5 D. 227). See, as to arrears of teinds, *Lord Advocate v. Sinclair's Trs.*, 1855, 17 D. 290; *Preston v. Mags. of Edinburgh*, 1870, 8 Macph. 502, where the claim arose under an obligation of relief.]

³ *Gillow v. Burgess*, 1824, 3 S. 45, N. E. 29.

⁴ *Wallace v. Geddes*, H. L., 13 June 1821, 1 Sh. App. Ca. 42. Claim for salary disputed, and found due. Interest given in the Court of Session. Reversed, and allowed only from the constitution of the claim by judgment.

⁵ *Hill v. Gilroy*, 1821, 1 S. 33.

⁶ *Crawford and Stark v. Bertram*, 15 May 1812, 16 Fac. Coll. 558. This was an insurance of a ship on the North Highland

adopted in England.¹ 5. Where the raiser of a multiplepointing has improperly delayed to condescend on the fund, he has been held liable for interest.² 6. Where interest is due abroad, it is given here, and at the same rate.³ 7. No interest is allowed on expenses of process, unless in very special circumstances.⁴

2. Before the spirit of the canon law had entirely ceased to influence our civil jurisprudence, there were some cases in which it seemed to the Legislature necessary to interpose, and expressly to declare, that breach of engagement, or *mora* in payment, should ground a claim for interest. These are the chief cases in which our institutional authors say that interest is due *ex lege*. 1. By several statutes, interest is declared to be due on bills of exchange, inland bills, and promissory notes, from their date in case of not-acceptance, or from the day of falling due if accepted.⁵ 2. Interest is also declared by statute to be due on debts for which the debtor has been denounced rebel, on letters of horning.⁶ And, 3. Interest is exacted on cess, after six months from the term of payment.⁷

II. OF CLAIMS FOR INTEREST ON CONVENTION, EXPRESS OR IMPLIED.—In cases where there has been no breach of contract, and no damage thence arising, interest is sometimes, from the nature of the transaction, and the express or implied agreement of the parties, held to be a part of the bargain. When the taking of interest by contract, reprobated by the canon law, came to be sanctioned, the general rule was hostile to the claim, unless the pactio was express. But in later times the exceptions introduced have been so numerous, that were a rule now to be laid down, it would be more correct, reversing the proposition of the ancient law, to say that interest is due in all cases where money is lent, or where the use of it is taken or retained; unless, from the circumstances of the case, there is ground in equity to hold that interest was not meant to be demanded.

1. EXPRESS STIPULATION OF INTEREST.—This is effectual, provided the rate of interest be restrained within the bounds prescribed by law. It must not in rate exceed five per centum per annum; nor must it be taken by anticipation, except in discounting bills under the custom of trade.⁸

2. IMPLIED CONTRACT.—By implied contract, interest is due, 1. Where one has levied moneys belonging to another, which bore interest in the hands of the former debtor. As, for example, if one who is due £100 assign to his creditor a bond for £200, and the creditor uplift the whole sum, he is held bound, without any express stipulation, to pay interest for what he shall so have received.⁹ So, an executor levying debts due to the deceased, which bore interest in the hands of the original debtor,¹⁰ is held liable for interest if he have taken [648] up the money without necessity; or at all events, from the time at which he ought

fishery. She was lost in the Pentland Firth, and on 30th April a requisition was made for settlement of the loss by a bill at four months, as usual. There followed a litigation of nine years; and when the underwriters were at last adjudged to pay the loss, the question arose, whether they were bound to pay interest? The Court held interest due from the time when the loss should have been paid.

¹ In *De Haviland v Bowerbank*, 1 Camp. 51, Lord Ellenborough said: 'Mr. Justice Buller in one instance allowed interest on policies of insurance; but I believe that he was there thought to have done wrong.'

² *Graham v M'Nab's Trs.*, 1822, 2 S. 22, N. E. 19. [*Williamson v Suttie*, 1843, 15 Jur. 637.]

³ *Wilkinson v Monies*, 1821, 1 S. 89, N. E. 91.

⁴ *Dunlop v Spier*, 1825, 4 S. 179, N. E. 181; *Pearce v M'Donell*, 1825, 3 S. 603, N. E. 424; *M'Dowall v M'Dowall*, 1821, 1 S. 200, N. E. 188; *E. of Fife v Duff*, 1827, 5 S. 524, N. E. 492.

⁵ 1681, c. 20; 1696, c. 36; 12 Geo. III. c. 72.

⁶ 1621, c. 20.

⁷ 1686, c. 2. 'His Majesty, and the estates of Parliament, statutes and ordains, in time coming, that all cess which shall not be paid within six months after the same falls due, shall bear annualrent after elapsing of the said six months, albeit horning or other diligence be not used for the same.'

⁸ See above, p. 327 et seq. See also, as to the Effect of a Collateral Obligation for Interest, p. 365. [The restriction of interest to a maximum rate of 5 per cent., and the penalties created by the Usury Acts, are repealed by 17 and 18 Vict. c. 90. As to interest on bonds under a condition referring to the market rate of interest, see *Field v Watt's Trs.*, 1863, 2 Macph. 33.]

⁹ *Irving v Gordon*, 1710, M. 553. See also *Erskine v L. Lauderdale*, 1736, M. 554.

¹⁰ *Arbuthnot v Arbuthnot*, 1758, M. 539. Here the case related to money unnecessarily uplifted from the funds, and on that ground chiefly the claim of interest seems to have been pressed; but the Court appears to have taken the question more broadly, and gave interest from the time when the legatees should have received their shares. 2 Fac. Coll. 147.

to have distributed the fund. 2. Interest is, by implied contract, due on a marriage portion; for it is intended to contribute forthwith to the wife's subsistence, or the expense of the marriage.¹ 3. On the ground also of implied contract, one who pays money for another, in consequence of his mandate, or as his factor or agent, is held entitled to full reimbursement of interest, as well as of the principal sum advanced.² 4. The doctrine is gradually extending, so as to recognise a claim of interest in all cases of loan and debt in which one enjoys the use of money belonging to another.³ 5. An agreement to pay the past interest is also held to imply an obligation for future interests;⁴ and where it has been the course of dealing between the parties to pay interest, an adherence to that course is implied. 6. By implied contract, interest is due on the price or value of any property, to the use and benefit of which the buyer enters, to the deprivation of the seller; and this without any regard to breach of contract or *mora*, but as the counterpart or consideration for the enjoyment of the fruits and profits.⁵ 7. On the same principle, where money has been used, and interest saved, or profit made by the use, the person reaping the benefit is presumed to have agreed to pay interest for the use.⁶ 8. A trustee or factor, who has money belonging to his principal in his hand, is liable either for full interest, or at least for bank interest, partly from implied contract, partly on the ground of neglect.⁷ And judicial factors are liable for interest upon such rents as they shall recover, or ought to have recovered.⁸ 9. All money obligations, taken to one in liferent and another in fee, imply interest as the sole liferent profit derivable from money so lent. Ersk. iii. 3. 79.⁹

Expenses of process do not bear interest till constituted by decree. But where [649] expense has been unjustly occasioned, the person immediately disbursing that expense may fairly be considered as in the condition of a cautioner for him who in the end is found truly to be debtor for that expense; and whatever he is under the necessity of paying before the close of the litigation, he ought in equity to be entitled to recover with interest. On this principle, interest was found due after a year from the date of the interlocutors finding expenses due.¹⁰ Interest has also been given on any considerable sum of expense necessarily

¹ [Also on legacies from testator's death. *Duff's Trs. v Scripture Readers*, 24 D. 552.]

² Ersk. iii. 3. 80.

³ *Garthland's Trs. v M'Dowal*, 26 May 1820, 20 Fac. Coll. 140.

⁴ *Hume v Seaton*, 1669, M. 486. See also *Carnegie v Durham*, 1676, M. 484.

⁵ *L. Durie v L. Ramsay*, 1624, M. 542, where the buyer was not in fault, the price having been arrested in his hands. Interest was found due, 'as it is against reason and conscience both to retain the money without paying annualrent thereof, and to bruik also the whole profits of the lands.'

Clunie & Stirling v Ogilvie, 1626, M. 543.

Stirling v Panter, 1627, M. 3728, where an option was allowed to pay interest, or account for the rents.

L. Balnagown v M'Kenzie, 1663, M. 545, where the same alternative was given, although the seller had not furnished a proper progress.

Wallace v Oswald, 1825, 3 S. 525, N. E. 364.

⁶ *Hardie v Cauvin*, 1823, 2 S. 213, N. E. 187. This was a claim for interest on the unseparated share of goods in communion falling to the wife's relations on her death, but not claimed till the husband's death. Interest was allowed.

⁷ *L. Elphinston v Keiths*, 1790, M. 4067. Here the defenders were confidential agents of Earl Marischal, having considerable sums in their hands, for which they were never required to pay interest; while, on the other hand, they made no demand for personal labour. Some years after the

Earl's death, moneys lodged in their hand by him were claimed by his heirs, and they refused to pay interest. The Court held that a factor was not obliged to pay interest instantly from the principal's death; but as soon as he knew how the money was to be disposed of, he was bound to lodge it in a bank. Judgment was given for bank interest from a year after the Earl's death.

N.B.—There seems no equitable ground for such indulgence; for the factor ought to have the money in bank, as the money of the principal, or to pay interest for it at the full rate.

Campbell v Rose, 1752, M. 516. Here a sub-factor found liable for interest on rents levied from the term his accounts were required, which was the year after levying them. The analogy seems to hold as to the time when the accounts should regularly have been rendered, or the rents accounted for. In short, interest is due for *mora*. Ersk. iii. 3. 80.

See cases below, *Tait*, etc., p. 696, notes 4 and 5.

⁸ 31 July 1690, Acts of Sed. p. 186. *Cranstoun v Scott*, 1826, 5 S. 62, N. E. 57. [See the Pupils Protection Act, 12 and 13 Vict. c. 51, sec. 5.]

⁹ [On the subject of interest due under implied agreement, see *Broun's Trs. v Brown*, 1830, 4 W. and S. 28; *Darling v Adamson*, 1834, 12 S. 598; *Spalding v Farquharson*, 19 May 1809, F. C.; *Union Canal Co. v Carmichael*, 1 Bell's App. Ca. 116; *Sinclair v Sinclair*, 1847, 10 D. 190.]

¹⁰ *Warner v Cuninghame*, 29 May 1813, Fac. Coll. This case is not correctly reported. The Court allowed interest on the

advanced years before the date of the judgment, as being truly a part of the actual expense.¹ And where the expense of extracting a decree of the Court of Admiralty had been paid several years before by the party found entitled to expenses, interest was allowed on the sum so paid.²

III. OF THE COMMENCEMENT AND TERMINATION OF INTEREST.—1. The rules for the COMMENCEMENT OF INTEREST are these: 1. Where there is an express agreement concerning the commencement of interest, it rules the case. 2. Otherwise, in the general case, interest runs from the stipulated day of payment. 3. Where the day of payment is optional, interest runs only from the day ascertained by the act declaring the option. So, in bills payable at sight, or so many days after it, the presentment regulates the running of interest; and this is fixed either by a date adjected to the acceptance or by a protest. Or where there is no evidence of the date of presentment, but only of the presentment having taken place, it will be held as of a date as early³ as circumstances render probable. So, a bill payable on demand will bear interest only from the protest,⁴ or citation in an action.⁵ 4. Interest runs upon arrears of cess from the expiration of six months after the term of payment.⁶ 5. Interest runs on money advanced by mandatories, etc., from the date of advance. The Court, by one decision, refused to extend this rule to law agents;⁷ and, by a later decision, found a law agent entitled to interest after a year from the date of the last article.⁸ 6. The price of property bears interest from the time the benefit of possession accrues to the purchaser, the price being a surrogatum for the subject; and while the rents are accruing to the purchaser, the running of interest is not stopped by any attachment, or by want of sufficient titles: it can be stopped only by consignment. 7. It is a frequent stipulation in contracts of partnership, that on the death or bankruptcy of a partner his interest in the stock shall be ascertained as at the date of the last balance; but for the conveniency of the company, and to prevent confusion from a sudden demand, the sum due is made payable at a future term, or sometimes by instalments; and it has been doubted whether interest runs [650] during the time between the date of the balance and the stipulated term of payment. According to the general rule, by which the money becomes the surrogatum of the share of company stock, which is a fund bearing profit, it would appear that, unless where the usage of trade or practice of the parties has made an exception, interest would be due.⁹ 8. Interest on merchants' accounts of furnishings begins on the expiration of the accustomed credit; or if there be no special custom to regulate it, from the date of citation when the money should have been paid. 9. Interest at the legal rate begins to run on sums lent on bottomry from the termination of the voyage. 10. Sums due by underwriters on policies of insurance have been found to bear interest from the time when the loss should have been settled.¹⁰

2. TERMINATION OF INTEREST.—As to the termination of the period during which

expense found due by interlocutor in February 1802, and on the expense found due by interlocutor in February 1809, from and after the elapse of a year from the dates of those interlocutors. [See *Caledonian, etc. Railway Co. v Lockhart*, 1858, 20 D. 390; *Dalmahoy v Mags. of Brechin*, 1859, 21 D. 210.]

¹ *Groat v Sinclair*, 15 May 1819, Fac. Coll. Here also the party held liable in expense had derived, during the course of a most tedious litigation, advantage by dead interest on the price of the lands in question.

² *M'Dowall v M'Dowall*, 1821, 1 S. 200, N. E. 188.

³ *Kinloch v Mercer's Reps.*, 1748, M. 477. On this principle, in the case of a bill between two persons living in the same place, the acceptance, not dated, was held as evidence of a presentment of the date of the bill itself.

If the parties are at a distance, the course of post would probably be taken as the date of the acceptance.

⁴ *Ersk. iii.* 3. 77.

⁵ *Moncreiff v Sir W. Moncreiff*, 1752, M. 481.

⁶ 1686, c. 2. See above, p. 692, note 7.

⁷ *Muirhead v Town of Haddington*, 1750, M. 532.

⁸ *Henry v Sutherland*, 1801, M. App. Annualrent, No. 1. A law agent found entitled to charge interest on the balance due to him, after a year from the date of the last article in the account. [In *Young v Baillie*, 1830, 8 S. 624, it was decided 'that interest runs on a law agent's account for business from the date of a twelvemonth after the last item, and for cash lent from the date of the advance.' *Barclay v Barclay*, 1850, 22 Jur. 354. As to interest on factor's commission, see *Peddie v Beveridge*, 1860, 22 D. 707.]

⁹ [*Findlay, Bannatyne, & Co.'s Assig. v Donaldson*, 1864, 2 Macph. (H. L.) 87, reversing 22 D. 937.]

¹⁰ See *Crawford & Stark v Bertram*, *supra*, p. 691, note 6; and Lord Ellenborough's opinion in *De Haviland v Bowerbank*, there quoted.

interest is to be calculated on the claims of creditors, the natural rule is, that interest shall continue to run till the day of payment. But, 1. There is a limitation established by statute where the claim is made against a CAUTIONER: the claim of interest in such a case is restricted to the period of seven years. 2. The rule suffers also a limitation on the peculiar principles of bankrupt law. On BANKRUPTCY, so far as the common fund is concerned, it lies dead in the hands of trustees, or at best bearing bank interest from the moment when the debtor's transactions are stopped; and from the same point of time the currency of interest should stop on the claims of the creditors. But, *first*, It is only in the law relative to mercantile bankruptcy that this rule has been followed in Scotland: it is enacted, that the trustee, in making up a state of the debts in sequestration, shall 'calculate interest on each up to the date of the first deliverance on the petition for sequestration.'¹ *Secondly*, The rule is confined, even in mercantile bankruptcy, to the claim as made against the divisible fund: as against the bankrupt himself, in using diligence against his person, as well as against any reversion which may be left of the sequestrated estate after paying the principal sums, with interest to the date of the first deliverance, interest is demandable according to the common rule.² And, *thirdly*, No provision restraining interest having been made for cases where there is no sequestration, they must be regulated by the rules of common law, in which there is no principle acknowledged that can bar the running of interest down to the very day of payment. It has been understood, indeed, that in judicial sales and ranking, not only are creditors entitled to interest after the bankruptcy, but to interest on the accumulated sum of principal and interest, down to the period when the price of the lands is payable. In distributing moveable funds under actions of multiplepounding, there is no stop to the currency of interest.

While the claims of all the creditors continue unaccumulated, it can very seldom be a matter of any consequence at what period the interest ceases to run against the inadequate fund, since examples are now so exceedingly rare of creditors who are not entitled to [651] interest. There is, however, an advantage to be gained by those who have got their debts accumulated; for the increase by the currency of interest is in a greater ratio than the legal interest.

IV. ACCUMULATION OF PRINCIPAL AND INTEREST.—Although the general rule of law be, that interest shall not be allowed upon interest, there are occasions on which accumulation is lawful. The principles of the doctrine of accumulation seem to be these:—

1. Interest does not, in the general case, *ipso jure* bear interest. Therefore, however long ARREARS OF INTEREST may have continued unpaid, they cannot without some voluntary or judicial operation be converted into a principal bearing interest. It is not even lawful in a loan to stipulate that, if the interest be not paid, it shall bear interest.³ It may appear

¹ 54 Geo. III. c. 137, sec. 45, also sec. 49.

² By 33 Geo. III. sec. 46, a provision was introduced respecting the surplus of the estate, the justice of which, and the soundness of principle on which it proceeds, were very questionable. Where there is a surplus, the case is no longer under the peculiar principles of bankrupt law. There is no ground for stopping the currency of the interest as against the bankrupt's reversion: it is as if there never had been a bankruptcy. But by the 46th section of the Act it was provided, 'That the surplus of the bankrupt's estate and effects that may remain after payment of his debts, *computing interest as aforesaid* (i.e. "up to the date of the first deliverance"), and the charges of recovering the estate and distributing the same, shall be paid or made over to him, or to his assignees or successor.' The English law had adopted the true principle, the creditors entitled to interest having right to it out of the reversion, not merely up to the date of the commission,

but also to the day of payment. Cullen's Principles of Bankrupt Law 410, and cases there quoted. In the Act of Sederunt passed 14th December 1805, relative to the Act 33 Geo. III., this matter was regulated correctly; and now by the 49th section of the statute of 54 Geo. III. c. 137, sec. 49, the matter is placed upon that footing.

³ Where money is deposited in a bank, bearing interest according to the rule of indefinite payment, a draft generally made on the bank ought to be paid out of the interests that may have grown on the sum deposited, exhausting the deposit only in so far as there is no interest lying in the banker's hand. But bankers give deposit receipts to their customers; and when a sum is wanted, they require the receipt to be produced, and mark the draft on the back of it as a sum paid to account of the principal, by which means they keep in their hand the interest, as a dead fund on which no interest runs. Where, instead of such a receipt, the sum is entered

in some degree inconsistent with the rule that interest bears no interest, that in JUDICIAL SALES and ranking the debts have been held as accumulated at the date of the payment of the price. This is not merely by the force of the decree of sale considered as a general adjudication; and yet it seems to be in some degree a mistake in principle to call this an accumulation. The true principle seems to be, that at the term of payment of the price, the dividends proportioned to the claims of each creditor are held as set apart for him, with all their accruing interests.¹ A proper accumulation produces the effect of a new currency of interest on interest, to all intents and purposes, so as even to affect personal funds and postponed creditors; but such accumulation cannot possibly be produced by a sale, which converts the subject into a price. The sole effect of this must be to change the claim and security of the creditor into a right to payment of the dividend corresponding with the full extent of debt then due; so that it operates as an accumulation only relatively to that particular subject.²

2. There is an exception to the above rule wherever the holder of the fund is under an obligation of DUTY TO LAY OUT and accumulate the interests. 1. A trustee is bound thus to lay out and accumulate funds as they arise or come into his hands, and is therefore chargeable with interest on interest periodically, from the time at which interests so arising ought to have been laid out.³ 2. A law agent, acting as a money factor, is bound to the same [652] duty of annual accumulation, in respect to funds entrusted to his management.⁴ 3. One who insists on retaining in his hands a sum placed with him, either as agent or even as debtor, is bound to the same duty of laying out and accumulating the interest annually, having no right to gain by what he retains in mere security.⁵ 4. One who by any fraudulent or illegal act, or breach of duty, withholds money, is bound to account for it with accumulated interest. So a tutor or curator is liable for interest on interest.⁶ So, a person who by a fraudulent transaction had obtained a discharge of a debt, on that transaction being reduced, was held liable for compound interest, by an accumulation every two years.⁷

3. Where a cautioner has been forced to pay a debt, consisting of principal and interest, the whole bears interest to him as a debt against the principal. But this is not properly an accumulation, or an exception to the general rule already laid down. It is in consequence only of the payment by the cautioner that he becomes a proper creditor of the principal debtor; and the amount of his debt is the sum of his advance. This rule was introduced by Act of Sederunt, in cases where the cautioner held a bond for relief of the principal, and

in account, and a mere receipt to account is given, that account must be settled, as it would seem, on the principle of indefinite payments.

¹ Ersk. iii. 3. 81; and this is confirmed by the statute 1621, c. 28, which authorizes the creditor to include the interest to the day of payment in the bond as a principal, provided payment be not demanded before the stipulated term.

² Before 1693, the sale of a bankrupt's lands preceded the ranking. By the regulations 1695, art. 26, the ranking is ordered to precede the sale. In sales by apparent heirs, the sale has always preceded the ranking; and now, by the late sequestration statutes, the sale has been ordered to proceed with all possible expedition, whether the ranking be finished or not. Amid those changes disputes arose relative to the period of accumulation: sometimes the date of the decree of sale was contended for; sometimes that of the payment of the price; and sometimes, again, that of the decree of ranking. But it may be considered now as settled that the debts are converted into dividends at the term of payment of the price; the interest accruing on the dividend belonging, of course, to the creditor entitled to such dividend. See *Brown v the York*

Building Co., 17 Jan. 1792, M. 13339. And this seems to proceed, not on the principle of an actual judicial accumulation, as at the payment of the principal, but simply as a necessary consequence of the right of the creditor attaching to the price, and cutting off a proportional part as belonging to him.

³ *Graham v Frier*, 1824, 2 S. 606, N. E. 518; *Lady Montgomerie v Wauchope*, 1822, 1 S. 453, N. E. 421, and authorities there referred to. [*Campbell v Keith*, 1840, 2 D. 1367.]

⁴ *D. of Queensberry's Exrs. v Tait*, 1826, 5 S. 180, N. E. 167; *Cranstoun v Scott*, 1826, *ib.* 62, N. E. 57. [*Blair v Murray*, 1843, 5 D. 1315.]

⁵ *D. of Queensberry's Exrs. v Tait*, 1822, Fac. Coll.; same case, 1826, 5 S. 180, N. E. 167. But see *M'Neill v M'Neill*, 4 S. 620, N. E. 620, as reversed in H. L., 4 W. and Sh. 455.

⁶ *Hamilton v Marshall*, 25 Feb. 1813, Fac. Coll. The accumulation was triennial. [A curator holding money of the minor in his hands held liable in 4 per cent. interest on interest annually, and entitled to 5 per cent. on advances. See *Ralston*, 4 S. and D. 421, N. E. 425; *Laurie v Ritchie*, 1837, 16 S. 219.]

⁷ *M'Neill v M'Neill*, *ut supra*, reversed 4 W. and S. 455.

all damage, etc.; and it was required as a condition, that the payment should be made on distress.¹ The modern practice has been, to allow cautioners in all cases to adjudge for principal and interest as accumulated, and bearing interest from the day of payment, even where the cautioner has paid without distress;² and this rule is consistent with the true principle, and there seems so little danger of abuse or collusion (which alone could be the reason of annexing the condition of distress), that no good objection occurs to this relaxation. Where the debt is secured by heritable bond, a cautioner for the regular payment of the interest, paying, and taking assignation to the security, is entitled under the penalty to rank for interest on the interest paid.³

4. By bond of corroboration, or other form of voluntary innovation, the accumulation may be made. This is equivalent to a payment and new loan of the whole sum. This cannot be done, as we have seen, by anticipation; nor can it be effectually accomplished after bankruptcy, under 1696, c. 5, or the late Acts.

5. By judicial proceedings the debt may be accumulated. 1. A decree for debt, however, does not accumulate the principal and interest. It is necessary to proceed to diligence in execution before that can be accomplished.⁴ 2. Denunciation and horning is by [653] 1621, c. 20, declared to have the effect of entitling the creditor to claim interest on the sums in the horning;⁵ and although interest on interest is not expressly mentioned, this is obviously implied, and so the statute has always been understood. The principle is well indicated in the preamble, that the creditor has done all in his power to recover his money; and that if the debtor still evades payment, he keeps the money as a principal sum, and cannot in justice clear himself by afterwards paying no more than he should have paid at first. 3. Adjudication, as an action of execution, terminates in a decree, either adjudging as much of the debtor's estate as should be equivalent to the principal sum, interest, and a fifth part more; or adjudging the debtor's estate, in general, redeemable on payment of the accumulated sum of principal, interest, and expenses: and therefore an adjudication has strictly and properly the effect of an accumulation. 4. The decree of judicial sale, at the instance of an apparent heir, has always been regarded as a general decree of adjudication for the behoof of all the creditors; and the same rule is now extended to the common decree of sale at the instance of creditors.⁶ But it has not yet been settled by Act of Sederunt, as the Court is empowered to do, at what period and in what manner the principal sums and bygone interest of the debts shall be accumulated. Certainly the general adjudication thus implied in the decree of sale, is not in strictness a decree of adjudication to the effect of accumulating the debt; for the debt is not mentioned in it, nor the accumulated sum specified. It is only by inference, and *fictione juris*, that a decree of sale is regarded as a general adjudication, and this merely for the beneficial purpose of preventing the acquisition of preferences by new diligence, on the part of individual creditors, after the estate has come into a course of liquidation and divi-

¹ 1 Feb. 1610. This Act is quoted at length by Spottiswood, p. 34. See Sir Ilay Campbell's Acts of Sederunt, p. 66.

² Ersk. iii. 3. 78.

³ *Inglis v Benny*, 1825, 4 S. 113, N. E. 114.

⁴ *Campbell v E. of Galloway*, 1802, M. App. Annualrent, No. 4. In this case there were circumstances which brought it rather under the rule above laid down, justifying a stricter rule of accounting. There was something of a trustee's duty incumbent on the debtor, and something also of an unjust opposition to a demand, suspending the operation of a judgment. Judgment had been given, in December 1789, for payment of a debt with interest. The case was kept depending in the Court of Session and House of Peers till 1794, when the judgment was affirmed. Having returned to the Court of Session on some undecided points, a demand was

made to have the principal and interest accumulated; and the question arose, From what period interest should be given by accumulation? The Court was much divided, some judges being inclined to accumulate as at the date of the first decree, others to hold that no accumulation should be authorized. A middle course was taken, and the debt accumulated as at the time when the demand for accumulation was made, and when an interim decree for the principal and past interest might have been given.

⁵ This denunciation must be made at the head burgh of the creditor's residence. It is not enough that it be at the cross of Edinburgh, if the debtor reside beyond the county. *Kames' Rem. Dec.* 43.

⁶ 54 Geo. III. c. 187, sec. 10. [19 and 20 Vict. c. 91 sec. 4.]

sion.¹ 5. None of the diligences against moveables produce an accumulation; and in multiplepointings, the creditors are ranked for the principal, simple interest, and expense.

SECTION II.

OF CLAIMS FOR DAMAGES.

CLAIMS of damage may arise either from injuries inflicted, as by personal assault, libel, seduction, adultery, etc.; or from breach of contract; or from neglect of the due diligence which law requires in particular situations and contracts. In treating of particular contracts, something has already been said of claims of damage arising from breach of contract and from negligence.²

In questions of damage, the fact forms the chief point of inquiry, whether the injury was committed, or the covenant broken? whether, in consequence, a loss or injury has been occasioned? and what the amount of that loss is? But sometimes the case depends on questions of law of extreme nicety, both where the action is grounded on injury committed, and where it rests on breach of contract. In the latter class of questions particularly, it may be necessary to distinguish between the direct and the remote effects of the [654] disappointment; or between the actual and positive and the negative loss. Without entering upon these distinctions further than already touched upon, one or two observations may here be sufficient.

1. Questions of damages are now, by the recent statutes for regulating the Jury Court, to be sent to that court for determination, when the damage arises from injuries to the person, real or verbal; or from injury to moveables; or to lands where the title is not in question; or from breach of promise of marriage; or on account of seduction or adultery; or on account of delinquency, or *quasi* delinquency of any kind.³

2. A claim for damages may be made effectual in bankruptcy. Even in England, if the demand in the nature of damages be capable of being liquidated and ascertained at the time of the bankruptcy taking place, so that a creditor can swear to the amount, he may prove it as a debt under the commission. But in many respects, the law of England, in respect to claims of damages in bankruptcy, is so peculiar, and rests on grounds so artificial, that they are not to be resorted to in illustration of the rules of Scottish jurisprudence on this point. The object of the proceedings in bankruptcy with us, is to give to every creditor payment of his debt; and on the distribution of the estate fairly disclosed, to discharge the debtor of every possible claim existing at the time of the bankruptcy, whether liquid or unliquidated, whether presently due or only in future, whether pure or merely contingent. According to this simple and natural view, all claims of damages seem as competent in bankruptcy as ordinary claims of debts are, provided the damage has arisen previous to or in consequence of the bankruptcy. There may undoubtedly be a difficulty in so adjusting the claim as that the creditor shall be able to swear to a precise debt, until by judicial proceedings, compromise, or arbitration, the amount of the damage shall be ascertained. But although this may deprive the creditor of a vote in the deliberations of the creditors, or prevent him from grounding on his unliquidated claim an application for sequestration, it will not, according to the course of Scottish jurisprudence, or the tenor of the sequestration law, deprive him of his right to have his claim liquidated, and proved, and ranked, to the effect of receiving a dividend.

¹ It was accordingly agreed by the judges, in the case of *Brown v York Building Co.*, 1792, M. 13339, that the decree of sale was not to be held as an accumulation of the debts of the several creditors.

² See above, Of Contracts of Sale, pp. 477-8; Of Diligence Prestable, p. 482, etc.

³ 59 Geo. III. c. 35, sec. 1; 6 Geo. IV. c. 120, sec. 28. [But see the provisions of the Court of Session Evidence Act, 1866.]

3. However hard the situation may be out of which a claim of damages arises, the bankruptcy itself is not one of the elements to be taken by a jury in assessing a higher sum of damages. The debt due is properly the amount of the loss suffered; and although, in some cases of damages, the person responsible will be adjudged to pay for the injury according to the measure of his fortune, the mere circumstance of unexpected insolvency ought not, on the one hand, to mitigate the damages; and the consideration of his paying only a dividend ought not, on the other, to be suffered to enlarge the verdict as against the other creditors.¹

SECTION III.

OF PENALTIES.

Penalties are annexed, *first*, To obligations to perform, or not to perform, a particular act; or, *secondly*, To money obligations. They are intended in the former case either to enforce, by more than the usual consequences, what the party is anxious to secure; or to stand as liquidated damage where the event anticipated has taken place, and to [655] save the delay and vexation of a judicial inquiry into the amount of loss. In the latter case they are intended to cover interest or expenses in making the debt effectual to confer on the creditor for this purpose the benefit of the security, or of the rapid execution which is stipulated for the principal debt itself.

1. PENALTIES IN CONTRACTS AND OBLIGATIONS AD FACTUM PRÆSTANDUM.—1. Where such penalties are intended as liquidated damages, and especially where there appears to be nothing exorbitant in the stipulation, but a reasonable and fair proportion between the loss and the penalty, a court of justice will not interfere.² Thus, where in a lease an additional rent is stipulated on particular modes of cultivation being adopted, and where no doubt occurs as to the *bona fides* of the tenant in altering the original mode of cultivation prescribed, the penalty is held an additional rent conventionally proportioned to the different use to be taken of the land.³ So, in the case of a judicial sale, where the loss arising from failure of an offerer to fulfil his engagement cannot easily be ascertained, a court will not disturb the liquidated damage.⁴ 2. But where the penalty is manifestly exorbitant, and a penal forfeiture rather than estimated damage, a court of equity does interfere; the exorbitancy being taken in some sort as a criterion whether it be properly a penalty or conventional damage that has been stipulated. In such cases especially where deviation is accidental or necessary, an inquiry has been admitted into the actual loss as all that can be demanded in equity.⁵ 3. Where the penalty is plainly intended to secure against some possible invasion, although it may be conceived in the shape of an increased rent, the party against whom it is pointed is not entitled to insist on taking the enlarged use, paying the penal sum. It is held necessary, in order to his exercising such power, that a *jus quæsitum*

¹ In the case of *Macknight v Bertram, Gardner, & Co.* (*supra*, p. 297, note 1), an attempt was made to have the sum of damages enlarged, to the effect of giving a larger dividend and more adequate compensation. But the Court held the amount of the damage estimated, without regard to the dividend, to form the true debt for which the creditor was to be ranked.

² [Of this nature are penalties of the nature of demurrage for non-completion of contract works. See *Johnston v Robertson*, 1861, 23 D. 646.]

³ *Pollock v Paton*, 1777, M. App. Tack, No. 4; *Henderson v Maxwell*, 1802, M. 10054; *Graham v Straiton*, H. L., 11 May 1789, 3 Pat. 119; *Frazer v Ewart*, 25 Feb. 1813, Fac.

Coll.; *Miller v Lord and Lady Gwydir*, 1824, 3 S. 65, N. E. 42. [*Hall v Grant*, 1831, 9 S. 612; *Lawson v Ogilvie*, 1834, 7 W. and S. 397, affirming 10 S. 531; *Gillanders v Craig*, 1856, 19 D. 116.]

⁴ *Currie's Crs. v Hannay*, 1791, M. 3162; *Johnston's Trs. v Johnston*, 19 Jan. 1819, Fac. Coll. [*Glasgow, etc. Canal Co. v Greenock Railway Co.*, 1850, 13 D. 182.]

⁵ See the doctrine of the Court in *M'Intosh v M'Donell*, 1798, M. App. Tack, No. 4. See also opinion of Court in *Wright v M'Gregor*, 9 Feb. 1826, Fac. Coll. [*Watson v Merri- lees*, 1848, 10 D. 370; *Craig v M'Beath*, 1863, 1 Macph. 1026; *Forrest v Henderson*, 1869, 8 Macph. 187.]

be plainly stipulated; as, for example, that a tenant shall have it in his power to follow a particular course on paying a certain rent. Unless there be such stipulation, the penalty, though in one sense, and in the case of necessary or actual deviation, a conventional damage, is to be held as truly an instrument of restraint,¹ and the payment of the penalty does not liberate from the performance of the engagement.²

2. PENALTIES IN MONEY OBLIGATIONS.—These are meant to cover interest or expenses, and to give all the security and execution which is competent in relation to the principal debt, for the recovery of those which are future and contingent claims. In bonds and transactions for the loan of money, the borrower has often so much confidence in his prospect of repaying the sum against the day fixed, and so much anxiety to obtain the accommodation, that he is regardless of consequences in fixing the amount of the penalty. He trusts that the event which is to entitle the lender to the penalty will never happen. On the other hand, [656] a lender, anxious to have back his money at the appointed term, thinks that the dread of a demand for the whole penalty will, when the term begins to approach, make his debtor exert himself. But when that failure does come, it would be unjust to permit the creditor to reap so exorbitant an advantage as the recovery of the whole penalty; and it is an important object to take care that no undue advantage be taken of the necessities of debtors. Accordingly, in all countries, a power is vested somewhere for MITIGATING SUCH PENALTIES, and reducing them to the actual or probable amount of the damage. In France the doctrine of mitigation was admitted.³ In England a remedy is to be had in equity. And with us, the Court of Session, as the supreme court of law and equity, has the power of mitigation. On this principle the laws against usury rest, and those laws also which discourage and annul unconscionable bargains for advancing money to heirs in expectancy. On the same principle the restraining of penalties in bonds is to be justified. The earliest case we have in Scotland on this subject was determined on sound principles. It occurred so far back as the middle of the sixteenth century, and conventional penalties were held to be no further exigible by the practice of Scotland than to the amount of the real damage and interest, because they approach too near to usury, and would elude the law.⁴ A penalty in a bond which bore no interest, was on this principle restricted to the interest.⁵ By the old form of the heritable bond, where the debtor was infest only in security of an annual-rent redeemable by payment of the principal sum, interest, and penalty, the penalty was held, in one sense at least, not to be really secured; for although the debtor could not, in competition with other creditors, redeem his land without paying the penalty (or such part of it at least as could legally be claimed), the annual-renter had no preference for his penalty.⁶ But by the present form of the heritable bond all those difficulties are removed.

¹ *Muir M'Kenzie v Craigies*, 18 June 1811, Fac. Coll.; *Wortly M'Kenzie v Gilchrist*, 13 Dec. 1811, Fac. Coll. In these two cases a similar decision was pronounced in the two Divisions of the Court.

See some very useful remarks on this subject in Mr. William Bell's note to Bell on Leases, vol. i. 253 et seq. In that note the cases on the point are very judiciously collected and arranged.

² Ersk. iii. 3. 86. *Ayton v Paterson*, 1627, M. 1034; *Orichton v Perie*, 1630, M. 10035; *Beattie v Lambie*, 1695, M. 10039. [*Curtis v Sandison*, 10 S. 72; *University of Glasgow v Fac. of Surgeons*, 1840, 1 Rob. 397.]

³ Pothier, Tr. des Oblig. No. 345.

⁴ *Home v Hepburn*, 1550, M. 10033. [By 54 Geo. III. c. 137, sec. 9, and now by 19 and 20 Vict. c. 91, sec. 5, it is enacted that in all cases where penalties for non-payment over and above performance are contained in bonds or other obligations for sums of money, and are made the subject of

adjudication or of demand in any other shape, it shall be in the power of the Court to modify and restrict such penalties as not to exceed the expense incurred in making the debt effectual.]

⁵ *Sample v Sample*, 1622, M. 10033.

⁶ The whole of this doctrine, as applicable to the old heritable bond, will be found in two cases—*The Ranking of Cockburn*, and *Menzies v Denham*.

1. As to creditors by real rights, it was in the latter of these cases found, 'that the creditor in an heritable bond for security of his annualrents was only preferable for his principal sum and annualrents, but not for his penalty or termly failzie.' 2 Feb. 1739, M. 10044. But,

2. As to the effect of the clause of reversion (which clearly barred the debtor himself from redeeming without paying the penalties) upon the purchaser of the estate at a judicial sale, the Court found, 1. That the creditor had no action against the buyer, to force him to pay the penalty; and, 2.

The infeftment which is given to the creditor in the lands is 'for further security of the payment of the sums of money, principal, annualrents, and liquidate penalty, and termly failures above mentioned.' So that the real right by infeftment as effectually covers the penalty as it does the principal.¹ In the same way summary diligence proceeds for [657] the penalty to the effect of authorizing a demand for the actual expense: the creditor not being entitled to refuse the principal, interest, and actual expense; the debtor not being entitled to suspension, unless this has been tendered.²

As to the amount of the expense and damage allowed to be claimed under cover of the penalty, these points seem to be fixed: 1. As the legal interest is the proper damage arising from a failure to discharge a pecuniary obligation, where interest was not stipulated, and while yet it was not held to be due without a special contract, the penalty in the first place went to cover the interest.³ 2. All the expense of making the debt effectual is recoverable under the penalty.⁴ So the expense of diligence is clearly included. Even the expense of a litigation, collaterally arising in making effectual the claims, has been admitted.⁵ The expense also of proceedings against a co-obligant has been allowed.⁶ As to the expense of litigation, which has not been allowed in the action itself, there seems to be ground for distinguishing; and, *first*, If the litigation has been between the creditor and debtor themselves, the refusal of expenses to the creditor in that action seems to exclude his claim under the penalty.⁷ As to the expense of litigation in proceedings where third parties have been concerned, the refusal of expenses in the action is not conclusive against the claim for expense under the penalty.⁸ But although collateral expense has been allowed, it has been refused where the proceeding is not directly under the bond.⁹ 3. Lord Stair, in speaking of the power of the Court of Session to modify and restrict penalties, says: 'These clauses have this effect, that the Lords take slender probation of the true expenses, and do not consider whether they were unnecessary or not, so that they exceed not the sum agreed upon; whereas in other cases they allow no expense but what is necessary and profitable.'¹⁰ 4. Doubts were formerly entertained whether an adjudication on a bond bearing a penalty did not deprive the Court of all power of mitigation. Those doubts were grounded on the principle that an adjudication is, in truth, a sale under

That the buyer had no direct means of forcing the creditor to denude or convey his right till his penalty, or at least expenses, were paid; and this seeming to some of the Court to endanger the efficacy of the laws relating to judicial sales, it was observed that by 1695, c. 6, the buyer might consign the price, which liberates him and disburdens the land. *Ranking of Cockburn's Crs.*, 1700, 2 Fount. 101, M. 1290.

¹ *Duff v Chapman*, 1755, M. 10046; and see 5 Brown's Sup. 292 for Lord Kilkerran's note. This point was first tried in the *Ranking of Jarvieston*, where it was objected to a creditor by heritable bond, claiming to be ranked for the expenses incurred, that he had no preference for the penalty to any further extent than the mere expense of the infeftment; all other claims for expense, however good against the debtor, being, in competition, to be considered as claims for future debts not secured by the infeftment. And it was strongly affirmed to be the universal understanding in practice, that such was the law. The Court at first dismissed the claim, 'moved chiefly by the practice alleged by the objector;' but 'finding, upon investigation into rankings, that the practice was not uniform, they decided that the heritable creditors are preferable upon their heritable bonds, to the extent of their necessary expenses, alongst with their principal sums and interests.' *Ranking of Jarvieston*, 1782, M. 14132. This is now held as settled.

² *Hynd v Soot*, 1826, 4 S. 628, N. E. 636; *Cowper v Stewart*, 1746, M. 10044.

³ *Semple v Semple*, 1622, M. 10033.

⁴ *Ranking of Jarvieston*, 1782, M. 14132.

⁵ *Ramsay v Goldie*, 1826, 4 S. 737, N. E. 744.

⁶ *Duff's case*, *supra*, note 1.

⁷ *Allan v Young*, 1757, M. 10047, 5 Brown's Sup. 340; *Gordon v Maitland*, 1761, M. 10050.

⁸ *Duff's case*, *supra*, note 1; *Allardes v Morison*, 1788, M. 10052. See *Ramsay*, *supra*, note 5. [See *Smith v M'Lean's Trs.*, 1800, M. App. Expenses, No. 1; *Mein v M'Nair*, 1829, 7 S. 653.]

⁹ In the *Ranking of Jarvieston* (*supra*), it was found that a creditor by heritable bond, receiving a collateral assignation to certain debts, and being put to considerable expense in prosecuting for them, could not include this expense under his penalty. In the case of Kildonan's creditors, it was found that an heritable creditor having entered into possession, by appointing a factor under the usual clause empowering him so to do, and declaring him liable only for his intromissions, deducting the expenses of levying the rents, and for omissions: he was not entitled, in accounting with the debtor's creditors, to charge a salary to his factor. *Crs. of Kildonan v Douglas, Heron, & Co.*, 1785, M. 14135. [*Orr v Mackenzie*, 1839, 1 D. 1046.]

¹⁰ *Stair* iv. 3. 2.

reversion. But this opinion of the nature of an adjudication has been given up.¹ And accordingly it has been found that the Court has the power of mitigating penalties in adjudications, as completely as in bonds.² 5. Although it may be said, in one sense, that a creditor by heritable bond is infeft, and holds a real right over the lands in security of the [658] debt, with interest, and the whole of the penalty, and therefore ought to be so *ranked*, whatever he may be allowed to *draw*, yet the matter has been otherwise decided. Like an obligation and security in relief, the right of the heritable creditor under the penalty is never held to attach, except so far as expenses are actually incurred.³

PART II.

THE DOCTRINE OF PASSIVE TITLES, OR THE EFFECT OF DEBT AGAINST REPRESENTATIVES.

WE have hitherto considered debts as operating against the original obligant; but they are available also against heirs representing such original debtor, taking his estate, and becoming in consequence liable for his debts, either universally or to a limited extent.

The estate of the debtor, as well as his person, is liable for the performance of his engagements, and may be attached not only during his life, but after his death. The transference of the estate to his heir does not extinguish this liability; but on the contrary, according to the law of Scotland, his heir, taking up the universal right and character of heir, is held, in assuming the benefit, to undertake also the burden, and to become liable for every debt of the proprietor deceased. The extent of this liability should naturally be measured by the value of the estate; but the law of Scotland has carried it to an unlimited extent, discharging the creditors from any necessity of making inquiry into the exact amount of what the heir has so taken, and by a presumption of law holding the estate to be fully adequate to the payment of any debts.⁴ An undertaking, accordingly, to this extent, is

¹ *Campbell v Scotland and Jack*, 1794, M. 321. There will be occasion afterwards to investigate this more particularly, in treating of the Effects of Payment.

² *Purdon Gray v Buchanan*. The case occurred in a ranking, but the objection was moved by the heir of the debtor; and in this way it may almost be said that the question was viewed in both lights, as between the debtor himself and the adjudger, and as in a competition. The Lord Ordinary first 'ranked and preferred the adjudger for payment of the accumulated sum contained in his decree of adjudication, and interest thereof from the date of the said decree till payment;' and to this, by their first judgment, the Court adhered. But afterwards, upon considering the important change produced on the common opinion respecting the nature of a general adjudication, by the decision in *Campbell and Scotland's* case, they 'altered and restricted the adjudication to a security for principal sum, interest, and necessary expenses of adjudication.' 10 July 1800. It is true that afterwards this judgment was altered, but upon a ground quite foreign from the point now under discussion, viz. the effect of certain objections to the adjudication.

It was understood upon the bench, when this decision was pronounced, that the decision was in no shape to affect the

method of adjudging, or to prevent a creditor from adjudging for his full penalties, reserving for future consideration to what extent the claim should be mitigated. On the other hand, he may be a loser by dead interest, which the Court will, as in the case of *Murray of Stanhope v E. of March*, in 1772, think themselves bound in equity to recompense out of the penalty; and, on the other hand, while he regularly receives his interest or holds possession, he may by repeated adjudications give ground for condemning his conduct as oppressive, and so authorize the Court to refuse all claim under the penalty.

³ In the *Ranking of Jarvieston*, *supra*, p. 701, an inquiry was ordered into the practice of accountants in ranking creditors by heritable bonds upon the penalties; and the Court, upon considering the result, found, 'That penalties, to the extent of the necessary expenses, have the benefit of the real security upon infestments, such as those founded on: therefore found the creditors in this case preferable for their penalties, to the extent of the necessary expense; but found that the expense laid out in recovering the contents of a collateral security could not be understood as a part of the penalty in the heritable bond.'

⁴ [The principle laid down in the text, that in equity the

inferred from the service of the heir, and is called the passive title of an heir, as the right which gives him access to the estate is called his active title. It is on account of this liability that the doctrine which prevails in the laws of other countries is not admitted in Scotland,—namely, that the heir's right is completed by the death of the ancestor; [659] *mortuus sasisit vivum*. The title of heir must be completed, so as to give to him an opportunity of refusing or of recognising this extensive responsibility, or of taking the proper measures for having it limited and restrained to the true amount of the estate. Without inquiring historically into the progress by which this unlimited or universal liability came to be established as a consequence of the heir's entry, the rules are these: 1. That the heir who enters unconditionally to the succession of his ancestor, is liable without limitation to his debts. But this applies only to the heritable and not to the moveable estate; no such unlimited responsibility arises from taking the moveable succession, except in cases of fraudulent and unchecked intromissions, against which the law guards by a presumption that the funds intromitted with were sufficient for all the debts. 2. That the heir cannot escape from this consequence by varying the form, without changing the substance of the act by which he takes the estate. 3. That he may guard himself and his estate against this unlimited responsibility, by taking measures at once to show the true extent of the estates which he assumes as heir, and to limit his acknowledgment. And, 4. That the law has favoured creditors of the ancestor so far, that diligence by them, used within a certain term, has preference over the creditors of the heir; and that, although the ancestor's title to the estate may not have been feudally completed, his debts will affect it, if, by a certain course of possession as proprietor, a credit has on that footing been established, by which tradesmen and others may be deceived.

The subject may be considered under the following heads:—

1. Of the passive representation of an heir entering by service, or assuming the possession generally.
2. Of limited representation.
3. Of the debts of apparent heirs in possession.

CHAPTER I.

OF PASSIVE REPRESENTATION.

1. WHERE an heir enters as such by SERVICE in any character of universal succession, he is held to recognise a general responsibility, as *eadem persona cum defuncto*. From all the regular methods of completing the titles of an heir in heritage, whether as heir of line, heir of conquest, or heir male, this effect follows. It is not so, however, as to an heir succeeding by a particular destination, not being *hæres alioquin successurus*. He is, under a limited responsibility, liable to the extent only of the value of that to which he has succeeded.¹

liability of the heir should be measured by the value of the estate, has been extended by statute to special services. See Titles to Land Consolidation Act, 1868, sec. 47. And in some exceptional cases, even a general service, without inventory or specification, has been held not to render the heir liable by passive representation, as where nothing was taken by the service, or where the title was made up merely for the purpose of conveying over the estate to trustees. See *E. of Fife v Duff*, 1828, 6 S. 698; *Mackay v Campbell's Trs.*, 1835, 13 S. 246.]

¹ Erskine (iii. 8. 51) disputes this doctrine, against the authority of Dirleton, Stewart, and Bankton; extending it only to the case of an heir *nominatim* substituted in a bond, or a grantee in a disposition *omnium bonorum*, to take effect at the death of the granter. But the point is settled by the case of *Baird v the E. of Rosebery*, 1766, M. 14019, affirmed 3 April 1767. 'In this case,' Lord Monboddo says, 'the Lords determined a very general point of law, viz. that an heir of provision of a particular estate, such as an heir of tailzie, is not by his service universally liable, but only in

The rule does not extend to the MOVEABLE SUCCESSION; the title by which that estate is administered proceeding on an inventory, and being limited to the amount of the inventory.¹

[660] 2. PRÆCEPTIO HÆREDITATIS.—By anticipating the heritable succession, and accepting of a gratuitous conveyance from the ancestor, the heir is held to undertake responsibility for all previous debts. He is held as successor *titulo lucrativo post debitum contractum*; and his act is considered as *præceptio hæreditatis*.²

It may be observed, with regard to this passive title, 1. That it does not prevent a prior creditor from seeking his remedy under the Act 1621, c. 18, by which creditors are protected against gratuitous alienations to conjunct and confident persons; and it may be of importance to proceed on this ground, rather than on the passive title, in order to establish a preference over the heir's own creditors.³ 2. That no creditor has the benefit of this passive title, whose debt was not contracted previously to the conveyance being accepted by the heir.⁴ 3. That this not being a representation founded on presumed delict, it transmits against the heirs of the person so taking *præceptione*.

Where a conveyance is made to the heir under the burden of the granter's debts, it is effectual to posterior creditors as well as prior, to the extent of the property conveyed; but it infers no passive title of which the posterior creditors may avail themselves.⁵

3. GESTIO PRO HÆREDE.—Where the person entitled to succeed as heir proceeds, after the death of the ancestor, without service, to occupy and enjoy the estate, so as no one but an heir is entitled to do, not only is he held to recognise a general liability; but by removing as far as he can, or eluding, all check on the extent of what he receives, he further confirms the right of creditors to look to him for unlimited engagement.⁶ That the doctrine rests partly on the implied acknowledgment of responsibility, is manifest on all those examples of it which preclude the possibility of creditors being defrauded by concealment; as in the conveyance of a subject to a third party, or the consenting to such a conveyance, or the granting of discharges or receipts for debts or rents. That it rests partly on the danger of fraud, appears in those cases where there is uncontrolled intromission with rents, heirship moveables, title-deeds.⁷ This, like all other passive titles, is much relaxed in modern times. And, 1. It is excluded by any right in a third party taking the estate out of the ancestor's person. 2. By any singular title in the heir. 3. If the intromission be inconsiderable, and without any marks of intention to defraud the creditors.⁸ The passive title of *gestio pro hærede* is not transmissible against the heir of the gestor, who will be liable only *in valorem*.⁹

valorem, like an heir *cum beneficio inventarii*. The direct contrary of this was as unanimously decided in the case of *Pitrichie*, and a petition refused without answers. Lord Pitfour observed the change of our law in this respect, and how much inclined our forefathers were to introduce universal passive titles, as appears from the Act 1695.¹⁰ 5 Brown's Sup. 926. [See *Scott v Tawse*, 1828, Sh. (Teind Ca.) 163; *Farquhar v Hamilton*, 1842, 4 D. 600; *Sinclair v Dunbar*, 1845, 7 D. 1085; *Dewar v Burden*, 1845, 8 D. 90, 7 Bell App. Ca. 32.]

¹ See below, Of Confirmation.

² There is something obscure in the principle on which this passive title rests. For, 1. It is not universal, giving no ground of action to a creditor of the ancestor, whose debt is posterior to the conveyance. 2. It corresponds with the operation of the Act of 1621, c. 18, in subjecting the heir *in valorem* to all prior creditors. Yet, 3. It does not stop there, but infers responsibility for prior debts, however inconsiderable the subject thus taken, and whatever the amount of the debts. Stair (iii. 7. 1) places it on the ground of an expedient extension of the Act 1621 in the peculiar case of apparent

heirs. Erskine (iii. 8. 88) resolves it into the heir's acknowledgment of the character of heir, which is not perfectly correct, otherwise it would infer a universal passive title. Both of them add this limitation, that the responsibility is only for antecedent debts. Stair (sec. 1) says that the heir's representation is 'with this temperament, that he shall be liable only to the debt contracted before the disposition or right made to him by the defunct.' Erskine (sec. 88) says: 'The effect of the passive title becomes restricted, as if the ancestor had died immediately after executing the right, and so extends to no debts contracted by him afterwards.'

³ See below, Commentary on the Act 1621, c. 18.

⁴ Ersk. iii. 8. 88. See above, note 2.

⁵ *Smith v Marshall*, 1780, M. 2322. See *Bruce v Bruce*, 1826, 5 S. 119, N. E. 109.

⁶ Ersk. iii. 8. 82; 1695, c. 24.

⁷ See Ersk. iii. 8. 83, 84.

⁸ Ersk. iii. 8. 86. *Jeffrey v Blair*, 1791, Bell's Oct. Cases 482.

⁹ Ersk. iii. 8. 91. See *Penman & Brown v Penman*, 1775, M. 9836.

4. The heir will not escape from unlimited responsibility by altering the form [661] while he enjoys the substance of the succession. So, 1. If an APPARENT HEIR, after the ancestor's death, purchase otherwise than at a public judicial sale, he is held to represent his predecessor universally, and to be liable for all his debts and deeds as if served heir.¹ 2. Where rights, or legal diligence affecting the predecessor's estate, are settled on a relation so near to the apparent heir that the heir succeeds; if he shall possess the estate on such rights or diligence, except on lawful purchase at public roup, he shall be held liable as on a passive title, while the rights and diligences shall be available against creditors only so far as it shall be proved that they were purchased for sums of money.² 3. If the heir shall complete his title by adjudication on his own trust bond (which was a mode of evasion of the universal responsibility formerly attempted), he shall be held to represent universally,³ unless the right shall be completed, and possession obtained before the ancestor's death.⁴

5. VITIOUS INTROMISSIONS.—In moveables there is no entry as by service, and no universal responsibility on the part of the executor, whose entry is by inventory in the character of administrator, not of heir. But wherever any one having access to the effects and moveable estate of a person deceased, unwarrantably takes possession of and intermeddles with those funds, the law infers a universal responsibility from the uncontrolled intromission.⁵ It may be observed, 1. That it is not necessary for raising this presumption that the intromitter shall, as in the passive titles in heritage, be entitled to take up the succession. 2. That any probable title of intromission, or circumstances removing the presumption of fraud, and affording fair grounds of scrutiny into the actual state of the succession, are held sufficient to relieve from this penal consequence;⁶ and although the spirit of the law has become much milder, and the form of the presumption is much mitigated even since that rule was laid down, yet wherever there are circumstances of suspicion, or the removal of the natural and reasonable checks on the intromission, the presumption of the law still is enforced.⁷ 3. That, according to the law of penal actions, a demand by the creditors of the defunct, on the footing of this passive title, cannot competently be made against the heirs of the intromitter.⁸

CHAPTER II.

OF LIMITED REPRESENTATION.

THERE are some passive titles which do not extend to a responsibility for the whole debts of the deceased, but to a responsibility bounded by certain limits.

SECTION I.

LIMITED REPRESENTATION PRODUCED BY JUDICIAL PROCEEDINGS.

There are two occasions on which representation to a limited extent may be [662] established by adverse proceedings on the part of the creditor.

¹ 1695, c. 24.

² 1695, c. 24.

³ Act of Sederunt, 28 Feb. 1662; 1695, c. 24.

⁴ *M'Niel v Mathie*, 1759, M. 9752.

⁵ Stair iii. 9. 9; Ersk. iii. 9. 49. [Representatives introducing without a title held liable *in solidum*. *Wilson v Taylor*, 1865, 3 Macph. 1060.]

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⁶ Ersk. iii. 9. 52. [*Gardner v Stevenson*, 1830, 8 S. 600; *Young v Marshall*, 1831, 9 S. 638; *Thomson v Miller*, 1834, 13 S. 149; *Dudgeon v Dudgeon's Trs.*, 1844, 6 D. 1015.]

⁷ See *Gardener v Davidson*, 1802, M. 9840; *Scott v L. Belhaven*, 1821, 1 S. 33; *Cunningham & Bell v M'Kirdy*, 1827, 5 S. 315, N. E. 292.

⁸ See case of *Penman*, *supra*, p. 704, note 9.

1. Where an action is raised against the heir of a debtor, and he, acquiescing in the character under which he has been called, states a peremptory defence on the merits of the cause, as payment, discharge, prescription, etc., he is held to incur a passive title to the effect of being liable for that particular debt, but no further.¹

2. Where a creditor has no direct means of attaching the estate of his debtor, the heir not being entered, it is provided by particular statutes² that the creditor may charge the heir to enter, under certification that, if he fail so to do, he shall be considered as liable to the debt of the charger in the same way as if he had entered; so that not only may adjudication proceed, but action may be sued out personally against the heir not renouncing.³

SECTION II.

OF ENTRY AS HEIR CUM BENEFICIO INVENTARII.

It would be a very inexpedient deviation from the rules of justice, to infer against an heir an unlimited responsibility, without any regard to the extent of the succession, were there no remedy to mitigate the harshness of the rule. But the Scottish Legislature, in the statute already referred to, adopted from the Roman law⁴ a regulation enabling the heir to enter *cum beneficio inventarii*. By this law the Legislature provided,⁵ that on following out particular proceedings, and observing certain precautions for ascertaining the true extent of the succession,⁶ the heir's responsibility should be limited to extend 'so far as the value of the heritage given up in the inventory will extend, and no further.'

[663] The requisites to be observed are: 1. That this privilege shall be claimed, and the inventory given in, recorded and extracted, within the *annus deliberandi*. 2. That the inventory shall be full, and upon oath, of all lands, houses, etc., which the heir claims as such. 3. That it shall be subscribed before witnesses, duly insert and designed. 4. That it shall be given in to the clerk of the Sheriff Court of the shire where the lands lie; or if there be no lands requiring sasine, to the Sheriff-clerk of the shire where the ancestor died. 5. That the inventory shall be sanctioned, subscribed by the judge, and recorded and extracted.

As to the effect of this statute, and of the heir's entry under its provisions, the following points may be observed: 1. The heir does not thereby vest the estate in his person, strictly speaking, as a trust-estate, or so that the debts of his ancestor are by his act to be held as real burdens on the lands. The heir must indeed account for the value, on the principles

¹ Ersk. iii. 8. 93. *Lundie v L. Sinclair*, 1713, M. 12064.

² See Commentary on these Acts, 1540, c. 106, below, under Adjudication.

³ Ersk. iii. 8. 93.

⁴ Cod. Lib. Tit. De Jure deliber. l. 22, secs. 2, 3, 4.

⁵ The second part of the Act 1695, c. 24, is in these words: 'That for hereafter any apparent heir shall have free liberty and access to enter to his predecessor *cum beneficio inventarii*, or upon inventory as use is in executries and moveables, allowing still to the said apparent heir year and day to deliberate; in which time he may make up the foresaid inventory, which he is to give up upon oath full and particular as to all lands, houses, annualrents, or other heritable rights whatsoever to which the said apparent heir may or pretends to succeed. Which inventory, to be subscribed by him before witnesses, duly insert and designed, shall be given to the clerk of the Sheriff Court of the shire where the defunct's lands and heritage lie. To which inventory the sheriff, etc., with the clerk, shall also subscribe in judgment, and record

the same in their registers, and give extracts thereof; and this inventory is to be given in recorded and extracted, as said is, within the said year and day to deliberate.' [For the present mode of completing a title by service with specification annexed, see the Titles to Land Consolidation Act, 1868, sec. 49.]

⁶ An heir defending himself on the inventory must show strict compliance with the Act. See *M'Kay v Sinclair*, 1708, M. 5331. It is sufficient if the inventory be given up and registered within the year, though the service is subsequent. And if any unavoidable obstacle prevent the completing of the inventories within the prescribed time, the Court will authorize them to be registered, reserving all objections. *Sir R. M'Kenzie*, 1749, M. 5353; *Elchies, Heir cum beneficio*, No. 5. *Bell*, 17 Nov. 1818, Fac. Coll. The inventory, however, must be lodged before the heir is served, otherwise he is held to have by his service incurred a representation not to be purged by inventory. *Codrington v Johnston's Trs.*, 11 Feb. 1818, Fac. Coll.; aff. 31 Mar. 1824, 2 Sh. App. Ca. 118.

which regulate a trustee's intromissions (see below). But under a service *cum beneficio*, as under the ordinary form of service, the heir becomes the absolute proprietor of the land, with only a personal responsibility for his predecessor's debts;¹ the sole difference being, that this responsibility is limited in the one case, universal in the other. A demand against the heir thus served is grounded on his title as heir. The conclusion of the summons is for a personal decree; and the proper tenor of that decree is, 'decerning against him for the debt, reserving to him his objections against full payment.'² 2. If any of the creditors of the predecessor desire to attach the estate, they must proceed by adjudication in the manner hereafter to be explained, and with such limited benefit as the law has assigned to the ancestor's creditors. 3. If a demand be made by a particular creditor, the heir not only may, but is bound to satisfy it, unless there shall appear danger of similar demands to a greater amount than the value of the estate; in which case the heir may raise an action of multiplepinding, calling all the creditors of the ancestor into the field, to have the fund fairly divided. 4. As the heir may pay to the creditor who first makes his demand, other creditors who come afterwards may be excluded by the exhausting of the whole value of the heritage in the inventory; or their demands may be limited to a small dividend from the inadequate residue. And against this the creditors seem to have no other protection than their own vigilance in citing the heir, and so by interpellation compelling him to bring all into the field by a multiplepinding, or by themselves raising a multiplepinding in the heir's name. 5. The heir may sell or voluntarily alienate the estate, to the disappointment of the ancestor's creditors; and against this, as against the other danger which they run, there is no protection but the vigilance of the creditors themselves in using the diligence of inhibition. 6. While the estate remains in the hands of the heir, unexhausted by payment actually made, no preference is acquired by creditors either citing the heir or obtaining decree against him; but the whole estate, or what remains unexhausted and unapplied, is a fund in the heir's hand, on which the creditors are to be ranked preferably, according to the diligence they have used for attaching it; or *pari passu* if no real diligence have been used.³ The creditors attaching the estate will be preferred accordingly;⁴ and, on the same principle, if the heir have prevented diligence, by granting an heritable security, that security will be available to give preference where there is no collusion or fraud.⁵ The [664] ranking of such security seems to be equivalent to payment in accounting for the fund. It is different from the effect of a mere decree on which no payment has been made. 7. The heir, although he does not hold the estate as vested in him in trust, is yet substantially a trustee, holding a fund equal to the value of the estate, for the benefit of the creditors of the predecessor, and for payment of which both the estate of his ancestor and his own may be attached. Accordingly, he is on the principle of trust bound to account for this fund. And so, *first*, Meliorations are imputed as part of the trust. *Secondly*, Whatever indulgence, deduction, or ease he receives in settling with individual creditors, are taken to be for the benefit of the whole.⁶ And, *thirdly*, The heir must either pay the debt, or assign the subjects in the inventory, and is not entitled to insist on paying only the value.⁷ 8. As the inventory does not present any evidence of the *value*, but only of the *extent* of the estate; and, indeed, as the whole is a proceeding of voluntary and not of contentious jurisdiction, and so gives no assurance of correctness; difficulties may arise after the heir has assumed the possession. Thus, 1. If, without taking any precaution to discriminate, he shall improve the estate, it is

¹ The entry of the heir *cum beneficio* cannot therefore be considered as diligence on the part of the ancestor's creditors, to secure their preference under the Act 1661, c. 24.

² *Gordon v Ross*, 1741, M. 5352. This reservation is best discussed in a multiplepinding, wherein the heir *cum beneficio*, condescending on the value of the estate, may show how it has been exhausted, or is subject to competing demands.

³ *Lawson v M'Dougall*, 1738, M. 5348; *Elchies, Heir cum ben. inv.* No. 2.

⁴ *Scott v Burnet*, 1724, M. 5336.

⁵ *Veitch v Young*, 1733, M. 5345.

⁶ *Aikenhead v Russell*, 1725, M. 5342.

⁷ *Vint v Lord and Lady Hawley*, 1712, M. 5335; *Douglas v Pringle*, 1724, M. 5335.

difficult to say that the right of the creditors shall be restrained to the original unimproved value; and accordingly it has been held that the creditors are entitled to reckon his responsibility at the value of the improved estate.¹ 2. Although the heir may, in a process of cognition, have the value of the estate ascertained, as a rule of liability and payment;² and if the matter should stop there, all future improvements will be held as made by the heir upon his own estate, just as if he had purchased it; yet he cannot compel creditors to acquiesce in this mode of ascertaining the value. They may insist on bringing the estate to a sale.³

SECTION III.

LIMITED RESPONSIBILITY FROM POSSESSION BY APPARENT HEIR, IN CONFERRING ON CREDITORS A RIGHT AGAINST THE NEXT HEIR ENTERING.

It seemed to the Scottish Legislature, while considering the whole of this matter of responsibility by succession to land, that although it might not be expedient to confer the title to land *ipso jure*, yet, from the possession of the ancestor's estate by an apparent heir, a degree of credit arises, which called for some modification of the ordinary rule that makes land and the heir succeeding to it responsible only for the debts of a proprietor feudally vested. When creditors see a man in possession as owner of an estate for a course of years, they are naturally led, without any particular inquiry into the state of his titles, to trust him as a person of credit and property; and it is hard and unjust that they should be dis-[665] appointed. On this account it was deemed expedient, that wherever such possession should be continued during the space of three years, the next heir completing his title to the land by passing over the person so possessing, should be held responsible for his debts, and bound to fulfil his onerous engagements to the extent of the value of the estate. And provision was so made accordingly,⁴ in another part of the same Act, which has already been commented on.

This is a very imperfect law; and the policy on which it is grounded leads much beyond the remedy actually applied. The points of importance under this Act are these: 1. The remedy is not confined to the case of an estate in which the heir succeeding to the apparent heir connects with the predecessor *last infest*, for the word *infestment* is not to be found in the statute. If the next heir complete his title to the estate by service connecting himself with a more remote predecessor than the apparent heir, although that predecessor should have held only a personal right as donee, it would be a case under the Act.⁵ 2. The interjected heir must actually have possessed the subject by himself, or by another under his authority. And so it will not avail his creditors if the estate has been in the possession

¹ *Aikenhead v Russell*, 1727, M. 5344.

² *Gray v M'Caul*, 1733, M. 5345. This action is declaratory. All the creditors must be called; and the conclusion is, 1. That the worth of the estate shall be ascertained after due inquiry made. 2. That the lands shall be found and declared to belong to the pursuer, and to be free and disburdened of the debts of the predecessor, upon payment to the creditors of the ascertained value. And the proper course is, to have a multiplepinding and exoneration conjoined with the declarator.

³ This, after some vacillation, was at last fixed. See the case of the *Crs. of Pilmure*, 1736, M. 5346, as corrected by the case of *Strachan's Heirs v his Crs.*, 1738, M. 5348. See also *Ersk.* iii. 8. 70.

⁴ The words of this part of the statute are: 'If any man shall serve himself heir, or by adjudication on his own bond

shall succeed, not to his immediate predecessor, but to one remoter, as passing by his father to his goodsire, or the like; then and in that case he shall be liable for the debts and deeds of the person interjected, to whom he was appearand heir, and who was in the possession of the lands and estate to which he is served for the space of three years, and that in so far as may extend to the value of the said lands and estate, and no further, deducing the debts already paid.' 1695, c. 24.

⁵ *Principles of Equity* 124. Observe here the extreme inaccuracy of Lord Kames in grounding his argument on a misquotation of the Act, p. 122. He imagines the case which he puts to be resolvable only on the equitable extension of the Act upon its policy, whereas the words fully comprehend it.

of a judicial factor in sequestration;¹ neither is it enough that he is apparent heir in the fee, and excluded only by the liferenter's possession, which, though to some effects it is held as the fiar's, never is so held but for the fiar's benefit.² But if, as apparent heir, he shall have granted a liferent right, his liferenter's possession would be held as his.³ 3. If the possession, though actual, has been not on apparency, but on a title ostensibly adverse to it, the creditors will not profit by it.⁴ 4. It is only upon the onerous debts and deeds of the interjected heir that a demand can be grounded against the succeeding heir. So a pecuniary debt of the interjected heir; or an obligation in a marriage contract;⁵ or a disposition of lands onerous, and with warrandice, express or implied; or a lease of any part of the lands, will authorize a demand, and the enforcement of the deed against the next heir. But a gratuitous engagement or conveyance, as a simple destination, or a bond of tailzie, will not sustain action under the statute.⁶ 5. The words of the Act require that the heir who is called upon as responsible must enter by service, or by adjudication on a trust-bond, to one more remote than the debtor whose possession on apparency had raised the credit; otherwise there is no action against him. It was therefore held, that where the next heir possessed merely on apparency, without service or adjudication on bond, he was not [666] responsible.⁷ This seems to be so little satisfactory, so far short of the principle of the Act, and to have been so much discountenanced in the House of Lords in one case,⁸ that our lawyers have expressed little confidence in this rule being adhered to.⁹ But in a subsequent case, a judgment was affirmed in the House of Lords, holding the heir who forbears to enter as not liable for this statutory passive title.¹⁰ 6. Where the next heir abstains from entering or adjudging, but gives a bond gratuitous, or for a small consideration, on which the land is adjudged, this has been held equivalent to entry, as under the fair meaning, though not within the words, of the Act.¹¹ 7. The responsibility is personal, but limited to the value of the estate, 'so far as may extend to the value of the said lands and estate, and no further, deducing the debts already paid.'¹² The creditor of the apparent heir, therefore, can attach the estate only by adjudication, after having constituted his debt against the heir who has entered. But here it may be questioned, *first*, Whether the creditors of the apparent heir have, in pecuniary debts, the preference conferred on the ancestor's creditors by 1661, c. 24? It would rather seem that they have such preference, since there are no words in the Act to exclude them, while the intendment of it is to confer on such creditors, to the value of the estate, the full privilege, as against the heir next entering, to which

¹ *Buchanan v Macdonald*, 7 Dec. 1796, Fac. Coll. [Donald v Colquhoun, 1835, 13 S. 574.]

² *Crs. of M'Caul v M'Caul*, 1745, M. 9748.

³ *M'Turk v Hunter*, 27 Feb. 1819. [Corbet v Porterfield, 1 Bell App. Ca. 47, affirming 1 D. 1038; and see *M'Turk v Hunter*, 27 Feb. 1819, F. C., where this effect was attributed to the possession under an agreement to divide rents pending a competition.]

⁴ *Ersk. iii. 8. 94*. But observe that the case of *Irvine v Knox*, there quoted, does not support the doctrine, though it seems to have been stated in argument, and probably was sanctioned by the judges in the opinions.

⁵ *Muirhead v Muirhead*, 1724, M. 9807; *Countess-Dowager of Glencairn v Cunningham Graham*, 23 May 1800, M. App. Heir Apparent, No. 1; aff. in H. L. 5 Pat. 134. See also *Ogilvy v Ogilvy*, 16 Dec. 1817, Fac. Coll. [Taylor v Hutton, 1854, 16 D. 885.]

⁶ *M. of Clydesdale v E. of Dundonald*, 1726, the fifth branch of the cause, M. 1262 et seq.; aff. Rob. 564. [Russell v Russell, 1852, 15 D. 192.]

⁷ *Sinclair v Sinclair*, 1736, M. 9810. Lord Elchies says the court pronounced this decision 'most unwillingly, because

it makes this clause of the Act 1695 of little effect.' Notes, pp. 317, 318. See also *Leith v L. Banff*, 9 Dec. 1741, *ib. notes*, p. 318. [The Act applies where a title is made up by Precept of Clare. *Brown v Henderson*, 1852, 14 D. 1041.]

⁸ Lord Elchies, in his note of the case of the *Crs. of Kinminity*, 11 May 1749, where decree of constitution and adjudication having been given against a minor, apparent heir, on debts of his father, who had possessed on apparency three years, and the Court having recalled them, the House of Lords affirmed the first judgment. And he adds: 'Lord Advocate told me it was upon the general point that, when the next apparent heir, the debtor, was three years in possession, the next apparent heir is liable in the same manner as if the debtor had been infert, if he possesses, whether he passes him by and serves to a remoter predecessor or not; and that the Lords meant to extend the Act 1695 further than we thought we could do, and further than we did in the cases of Lord Banff,' etc. Elchies, *voce Minor*, No. 12.

⁹ See *Ersk. iii. 8. 94*; 2 Kames' Principles of Equity 122-3.

¹⁰ *Grant v Sutherland*, 1754, M. 9819.

¹¹ *Burns v Picken*, 1758, M. 5273.

¹² [Smith v Harris, 1854, 16 D. 727.]

they would have been entitled had their debtor completed his titles. The whole purport of the statute of 1661, c. 24, seems consistent with this view of the matter; and it seems to have been the intention of the saving clause introduced into the Act of 1695,¹ to avoid the injustice which, 'as to the time past,' would have arisen from giving a preference to a class of creditors not formerly thought entitled to an action. *Secondly*, Another question may be raised, Whether adjudication in implement be competent on a conveyance or minute of sale, or other obligation to convey, by the apparent heir three years in possession? If so, the debt of the unentered heir may be made preferable to that of him who has completed his titles, since adjudication in implement is not subject to the *pari passu* preference of ordinary adjudgers.² But although it seems quite clear, that directly a conveyance by one unentered in the feudal right can give no preference,³ there appears to be no objection to a decree of adjudication in implement after due constitution of the obligation against the entered heir; the statute itself declaring not the debts only, but the deeds of the apparent heir effectual against the heir who enters.⁴ 8. The personal responsibility of the entered heir, [667] if not heir-at-law and representative of the deceased, is of the nature of a subsidiary obligation after the heirs of the deceased have been discussed.⁵ And as a corollary from this rule, if the heir entered shall have paid the debt of the deceased heir without pleading the exception, he will have action of relief against the representatives of that heir if primarily liable, not otherwise.⁶

Where the estate is under a strict entail, which would have prevented the debts of the apparent heir from affecting it though he had been entered and infeft, there can be no passive title under this Act to subject the heir. And although the creditors of an heir of entail infeft, whose debts have been contracted before the tailzie was recorded, may, after it is recorded, adjudge,⁷ it is different where the heir of entail dies in apparenacy, and the entail is not recorded till immediately before the death of the apparent heir: there the creditors of the apparent heir are not entitled to adjudge the estate in the person of the next substitute entering;⁸ the creditors in such personal debts are not in a better situation than the creditors of the next heir himself.

¹ 'As also with this order, *as to the time past*, that all the true and lawful debts of the apparent heir, entering as said is, and already contracted, with the true and real debts of the predecessors to whom he entered, shall be preferred in the first place.'

² 1661, c. 62; 1672, c. 19.

³ See *Simpson v Hamilton*, 1707, M. 9807.

⁴ In *Ogilvie v Ogilvie*, 16 Dec. 1817, it was held, that the obligation on a contract of marriage to complete valid titles to the estate, can only be fulfilled by the heir making up titles, and denuding in favour of the creditor in the contract of marriage.

⁵ *Vint v E. of Dalhousie*, 1712, M. 3562; Ersk. iii. 8. 94.

⁶ *Ogilvie v Ogilvie*, 16 Dec. 1817. Here the relief was denied, because the heir pursuing for relief was himself the primary obligant to complete titles to particular lands, and to denude in implement of a contract of marriage. 'Found that the said obligation, not being of a general nature, but

specifically for the settlement of the estate, does attach upon the heir of investiture of that estate; and therefore the heir, etc., attempting to take the said estate by passing by, etc., is not entitled to relief from the heir of line or general representative of John Ogilvie.' See also the case there quoted and referred to, *Countess of Hopeton v M. of Annandale*.

⁷ *Smollet's Crs. v Smollet*, 1807, M. App. Tailzie, No. 12.

⁸ An entailed estate was long possessed without the entail being recorded. At last it was recorded during the possession of an apparent heir. After his death, the next substitute made up titles under the entail. The creditors of some of the prior substitutes, who had been infeft while the entail stood unrecorded, adjudged; and the creditors of him who had possessed as apparent heir adjudged also. These last adjudgers were objected to, and the objection sustained. *Graham v Graham's Heirs*, 1795, Fac. Coll. 396; Bell, Oct. Ca. 162. [See *Russell v Russell*, 1852, 15 D. 192.]

BOOK IV.

OF PREFERENCES BY SECURITIES, VOLUNTARY OR JUDICIAL, OVER THE HERITABLE ESTATE.

PREFERENCES arise either, 1. From SECURITIES constituted by voluntary grant or by [669] legal diligence, or resulting from possession, or resting on some right of exclusion ; or, 2. From PRIVILEGES conferred on particular claims from motives of humanity, or by special statute. Preferences of the former and chief class depend on the principle that the creditor holds a real right in the property over which his security extends. This real right arises by express constitution or by tacit implication, savouring of the nature of property on the one hand, or of a right of mere possession and retention on the other, but being in either case defeasible by payment of the debt in security of which it is held. And this real right of property or of possession forms the *jus in re*, in contradistinction to the *jus ad rem* held by personal creditors.

Property is in Scotland divided into HERITABLE and MOVEABLE, corresponding nearly with the distinction of property in English law into REAL and PERSONAL. The former comprehends lands, and all rights and profits arising from or annexed to land, which are of a permanent and immoveable nature ; the latter comprehends moveables.

There is a subdivision of heritable property into feudal property, and property simply heritable. The former is constituted, transferred, and burdened by the forms of the feudal law ; the latter, by forms in almost all respects similar to those by which moveables are transferred.

In this Fourth Book it may be proper to consider : 1. SECURITIES constituted over the FEUDAL ESTATE ; and, 2. SECURITIES over the estate simply HERITABLE.

In the Fifth Book will be discussed : 1. SECURITIES over the MOVEABLE estate ; 2. SECURITIES by way of EXCLUSION ; and, 3. PRIVILEGED DEBTS.

Although the severities of the feudal system, its oppressive casualties, and its forfeitures, have now scarcely a place in the law of Scotland, the system of conveyancing respecting land remains as completely and strictly feudal as if that peculiar institution still existed in all its original strength.

The superior is regarded by the law as the proprietor of the land from whom the [670] vassal holds his right, but the right of the vassal is the great and truly valuable interest in the land. The former is called DOMINIUM DIRECTUM, the latter DOMINIUM UTILE.

1. In transferring the *dominium utile*, the owner of land must either substitute the acquirer in his own place as vassal of his superior, or constitute an inferior vassalage to be holden of himself, reserving an intermediate superiority in his own person. Every conveyance of land must be completed by sasine,¹ which is the only badge of real right in feudal

¹ [The reader will keep in view that by the Conveyancing Statutes, registration of conveyances is now equivalent to sasine.]

subjects by the law of Scotland, and that sasine must be recorded in a public register within a certain number of days, that it may be seen and examined by all persons interested.

Such sasine proceeds on the warrant or precept of the feudal proprietor,—either when a proprietor conveys his land to be held of himself as superior, or when he resigns his lands into his superior's hands by resignation *in favorem* for the purpose of being given out anew to the purchaser. He may also convey his land with a precept to be held of his own superior, provided that superior shall confirm his charter and sasine. Where the superior himself is the purchaser, the real right is conveyed, not by a proper sasine, but by what is held as such,—namely, by resigning the lands into the superior's own hands. This (called resignation *ad remanentiam*) operates as a discharge of the *dominium utile* by which the superior's right under his paramount sasine stood limited, and so is equivalent to a sasine in favour of the superior of the *dominium utile*.

Sasine is thus, in all cases, the only legitimate method of completing voluntary conveyances to feudal subjects. And all burdens and securities on such subjects, having the nature of real rights, are nothing else than partial, temporary, or conditional transferences. It may generally, therefore, be said that the whole law respecting the completion of real VOLUNTARY securities on land is expressed in this one proposition, That the security requires to its completion a sasine duly recorded.

2. This rule, as applicable to JUDICIAL securities, must be taken with a certain qualification. In consideration of the difficulty which creditors sometimes experience in forcing the debtor or his superior to give sasine voluntarily, and of the risk of the exclusion of some creditors by the more rapid or more favoured proceedings of others, the Legislature was induced to indulge creditors in this situation, so far as to hold a charge against the superior to be equivalent to sasine in questions with other creditors doing diligence. But still, although such charge is sufficient to establish a preference over the personal creditors, and creditors adjudging, it has no effect in competition with sasine on a voluntary security. To that case the rule above laid down still applies.

CHAPTER I.

OF VOLUNTARY SECURITIES ON THE FEUDAL ESTATE.

THE principles on which all voluntary securities upon land, for debt, depend are: 1. That the real right of the creditor, or *jus in re*, is constituted by the feudal form of sasine. 2. That the security or burden must precisely appear in the record. Before proceeding to examine the several grounds of preference by voluntary security, a short view of the history of the several securities may be useful.

1. The WADSET, in its original form, was a conveyance of land in impignoration to the [671] creditor for payment of money lent. The right of the creditor was secured by sasine: he entered into possession or drew the rents, and his right was at an end only when the total sum of advance was repaid. This form of security, though little in use now, was once the most common of all; for, amidst all its inconveniences, it had this advantage, that under cover of it, more easily than under that of any other security, the canonical prohibitions against the taking of interest could be eluded. At first, the right of the wadsetter or creditor was that of a proprietor, qualified by a condition of redemption declared in the deed. Afterwards, the conveyance to the creditor, and the condition of reversion to the debtor, were expressed in separate deeds; and then the creditor became in appearance an

absolute proprietor of the debtor's lands, but liable to a personal right of redemption in favour of the debtor. This personal right, when conceived in favour of the debtor and his assignees, could be assigned by the debtor; and the right of the assignee was completed by intimation to the creditor: or the right of redemption could be renounced in favour of the creditor himself, and then his right became absolute:¹ or if the debtor required a further advance, and if the creditor was willing to make it, a partial renunciation to that extent of the right of reversion (which obtained the strange name of an *eik*, or addition to the reversion) enlarged the creditor's security so as to include the new debt. But as in the wadset the creditor's right was *ex facie* absolute, and the right of reversion merely personal, it became necessary to secure the reversers, or proprietors, and their heirs, assignees, and creditors, against the possibility of a bad use being made of the apparently absolute right which was held by the wadsetter or lender, and to secure strangers against the secret claims of the reversers or borrowers. These two objects were accomplished by the statutes 1469, c. 27, and 1617, c. 16, declaring reversions to be real rights, effectual against singular successors, and ordering them to be recorded for publication. Gradually, from this time, the wadset came again to be expressed in one deed; and when this security is used at the present day, it is executed in the form of a contract.

2. INFETMENT OF ANNUALRENT.—This was another very ancient mode of borrowing money upon land. It gave the security of a right to an irredeemable annuity payable from the land. Neither this form of security nor the RENT-CHARGE (which was little else than this, deprived of its feudal form of *sasine*) were, strictly speaking, securities for debt, since they were proper purchases of an irredeemable and annual payment from land. But they were, with the wadset, the only forms once in use for this purpose. Approaches were gradually made, however, to the modern form of heritable security. Even prior to the abolition of the canon law, conveyancers ventured to introduce into their annualrent rights a clause of redemption, which converted them into impignoraions of a rent, as the wadset was an impignoraion of the land itself. And after the Reformation, the deed was furnished with a counterpart to this clause of redemption, viz. a power of requisition by the lender. The next step of the progress was to introduce, instead of the power of redemption and requisition, a proper personal bond to accompany the annualrent right, and by operation of which the principal sum might be recovered.

3. HERITABLE BOND.—By degrees the infetment of annualrent was converted into the form of an heritable bond, in which the debtor not only bound himself personally to repay the money, as in a common bond—and in further security sold, alienated, and disposed to the creditors an annualrent corresponding to the legal interest of the debt, payable forth of the lands—but also the lands themselves in security of the principal sum, interest, and [672] penalty, and accompanied and completed those rights by *sasine*. By this form the creditor holds a real security for the sum of debt actually due at the date of infetment, and for the interest as it arises; and he has a power of entering into possession or recovering the rents. If he do enter to the possession, he is obliged to account for the sums which he receives; and his security is extinguished in proportion to the amount of his intromissions or payments; subsisting only for the balance.

4. HERITABLE BOND AND DISPOSITION IN SECURITY.—An improvement was made in the above form of security, by adding a clause of disposition under reversion, selling, alienating, and disposing the lands, heritably, but redeemably, and under reversion. And the *sasine* by which this was completed is accompanied by a power or mandate, authorizing the creditor to sell the lands by public auction after certain notices and precautions.²

¹ So at least Hope held (*Minor Practics*, tit. 6, sec. 2), though Stair held otherwise, and that resignation was necessary. *Stair* ii. 10. 13.

² [Securities in this form are now wholly regulated by the VOL. I.

Titles to Land Consolidation Act, 1868, which see. It may here be noticed that a debtor, after granting an effectual heritable security over his estate, cannot thereafter give a preferable right to another by the device of assigning an

5. **ABSOLUTE DISPOSITION WITH BACKBOND.**—The application of the above forms of security to loans of money, or to debts formerly subsisting, is obvious. But occasions arose when something else was necessary. Men in need of occasional supplies of cash, and who at the same time preferred the borrowing of money to the sale of their land, required a form of security, under which one having the command of money should engage to make occasional advances, or to relieve a debtor from such pressing debts as he might at any time be called upon to pay. Of the above forms of security, none seemed fit to be applied on such an occasion except the wadset; but in its proper shape of a mutual contract, or even of an absolute conveyance, qualified by a bond of reversion, made real under the statutes 1469 and 1617, even this form of security was ill adapted for such an occasion: for the wadset can become a cover for a future debt only by an 'eik to the reversion,' recorded, and made real, in terms of law. But the separation of the disposition and right of reversion showed the possibility of using the form of an absolute disposition, qualified by a personal backbond; the absolute right being thus established in the creditor, so that no one deriving right through the debtor could have a claim for restitution until the debt should be paid up to the creditor. But it will not appear surprising that such a security should not have been adopted into common use, when it is considered how unwilling any proprietor must be to grant an absolute conveyance of his estate, by which he must cease to appear in the world as proprietor of it, and (being unprotected by the Acts 1469 and 1617) must leave it in his creditor's power to convey his estate away from him for ever.

6. **SECURITIES FOR RELIEF OF SUMS AND ENGAGEMENTS.**—In this difficulty lawyers and conveyancers set themselves to accommodate the old forms of security to the wishes of their employers. 1. They made the wadset to cover future debts, by taking it at once for sums 'advanced or to be advanced.' 2. The annualrent right, being the purchase of a rent redeemable on payment of the purchase money, was not so easily converted into a security for future debt; but it was made to serve the purpose, by a declaration (as Dallas informs us) that all other debts and engagements should be settled by the debtor before the power of redemption should be open to him. 3. To bend the form of the heritable bond to this new use, for which it was not originally calculated, other means were taken. As a security for a precise sum, this form is limited by the actual extent of what is due at the giving of the sasine, since there can be no security where there is no debt. It must, of course, be extinguished by payment or intromission, and cannot be tacitly revived. But as such a security was always thought competent for a cautionary engagement, or obligation of relief, the heritable right was given in security, and for relief of all sums, debts, engagements, and 'cautionaries.' This appears to have been a common security towards [673] the end of the seventeenth century.¹ These securities in relief were stopped in their effect as covers to future debts by the intervention of infestment in favour of another creditor.² But even with this qualification such securities were pregnant with mischief as instruments of fraud. By means of them a debtor could evade the provisions of the Act 1621, enacted for providing against conveyances to the prejudice of the diligence of creditors. He had only to grant a deed, such as either of those now described, while yet diligence had not begun against him; and when diligence began, his disponee paid off favourite creditors; neither the debtor himself nor the creditors being entitled to have the land restored without accounting to him for all the money he had paid on account of the debtor. As it was obvious also, that in all cases under a deed of this kind for security of the relief of all sums and engagements, the favourite creditors of bankrupts might receive payment of their debts with perfect safety to the trustee employed, it was, in order to avoid this, enacted by the Legislature (1696, c. 5), that 'because infestments for relief, not only of debts already con-

earlier deed of security in which he had acquired an interest by assignment or retrocession. *Love v Storie*, 1863, 2 Macph. 22.]

¹ See Lord Stair's report of the case of *Inglis*, Stair's Dec. ii. 557.

² *M'Dowal of French v Sir John Rutherford*, 1715, M. 1153.

tracted, but of debts to be contracted for hereafter, are often found to be the occasion and cover of fraud; all dispositions or other rights that shall be granted for hereafter, for relief or security of debts to be contracted for the future, shall be of no force as to any such debts that shall be found to be contracted after the sasine or infeftment following on the said disposition or right; but prejudice to the validity of the said disposition or right as to other points, as accords.'

7. SECURITIES FOR CASH-CREDITS.—The necessity of devising some means by which it might be possible to give security for future advances and cash-credits, led to a provision in the statute of 33 Geo. III. c. 74, and in the late Sequestration Act, 54 Geo. III. c. 137, permitting securities of this sort under certain conditions. The preamble of this part of the statute, after reciting the clause of the Act 1696, c. 5, relative to securities for future debts, proceeds thus: 'But it would tend not only to the benefit of commerce, but also of agriculture and manufactures, if securities by infeftment for the payment or relief of future balances arising upon cash accounts or credits, or of sums paid on such cash accounts or credits, were made an exception from the rule laid down in the said recited clause.' On this statement of the views of the Legislature, it is enacted, 1. That persons possessed of lands or other heritable subjects, and desirous to pledge them in security of sums paid or balances arising upon cash accounts or credits, although posterior to the date of the infeftment, may grant heritable securities accordingly on their lands or other heritable estate, with procuratory and precept for infefting any bank or banker, or other person who shall agree to give them such cash accounts or credits; and, 2. That securities may in the same way be granted by way of relief to any person who may become bound with the granter for payment of such sums or balances. But it is made an absolute condition on which the efficacy of the security is to depend, that the principal and interest which may become due upon the said cash accounts or credits shall be limited to a certain definite sum, to be specified in the security; the said definite sum not exceeding the amount of the principal sum, and three years' interest thereon at the rate of five per cent.¹

SECTION I.

OF THE COMPLETION OF HERITABLE SECURITIES BY RECORDED SASINE.

No real right in security constituted by act of the debtor over his feudal estate [674] is effectual, unless completed by sasine duly recorded.² The recorded instrument is thus the badge and criterion of preference among creditors. This doctrine may be considered, 1. In relation to ordinary estates in land; 2. In relation to burgage property.

SUBSECTION I.—OF THE INSTRUMENT OF SASINE.

Sasine is the symbolical tradition of the land, or other feudal subject, by the granter's bailie to the attorney of the grantee, in fulfilment of a conveyance by charter, disposition, heritable bond, etc.

¹ See below, Commentary on the Act 1696, c. 5.

² Under the term sasine, in the proposition stated thus generally, I include an instrument of resignation *ad remanentiam* in the special case of a conveyance in favour of the feudal superior. The act of resignation is truly the sasine or redelivery of the land to the superior; the instrument is the sole evidence of it, and it requires to be recorded precisely as an instrument of sasine is recorded. [By 8 and 9 Vict. c. 35,

the ceremony of giving sasine was abolished, and the form of the instrument much simplified. This Act occupies an anomalous position in the statute book. It is neither repealed nor consolidated with the other conveyancing statutes, but is printed as an appendix to the Titles to Land Consolidation Act. Now that it has been made competent to record conveyances of every description, it is not likely that sasine will ever be resorted to in practice.]

It must be given on the ground itself;¹ on any part of the estate conveyed, if it all lie contiguous and is contained in one charter. If not contiguous, or if held by different tenures, or if the titles be from different superiors, or if the subjects be represented by different symbols, sasine must be given by successive deliveries on the several parcels respectively and successively; unless by a charter from the Crown the subjects have been combined in a clause of union, or unless they make part of a barony.²

The only proof of the sasine is a written instrument narrating the act; stating the reading and publishing of the precept; the ceremony of delivering the symbols to the attorney, in perfect consistency with the warrant or precept; enumerating and describing the subjects, with the evidence on which they are included in the sasine; naming the person to whom sasine is given, and deducing the title by which he acquires right to the precept, if he should not be the person in whose favour it was originally granted. The ceremony takes place in presence of a notary and two witnesses, who all sign the instrument in testimony of the facts narrated in it.³

A few of the important points in the law of sasine, as affected by recent decisions, may here be stated:—1. The sasine must in discontinuous or separate subjects be taken successively on each parcel. But it does not seem to be fatal to the sasine should this not be stated in the instrument, provided the expression be not inconsistent with the requisite acts, and provided there is not evidence of the successive acts having been neglected.⁴ 2. The lands must be described and identified as those referred to in the precept. Sometimes the [675] precept is conceived in terms so general as to convey no distinct evidence of authority to give sasine in any particular subject; and in such a case the instrument must prove that the notary produced and read the evidence which identified the lands.⁵ 3. The sasine must be given to a person named and designed;⁶ either the person named in the precept, or one who by production and publication of the proper titles is proved to be in the right of the precept.⁷ 4. The notary's holograph docquet must not only bear his attestation by the words *vidi, scivi, et audiui* of the several facts set forth, but specially state his personal presence at the ceremony.⁸ It must also describe the instrument correctly; and so, when the instrument consists of more than one sheet, the pages must be correctly stated.⁹ But

¹ Resignation *ad remanentiam* is a personal act of reinvestment, and may be made anywhere in the personal presence of the superior, or of a commissioner appointed to act for him.

² *Denniston v Campbell*, 1824, 3 S. 218, N. E. 154.

³ See, for this doctrine of the text, *Stair* ii. 3. 16 et seq.; *Ersk.* ii. 3. 33 et seq. *Treatise on the Conveyance of Land to a Purchaser*, pp. 172–229.

⁴ *Gordon v Brodie*, 1773, 5 Brown's Sup. 587, 1 Hailes 535, Bell's Election Law 254, note. The words of the instrument were, 'Sasinam, etc. omnium et singularum prædict. terrarum, etc. tradidit, etc. per terræ et lapidis pro dict. terris traditionem.' The usual terms are a compearance on the lands respectively and successively; and that these things were so done 'on the grounds of the said lands respectively and successively.' The objection was taken that there was no special and successive delivery of sasine proved by the instrument; but it was repelled.

⁵ *Wallace v Dalrymple*, 1742, M. 6919. This was an heritable bond, with a precept for sasine in certain lands, and forth of all other lands of the granter in the shire of Ayr. Sasine was given in lands not specially mentioned 'as contained in the granter's infeftments,' but without expressing those infeftments to have been produced. The objection was sustained.

Hepburn Belches v Stewart, 21 Jan. 1815, 18 Fac. Coll. 165, confirming the above.

Lord Kames reports an opinion of the Court (implied in both the above cases), 'That a precept to give infeftment in lands described in general to belong to the granter of the precept, is a sufficient warrant to give infeftment in every particular thereof, which, by production of the granter's infeftment, is vouched to come under the general description.' *Trs. of Graham's Crs. v Hyslop*, M. 50.

⁶ *Denniston & Co. v M'Farlan*, 1808, M. App. Tack, No. 15. Sasine here was given to John Gillies, manager, and one of the partners of the Dalnotter Ironworks, belonging to Murdoch, Gordon, Gillies, & Co., and the other members of the said company. It was held a good sasine to Gillies, but not to the other partners.

⁷ 1693, c. 35.

⁸ *M'Intosh v Inglis and Weir*, 1825, 4 S. 190, N. E. 192. The objection was sustained on the omission of the words, 'Dum sic ut præmittitur dicerentur agerentur et fierent una cum prænominatis testibus præsens personaliter interfui,' although the docquet bore, 'Sic fieri et dici vidi scivi et audiui ac in notam cepi.' The Court in this case denied the authority of the case of Maxwell.

⁹ See *D. of Roxburgh v Hall*, 1741, M. 14332; and *Clark v Waddell*, 1752, M. 14333. Act of Sederunt, 17th Jan. 1756.

when it is on one sheet, the number of the pages in the docquet is not necessary to be stated.¹ 5. The instrument must truly describe, so as to identify it, the warrant on which it proceeds.² 6. Errors in the sasine, if manifestly mere mistakes and innocent, are not held fatal.³ 7. Erasures of the name of the lands are fatal.⁴

The subject may be concluded with this observation, that it has been laid down as a principle ruling such cases, 'That where it appears *ex facie* of the instrument that the thing was done, and that sasine was in reality given, blunders or mistakes in extending the instrument ought not to annul the sasine.'⁵ But this doctrine is not to be too much relied on. An instrument required as a solemnity is not within the reach of that constructive power which a court of justice is called upon to exercise in questions upon contracts or wills, where the granter's intention must, if possible, be discovered and made effectual. If judges are allowed to supply the defects of solemnities and instruments, it unfixes the whole system, and renders property uncertain.⁶

SUBSECTION II.—OF THE RECORDING OF THE SASINE.⁷

Sasine has no effect in competition with third parties holding an unexceptionable [676] right to the land, unless it shall have been recorded in a register appointed for the purpose, within sixty days from the date of the instrument. And by the Act of 54 Geo. III. c. 137, sec. 12, the date of the registration is held in all questions on the bankrupt statute of 1696, c. 5, to be the date of the security. Recording is thus an important point in the law of securities, and on the laws relating to it depends that publication by which the credit of landed men in Scotland may be estimated with great correctness.

Without entering upon any disquisition concerning the advantages and evils of this system, it may be observed, 1. That the records do not present a complete view of every imperfection that may exist in the debtor's right; 2. That they have become intricate and difficult to be consulted, so as much to augment the danger of relying on the information which they supply; and, 3. That this difficulty is daily increasing, by the splitting down of estates into portions in the creation of securities over particular farms: for one who borrows money, and foresees the chance of a future necessity to borrow more, aware that it is not easy to procure a loan on a secondary security over his lands, confines the first transaction to a portion of his estate, so as to leave him at liberty to make a similar transaction on another portion. If the sasines of any county in Scotland for the last ten years be compared with the number of sasines in the same county for a similar period half a century ago, the increasing complexity of the records will very strikingly appear.

The registers were first instituted by unprinted statutes, which had for their object the prevention of forgery, more than publication to third parties, and which do not seem to have been much in observance.⁸ A statute which was passed in 1617 gave them their permanent constitution, as publications of burdens on land, and of conveyances. By that

¹ *M'Lean v D. of Argyll*, 1777, 5 Brown's Sup. 590; *Morrison v Ramsay*, 1826, 5 S. 150, N. E. 136.

² *Gordon v E. of Fife*, 1826, 5 S. 550, N. E. 517. Here a doubt occurred as to the construction, whether it implied a charter of one king or of another, and the objection was repelled.

³ *Henderson v Dalrymple*, 1776, 5 Brown's Sup. 586; *Livingstone v L. Napier*, 1762, 5 Brown's Sup. 587, *ib.* 888; *D. of Douglas v Chalmers*, 5 Brown's Sup. 587; *Boyd v Hunter*, 1822, 1 S. 351, N. E. 330.

⁴ *Innes v E. of Fife*, 1827, 5 S. 559, N. E. 525.

⁵ *Tait's Cases*, *voce* Sasine, 5 Brown's Sup. 588.

⁶ See below, for objections to sasine as not duly authorized by the warrant, as an exhausted precept.

⁷ [By the Heritable Securities Acts, 8 and 9 Vict. c. 31, and 10 and 11 Vict. c. 50, it was made competent to record the security itself instead of expeding an instrument of sasine upon it. The principle having been since extended to conveyances of every description, sasines are rarely if ever resorted to in practice. On the subject of this section, reference is made to the provisions of the Titles to Land Consolidation Act, 1868, regulating the registration of conveyances. See secs. 15-19.]

⁸ See the statute 1599 in the Books of Sederunt, 3d November 1599. This was adopted by Parliament, 1609, c. 36. See also Act of Sederunt, 6th January 1604.

statute it was required that every sasine, in order to have effect against third parties, should be recorded within sixty days of its date.¹

Prior to these Acts, the preference depended on the infeftment being either public, from the superior, or completed by actual possession, till which it was held latent. The natural effect of the Act 1617, c. 16, should have been to take away all those distinctions, by affording the means of knowing at once from the record what sasines existed. But the Act did not at first produce its full effect, and the distinction of public and private infeftments still subsisted. The system of registration, however, was gradually improving; and the first check on the partiality or negligence of keepers of records was imposed by the regulations 1672, c. 16, which ordered a minute-book to be kept of the presentment of sasines for registration, to be compared quarterly with the record.² But a better remedy was proposed by Lord Stair, and embodied in the Act of Sederunt 15th July 1692, viz. that the presenter of the sasine should see the minute immediately written out and signed by himself and the keeper. This was offered, as Lord Stair says, by the Lords to the Legislature, and adopted by 1693, c. 14.³ These improvements having corrected most of the evils attending the imperfect state of the registers, the Legislature now thought it safe to alter expressly the former law as to public and base infeftments, and to place the preference of sasines entirely on the priority of their registration. This was done by 1693, c. 13.⁴

By 1686, c. 19, the certificate of the clerk on the back of the sasine had been declared

¹ 1617, c. 16. This statute proceeds upon a preamble 'of the gryet hurt sustened by his Majestie's liegis, by the fraudulent dealing of pairties, who having annaliet (sold) their lands, and reseavit gryet souns of money thairfor; yet, by their unjust concealing of sum privat right formerly made by them, rendereth subsequent alienation done for gryet souns of money altogidder unprofitable; whiche cannot be avoyded, unless the saidis privat rights be maid publick and patent to his lieges;' and provides, 1st, That there shall be a public register for all sasines, etc. 2d, That the sasines, etc., shall be recorded within threescore days after their date. 3d, That, if not thus duly registered, they are to make no faith in judgment by way of action or exception, 'in prejudice of a third party, who hath acquired a perfect and lawful right to the said lands and heritages, without prejudice always to them to use the said writs against the party maker thereof, his heirs and successors.' 4th, That the clerks, etc., shall be ready to receive sasines, etc., and shall record them within forty-eight hours, delivering them back with the day of registration and the place of the record marked. And, lastly, For the accomplishment of this national scheme of a record, besides a general register at Edinburgh, in which sasines of lands in any part of the country may be entered, the whole of Scotland is divided into districts, for each of which a particular register is appointed to be kept.

Similar regulations were, by 1681, c. 11, introduced in the case of sasines of burgage tenements; only, instead of the county records, the town-clerks are ordered to keep records on purpose. See below, p. 722.

² 1672, c. 16. 'There was,' says Fountainhall, 'a proposal and overture made to this Parliament (1681) anent the minute-books of hornings, inhibitions, infeftments, etc., that they should be printed and sold off, and be authentic, that a man for twelve pence might know from year to year what encumbrances any land or estate were under; and if they were not to be found in that minute, then they were not to make faith. But this was propaling, denuding, and discovering too much the weakness of the nobility and some of the

gentry's estates, and so was found inconvenient.' 1 Fount. 156.

³ 1693, c. 14. 'Our sovereign lord and lady, the King and Queen's Majesties, considering that the many good Acts appointing registers of seisins, reversions, hornings, inhibitions, interdictions, allowances of apprysings or adjudications, that purchasers and creditors might know with whom they might safely contract, have been much frustrated by the keepers of the registers not inserting the same in the registers at the time and in the order they were presented to them, whereby none could know by inspection of the registers what writs appointed to be registrate were in the hands of the keepers of the registers, and thereby could not securely bargain: for remedy whereof, their Majesties, with advice and consent of the estates of Parliament, do statute and ordain that all the keepers of the said registers shall keep minute-books of all writs presented to them to be registrate in their several registers, expressing the day and hour when, and the names and designations of the persons by whom, the said writs shall be presented; and that the said minute be immediately signed by the presenter of the writ, and also by the keeper, and patent to all the lieges who shall desire inspection of it, gratis; and that the writs shall be registrate exactly conform to the order of the said minute-book, all under the pain of deprivation of the keeper of the register. And further, their Majesties, with consent foressaid, declare the said keepers not observing the premises liable to the damage of the parties prejudged by the not due observing of this present Act.'

⁴ This Act is entitled, 'Act establishing the preference of real rights;' and 'for the better clearing and determining of competitions and preferences of real rights and infeftments,' enacts, etc., 'That all infeftments, whether of property, of annualrents, or other real rights whereupon sasines for hereafter shall be taken, shall in all competitions be preferable and preferred according to the date and priority of the registration of the sasines, without respect to the distinction of base and public infeftments, or of being clad with possession, or not clad with possession, in all time coming' (1693, c. 13)

sufficient for the security of the party, in evidence of the registration. But this was, on the suggestion of Lord Stair,¹ corrected by 1696, c. 18, which declares the whole effect of sasines, as against third parties, to depend upon their being 'duly booked and insert in the register.'²

Under these statutes, the requisite of registration includes three particulars: 1. The entry in the minute-book of the presentment, with a general description of the sasine and of the lands, and a reference to the part of the record where the copy of the sasine is to be found; 2. The transcript in the record; and, 3. The certificate on the back of the sasine, containing also reference to the pages of the record where the sasine is to be found.

The minute-book ascertains precisely the day on which the sasine is presented for [678] recording; and that is ordered to be the date also on which the sasine is to be actually recorded; or rather, sasines are required to be recorded according to the order of the entry in that book. If this had been enforced by declaring the entry in the minute-book to be the criterion of preference, provided the sasine itself were either in the hands of the keeper of the record, or transcribed in the register, the system would have answered its purpose. But it is enforced only by penalties directed against the keeper, namely deprivation, and a declaration that he shall be responsible for damages. It may happen, however, that either the sasine may not be recorded within the sixty days, or it may not be recorded at all, or it may be postponed to a sasine presented subsequently. The rules are:—

1. The date of presentment, according to the minute-book, is to be held the date of recording, in a question whether the sasine has been recorded within the sixty days; and in such case it affords no objection that the actual transcription has not taken place within the sixty days.³ The certificate of registration on the back of the sasine correctly bears the date of presentment; and by that certificate, if truly bearing the date of presenting as in the minute-book, questions on the Act 1696, c. 5, will, under the late statute,⁴ probably be determined, provided the sasine be in the hands of the keeper of the record, or transcribed in the register.⁵

2. In order to have effect against third parties, the sasine must be actually transcribed into the register. It would have been in all respects better had the instrument been deposited in the Register House, and a transcript given out to the party; and many questions would thus have been avoided of a very distressing kind. The rules respecting this the actual recording of the instrument are: 1. That it must be fully transcribed; not entered by abbreviation and reference, but verbatim;⁶ and particularly it is required by Act of

¹ See Stair ii. 3. 22.

² 1696, c. 18, proceeds on the preamble, 'That unless seisms and other writs and diligences appointed to be registrate be booked, and insert in the respective registers appointed for that effect, the lieges cannot be certiorate thereof, which is the great use and effect of their registration.' Therefore 'no seisin, or other writ or diligence appointed to be registrate, shall be of any force or effect against any but the granters and their heirs, unless it be duly booked and insert in the register.'

³ See Stair, Appendix, p. 790.

Sir A. M'Kenzie v M'Leod, 1768, M. 8800. In consequence of a very clear proof of the general practice and understanding, the minute of presentment was in these cases held to be the true date of the registration. These were election cases; and by 16 Geo. II. c. 11, sec. 10, it is enacted that no person can be enrolled as a freeholder in a county, unless his sasine has been recorded a year before the enrolment. Votes were objected to on this clause, the minute of presentment being beyond the year, but the sasine having been recorded within it. The Court held the minute of presentment to be sufficient.

E. of Fife v Gordon, 1774, M. 8850; same case, 5 Brown 589.

⁴ 54 Geo. II. c. 137, sec. 12.

⁵ **Dunbar v Sutherland**, 1790, M. 8799. This was an election question. A sasine had been duly marked by the keeper as recorded of a date beyond the year, but it was not actually transcribed in the record for a few days, which brought that act within the year. No minute-book was kept in that county (Caithness); and the Court, moved by the evil which otherwise would be produced to the whole county, held the registration as of the date of the certificate.

⁶ 1696, c. 18.

Gray v Hope, 1790, M. 8796, where, in a sasine, as transcribed in the record itself, the lands of Drumbowie having been omitted, the sasine was, in an election case, held null as to those lands.

Stewart v E. of Fife, 1827, 5 S. 383, N. E. 356, was an election question, in which the objection was similar to the above. Part of the lands in the qualification were omitted in recording the sasine, and it was held ineffectual.

Sederunt that the notary's docquet shall be verbatim transcribed.¹ 2. That clerical errors in transcribing essential parts of the instrument are fatal.² 3. That although the record [679] may be allowed to be corrected within the sixty days, this cannot be done after the expiration of that term.³

3. A competition may arise between a sasine first transcribed, though last presented, and a sasine which by the minute-book is proved to have been first presented, though last transcribed. A question has occurred in election law which has some influence on such a contest,—namely, Whether a sasine, transcribed into the register out of the order which it bore in the minute-book, be duly recorded? The two divisions of the Court pronounced different judgments.⁴ The determination in the latter case quoted below seems preferable. Both the date of presenting, indeed, and the order of recording, are best ascertained by the minute of presentation; which, as bearing a distinct reference to the place of the volume in which the transcript is to be found, admits not in any degree of the danger supposed to exist, that, on examining the record, one might not be able to find the sasine, and so be entitled to hold none to be in the record. The judges were careful, however, to reserve the question entire as in a competition; and were such a question to arise, the point must be held as unsettled. It might be of some importance in the argument to observe that there is one case in which the minute-book is unquestionably the criterion,—namely, where neither of the sasines is yet entered in the register. The sasine first in date, but last presented, would by this criterion be preferred. It is a matter which well deserves to be settled by the Legislature. And there seems to be little doubt that, according to the true spirit of the law, it ought to be enacted, that the entry in the minute-book should be the date of the registration, provided the sasine be actually inserted in the record before the principal sasine is redelivered to the party, with an entry in the minute-book of the page of the record on returning the sasine to the party. In this way, those who search the record would find either the sasine itself in the hands of the keeper, or the record of it in the book. In absence of any legislative remedy, it may be observed, 1. That the declared intention of the Legislature was to secure the recording of sasines in the precise order of their presentment, 'that purchasers and creditors might know with whom they might safely contract.' 2. That they declare the negligence of keepers to be detrimental, in so far as, by not inserting sasines in the 'order of their being presented, none could know by inspection of the registers what writs appointed to be registered were in the hands of the keepers of the registers, and thereby could not securely bargain.' And, 3. That it is to remedy those evils, and afford the means of 'securely bargaining,' that the minute-book, expressing not only the day, but the hour, is appointed; and that it is ordered 'that the writs shall be registered exactly conform to the order of the said minute-book.' There can be no doubt, therefore,

¹ Act of Sederunt, 17 Jan. 1756.

² *M'Queen v Nairne*, 1823, 2 S. 637, N. E. 539. The omission of 'primo' in the date made the sasine bear date in 1820 instead of 1821. It was held fatal, although the date was correctly entered in the minute-book.

Denniston v Spiers, 1824, 3 S. 285, N. E. 200. The error here was only in the year of the king's reign; but it was held fatal, although the year of our Lord was correctly transcribed.

³ *Dundas v Denniston*, 1824, 3 S. 400, N. E. 281.

N.B.—The case of *Tait*, 1822, 1 S. 241, N. E. 229, was held to have been decided *per incuriam*, and it was declared not to be a precedent hereafter.

⁴ In the case of *Drummond v Sir A. Ramsay*, 24 June 1809, F. C., the sasine was presented on 25th September, omitted to be entered of that date in the minute-book, but immediately entered in the record. On 4th October the omission in the minute-book was observed, and an entry made of that

date, and the date of the record and certificate erased to correspond. The great question was, Whether it was duly recorded, as it stood out of its order in the record? The Court (Second Division), judging on the election statute, held that the inserting of the sasine in the record, out of the order of the minute-book, was fatal to the claim of enrolment. The present Lord President Hope, Lord Glenlee, and Lord Newton, concurred in this opinion. It was opposed by the late Lord Meadowbank.

In the case of *Adam v Duthie*, 19 June 1810, F. C., the same question was determined the other way by the First Division; the late Lord President Blair, and a majority of the judges, holding the minute-book to give the true date of recording, and the transcription into the record book to be of no importance, provided it was duly referred to in the minute of presentation, so as to be found in the record by those wishing to examine it.

that the Legislature intended the minute-book to be the regulator of the order of preference by priority. At the same time, it must be admitted that there are no legislative words [680] on which to ground a judgment in favour of a sasine last registered, though first in the minute-book. If the Act 1693, c. 14, had declared a sasine recorded out of the order of the minute-book to be null in competition, this might have authorized judgment in favour of the sasine recorded last, if first presented. But there neither are such words, nor anything equivalent to them;¹ and courts of law are left to determine the question on the construction of the statute 1693, c. 13, which declares the priority of *registration* to be the criterion of preference.

4. When the competition has arisen prior to the presenting of any of the sasines for registration, the preference is determined by the priority of date of the sasine.

5. A sasine not recorded within the sixty days is, by the statute 1617, declared to make no faith in judgment, by way of action or exception, in prejudice of a third party who has acquired a perfect and lawful right to the lands and heritages; but (without) prejudice to use the said writs against the party maker thereof, and his heirs and successors.² It follows, 1. That the sasine is effectual against the granter and his heirs,³ and ineffectual only in competition with a perfect and lawful right; and, 2. That it is good against all having only personal rights to the lands.⁴

How far that will affect the power of taking a second sasine on the precept, shall be discussed hereafter.⁵

SUBSECTION III.—OF SASINES IN BURGAGE SUBJECTS.

Conveyances or securities of burgage subjects must be completed by a recorded sasine. The burgh itself, as a corporation, holds of the Crown by a tenure which requires no renewal;⁶ and each tenement in the burgh also holds in burgage of the Crown, the magistrates being by the charter merely the Crown's commissioners, in receiving resignations and renewing the burgage holdings of the proprietors.⁷

1. **SASINE.**—The right is conveyed, or a security granted, only by a deed containing a procuratory of resignation, on which the subject being resigned in the hands of the magistrates, 'as in those of His Majesty, immediate lawful superiors thereof,' sasine is forthwith given by the magistrates. The symbol is staff and baton, and not earth and stone.⁸ [681] The resignation must be renewed, and sasine given by a magistrate;⁹ and the instrument is extended by the clerk of the burgh.

2. **RECORDING.**—Clerks of burghs acting as notaries in the infeftments of heirs, dis-

¹ In the case of *Drummond v Sir A. Ramsay*, Lord Newton seems to have inferred an intention to annul the sasine recorded out of the order of the minute-book, from the responsibility of the keeper for damages. But that responsibility may be for the damages suffered by the person whose sasine is postponed in the register. See preceding page, note 4.

² See above, p. 718, note 1.

³ *Sir William Keith v Sinclair*, 1703, M. 13562, where this rule was held to regulate a competition between a purchaser deriving right from an heir whose sasine was never registered, and a purchaser from the next heir making up titles by *clare constat* and infeftment regularly recorded.

⁴ *Gray v Tenants*, 1626, M. 565. This was a competition for rents between an arrester and a disponee from the common debtor, but whose sasine was not recorded within the sixty days. The Lords held the right sufficient as to the granter to denude him of the lands; and neither he nor his creditor, holding a personal right by his diligence, could plead the exception of nullity, that being by the statute given only to

those having a perfect and full right. See *Durie* 197; also *Durie* 61, and the cases there referred to.

Another example of the rule is given in *Rowan v Colvil*, 1638, M. 13546, where a competition arose between an unrecorded infeftment in a mill, *cum astrictis multuris*, and a posterior infeftment in land, with a clause *cum molendinis et multuris*. The Court sustained the unrecorded infeftment against the disponee, who had no right to the mill.

⁵ See below, p. 735.

⁶ The magistrates, as administrators of the burgh property, have been held entitled to feu out the property of the burgh. *Dean v Mags. of Irvine*, 1752, M. 2522.

⁷ *Urquhart v Clunes*, 1758, M. 15079. Here a burgh having been suppressed, and a resignation *ad remanentiam* accepted by the king, the burgage proprietors were held Crown vassals.

⁸ See Act of Sederunt, 11th Feb. 1708. See also *Duncan v E. of Aberdeen*, 1742, M. 14317.

⁹ 1567, c. 27. It has been doubted whether this requires the clerk to be notary to the sasine.

ponees, and creditors, in burgage subjects, had, by the regularity with which they entered the sasines in their books, given so much credit to their records, that in the Act 1617, c. 16, establishing the recording of sasines in the records of the shire, an exception was made of burgage subjects. But errors and omissions crept in, which, after an attempt to correct them by Act of Sederunt, 22d February 1681, the Legislature, by 1681, c. 11, provided against, by requiring that sasines on subjects holding burgage should be recorded within sixty days from their date, in books to be kept by the town-clerk, under the penalty of the conveyance being held null.¹

If the subject is to be held burgage, the sasine must be recorded in the books of the burgh.² But where the holding is in feu, the registration ought to be in the county record.³ The difficulty in these cases is, to determine whether the holding be burgage or feu. In the two cases first above quoted, the subject was to be held for payment of a feu-duty, but bearing the common burdens of scot and lot, personal suit and presence in the courts of the burgh. In the last, the lands did not hold burgage. In constituting securities over burgage subjects, sometimes an heritable bond is granted, to be held, not in burgage, but in feu of the granter. Such a security, it would seem, must be recorded in the register of the county, not in the burgh record. But in the doubt which still hangs over this subject, it would be advisable to record the sasine in both ways.

SUBSECTION IV.—OF THE PREFERENCE OF SASINES AS DEPENDING ON THE NATURE OF THE PRECEPT,
THE STATE OF THE TITLES, ETC.

The right created may be either under a precept for holding base, or under a precept for a public holding, or under an alternative precept.

1. Where the right proceeds on a conveyance, in sale or in security, granted directly by the debtor, to be held BASE of himself, and completed by sasine duly recorded, the warrant of infeftment is a precept of sasine to be held *de me*. And what has already been said is sufficient to explain the criterion of preference.

2. Where the claimant's right proceeds on a conveyance to be held of the granter's superior only, it is called a PUBLIC holding. The warrant for infeftment is a procuratory of resignation, or a precept for sasine to be held *à me de superiore meo*: generally the deed contains both. And the grantee may proceed in one of two ways: Either, 1. He may, on the procuratory of resignation, have the lands resigned into the hands of the granter's superior, in order that a new charter may be granted to the disponent. Such charter is called a Charter of Resignation, and is completed by a sasine duly recorded. Preference here depends on the [682] registration of the sasine.⁴ Or, 2. The grantee may take sasine on the precept *à me*, and apply for a Charter of Confirmation, which ratifies that sasine, and makes it equally effectual as if taken on a legitimate precept. This effect takes place not merely as from the date of the charter, but as from the date of the sasine itself: and so the registration of the sasine thus taken will regulate the preference of the right.⁵ It will, however, be observed,

¹ 1681, c. 11.

² *Burnet v Drummond*, 5 July 1711, Forb. 517. Here Burnet was infeft in an annualrent out of some tenements and burgh acres in Culross, on a precept of sasine in an heritable bond, to be held of Sands, the proprietor of the subjects. The sasine was recorded in the town court books. Sands became bankrupt, and in a competition of his creditors this infeftment was objected to as null. But the Lords sustained the infeftment.

Dixon v Lowther, 1823, 2 S. 176, N. E. 158.

³ *Davie v Denny*, 2 June 1814, 17 Fac. Coll. 628.

⁴ It was formerly a subject of much controversy, whether

by mere resignation the vassal was so entirely divested of his right, that no future right granted by him could be available, though first completed by infeftment? See *Leges Burg.* c. 117; *Balfour's Practicks*, p. 158. Dirleton, in his Latin tract on Resignation, which he discusses in five questions, contends strenuously for the total extinction of the resigner's power. Craig, Hope, Stair, and Stewart give to the opposite opinion the weight of their great authority, and at last it was settled by a solemn decision that the resignation has no such effect. *Sir W. Purves v Strachan*, 1677, M. 6890.

⁵ See Hope, *Min. Pract.* tit. 5; *Stair* ii. 3. 28 et seq.; *Ersk.* ii. 7.

that the sasine in this case is ineffectual till confirmed; since it proceeds on a precept for a public holding merely, which the superior alone can effectually authorize.¹ It follows from this, *First*, That if anything occur, between the date of the sasine and the charter of confirmation, to prevent the superior from exercising his power of confirming, the sasine will remain ineffectual. This is called a Mid-impediment. As, for example, if the former proprietor have granted to another person a conveyance, on the procuratory of which that person has resigned, and obtained a charter of resignation, on which sasine has followed, the right will be completely transferred, and the superior's confirmation of the other conveyance will be unavailing. Or, if two public rights have been granted to different persons, and sasines have been taken on each, the sasine first confirmed is preferable, because the superior's power is thereby exhausted; and so, as between those two sasines, the criterion of preference is not the registration of the sasines, but the date of the confirmation. *Secondly*, If the former proprietor, after a conveyance on which public infeftment is taken, but before confirmation, shall grant a base right on which sasine shall be taken, the confirmation will render valid the public sasine, but under burden of the base right constituted in the meanwhile.² But it is no mid-impediment, that the person who obtains confirmation is made aware (even by the warrandice in his own conveyance) of the existence of a prior security.³

3. Where the right is granted with an alternative holding *à me vel de me*, and sasine follows, it is held to be in the first instance a base right, effectual from the date of the sasine; and afterwards, on confirmation, it becomes a public right.⁴ This is the common form of conveyances and securities. Of old, a double conveyance was granted, one for the purpose of holding base, the other for the purpose of holding public; and two precepts accompanied them. The two conveyances were afterwards combined, presenting in the clause containing an obligation to infeft by two manners of holding the vestige of the ancient form. And in the progress of improvement, instead of two precepts, one expressed in terms indefinite was introduced, fit to be used as the warrant either of sasine to be held base, or of a sasine to be held of the superior. But it is carefully to be observed, that a sasine taken on this indefinite precept is not always capable of the alternative construction above explained. 1. However indefinite the expression of the precept, a sasine taken on it will be only a public sasine, and utterly ineffectual till confirmation, if the deed contain no [683] alternative holding.⁵ And, 2. The alternative nature of the precept is to be judged of by the obligation to infeft.⁶

4. Where the conveyance is from a vassal to his superior, it is accomplished by resignation *ad remanentiam*. The resignation operates as a restoration of the superior's sasine to its full original extent, as before the vassal's right was constituted. There is no occasion, therefore, for a new sasine. The instrument of resignation completes the superior's right; but as there is no sasine, and the records must be satisfied, this instrument of resignation

¹ *Struthers v Lang*, 1826, Fac. Coll. 307, 4 S. 418, N. E. 421. See Hope, Min. Pract. tit. 5, secs. 1 and 3; Stair ii. 3. 28; Ersk. ii. 3. 13.

² Ersk. ii. 7. 15. See *Henderson v Campbell*, 5 July 1821, F. C.

³ *Leslies v M'Indoe's Tr.*, 1824, 3 S. 48, N. E. 31.

⁴ *Bishop of Aberdeen v L. Kenmore*, 1680, M. 3011.

⁵ *Struthers v Lang*, *supra*, note 1.

⁶ *Rowand v Campbell*, 1824, 21 Fac. Coll. 558, 3 S. 198, N. E. 134. Here the obligation to infeft was only to be held 'from me, of and under my lawful superiors,' etc. There was a procuratory of resignation and also a precept of sasine indefinite, and commencing thus: 'attour to the end the said H. W. may be immediately infeft,' etc. At first there was some doubt whether this intention of an immediate infeftment

which could be effectual only if base, was not enough to characterize the precept as alternative. But the Court at last held the obligation to infeft as conclusive.

Peebles v Watson, 1825, 4 S. 290, N. E. 293. Here there was no obligation to infeft *de me*, but 'to infeft by two infeftments and manners of holding, and that either by resignation or confirmation.' The want of the obligation to infeft to hold *de me*, and the distinguishing words 'confirmation or resignation,' applicable only to public holding, were held to characterize the sasine as only public, and ineffectual till confirmation.

M'Nair v M'Nair & Brunton, 1827, 5 S. 372, N. E. 345. Here the same characteristic expressions of the manner of completing the right by confirmation or resignation were again held conclusive of the character of a public right.

must be recorded, as the sasine is in ordinary cases; and it is by the date of registration of the instrument of resignation that the preference is fixed.¹

SECTION II.

OF SECURITIES AND CONVEYANCES IN COMPETITION.

Rights in security may be reduced to two classes: one comprehending those in which the real right depends on a sasine in the claimant's person; the other comprehending those in which the real right depends on a sasine in the person of another.

SECTION I.—RIGHTS IN SECURITY, DEPENDING ON SASINE IN THE CLAIMANT.

I. SUPERIOR FOR HIS DUTIES AND CASUALTIES.—The superior is secured in his duties and casualties by his own charter and sasine; and the vassal's right is held under condition of payment of the feudal duties contained in the *reddendo*.

1. The DUTIES form a *debitum fundi* preferable to all the vassal's creditors, and may by POINDING OF THE GROUND be made effectual against the vassal and all singular successors in the land.² They are entitled to a preference over all rights granted by the vassal; and this secures the arrears of feu-duty due at the time of the competition. In bankruptcy, the preference is given in the course of judicial sale or sequestration, on the footing that [684] the title of the purchaser cannot be completed without complying with this condition.³

2. But it is not merely for the arrears and current feu-duties that the superior has a preference. His non-entry and relief duties, and composition for singular successors, as already explained,⁴ sometimes constitute claims of great importance; and for these his security is equally complete.

II. SECURITIES FOR DEBT ON FEUDAL AND BURGAGE SUBJECTS.—These have been already enumerated, and it will not be necessary to add much to what has been said.

An indirect effect is produced by one of the securities stated above, which ought to be taken notice of. The security by disposition absolute, but subject to redemption, either in terms of a backbond or other form of acknowledgment, or according to the confidential understanding of the parties, is the proper form of security for covering future advances (unless under the late statutes respecting securities for cash accounts), and for securing obligations in relief. And it is accordingly the form in which banks generally take their securities for cash-credits. But the point to be now marked is, the effect of this security as going beyond the extent of the original transaction, to cover subsequent advances or engagements. It once was matter of controversy whether the creditor was entitled to withhold a reconveyance till payment, not only of the original loan, but of all subsequent advances. But this is now settled in favour of the creditor. The doctrine, indeed, may be laid down generally, that in all cases where one holds an absolute conveyance of property, whether heritable or moveable, under a personal obligation to restore it on payment of certain debts,

¹ The statute 1669, c. 3, which orders the registration of instruments of resignation *ad remanentiam*, enacts it under the pain of nullity. It is observable that there is no enactment that this registration shall be the criterion of preference; yet it seems very clear that the whole statutes of registration would be deemed applicable to this case, since it is adopted into the system; and, though not expressly mentioned in the statute 1693, resignation must be held as included.

² The summons of poinding the ground concludes, 1. For letters to poind and apprise the goods, etc., under the restric-

tion that the goods of tenants shall not be taken to the value of more than a term's rent; and, 2. For apprising of the ground-right and property of the lands to the value of the remainder, to the effect of extinguishing the vassal's right and vesting the same in the superior by consolidation, but redeemably. Stair iv. 23. 5; Ersk. iv. 1. 11 et seq.

³ The superior has a personal claim for his feu-duties on the contract, as well as a real right as for a *debitum fundi*.

⁴ See above, p. 21 et seq.

it will subsist as a good security, not only to cover a specific debt; but, under a general stipulation in the backbond to restore on payment of all advances, it will be effectual to cover every sum advanced previous to the demand of a reconveyance, and this not only against creditors, but against purchasers also. Against general creditors the demand of a reconveyance may effectually be resisted, even without any such general stipulation, till they or the debtor shall have paid every debt which shall have arisen subsequently. The holder is not bound to denude till he is satisfied and relieved of those debts.¹ In particular, a security, by absolute conveyance to land, where not restricted by a backbond recorded or produced in judgment, has been sustained to cover all debts due to the donee.² After such recording or production in judgment, the security is held to lose all power of further extension, and to remain stationary as at that moment.³

It is a more difficult question, What shall be the effect of a disposition in security, [685] conceived in terms of full conveyance, but expressly in security of a certain transaction, where the precise amount cannot be ascertained; as, for example, in relief of what may be deficient and requisite to be paid of a composition? It is a rule in all rights in security, that the debt for which they are granted shall be specific in amount, and in the name of the creditor.⁴ And the question here is, Whether the words of absolute conveyance have the effect of raising an exception to that rule, as in the case of an absolute disposition? The most unchallengeable security in such a case, undoubtedly, is an absolute conveyance, with a backbond recorded. But it does not appear to be hurtful to the effect of the absolute conveyance, that the deed should also set forth the nature of the transaction.

¹ *Brough's Crs. v Jolly*, 1793, M. 2585, where a disposition of heritable subjects was in question.

Robb's Crs. v Henry Raeburn & Co., 1808, M. App. Compens. No. 5, where the doctrine was applied to a conveyance of a ship.

Dougal v Gordon, 1795, Bell Fol. Ca. 42. Here the doctrine was laid down in general terms with relation to an absolute assignation of a moveable bond. [*Maitland v Cockerell*, 1827, 6 S. 109; *Russell v E. of Breadalbane*, 5 W. and S. 256, affirming 7 S. 767; *Tierney v Court*, 1832, 10 S. 664; *Leckie v Leckie*, 1854, 17 D. 77; and see *Robertson v Duff*, 1840, 2 D. 279.]

² *Riddel v Crs. of Niblie*, 1782, M. 1154. Here Jamieson had disposed his lands absolutely to Niblie, who granted a backbond declaring the infetment to be in security of certain debts of Jamieson in the person of Niblie, and for such debts as Niblie should afterwards transact with Jamieson's creditors. An objection was taken on stat. 1696, c. 5, to the infetment, as for relief or security of debts to be contracted. The Court repelled this objection, in respect that the disposition was absolute; and the great doctrine was laid down, that the donee having become creditor on the faith of his absolute right, could not be called on by the disponent or his creditors to denude, unless upon satisfaction for all the debts standing in his person.

Keith v Maxwell of Terraughty (below, note 3). Lord Justice-Clerk Macqueen and Lord President Campbell both said in this case, that to impeach the decision in Niblie's case would be an injury to the country.

Bartlet v Buchanan, 27 Nov. 1812, F. C. On the above principle, debts by personal bond were sustained as comprehended under the absolute infetment to the effect of diminishing the terce. [In *Lindsay v Davidson*, 1853, 15 D. 583, a creditor in possession under an absolute disposition without backbond was held entitled to resist an interdict by the trustee for the debtor's creditors, the object of which was to

disturb his possession, although he admitted that his right was truly a security.]

³ *Keith v Maxwell*, 1795, Bell Oct. Ca. 234. Sym conveyed his lands to Maxwell, who granted a backbond, declaring this to be a security for a debt of £6000 due to Constable, for whom Maxwell was trustee. This backbond was not recorded, but a reduction of the security was brought on Sym becoming bankrupt, and the backbond was produced in that action. The security was not reduced. Then Maxwell, the donee, became cautioner for Sym in a cash-account with Sir William Forbes & Co.; and Sym gave a bond of relief, with a declaration that the infetment should subsist as a security for his relief, and that he should not be bound to denude till fully relieved. A challenge of this new security was raised by Sym's creditors; and Lord Justice-Clerk Macqueen at first sustained the security, holding that the original conveyance, being an absolute disposition which did not fall under the Act 1696 (respecting securities for future debts), subsists till Maxwell is relieved of his engagements for Mr. Sym, whether prior or posterior to the date of the infetment. He thus applied the general rule of Niblie's case without discrimination. But afterwards he, as well as the rest of the Court, concurred in a distinction pointed out by Lord President Campbell, grounded on the production in judgment of the backbond by Maxwell to Sym, whereby the absolute conveyance came to be restricted to a mere security for the £6000, and stood so restricted on the records of the Court. But in making this distinction both these eminent judges expressed their full approbation of the rule adopted in Niblie's case as law. [See also *Gardyne v Royal Bank*, 1 Macq. 358, reversing 13 D. 912; *Darroch v Ranken*, 1855, 17 D. 935. If the backbond is not recorded, the creditor is liable to the superior in the obligations of the vassal. *Clark v Glasgow Insurance Co.*, 1850, 12 D. 1047.]

⁴ See below, p. 730.

The right conferred is universal; the condition is a fair one, though the amount of the burden is necessarily indefinite.¹

SECTION II.—RIGHTS IN SECURITY, DEPENDING ON SASINE IN ANOTHER PERSON.

In sales, conveyances, and settlements of land, it is frequent to reserve burdens on the right of the disponee, or powers to raise debts against the estate. The former are called **RESERVED BURDENS**; the latter are known by the name of **FACULTIES TO BURDEN**, and have already been sufficiently discussed.²

In entering on the modes of constituting securities by reservation, and their effect in competition with other real rights, it may be observed, that if the question arise before the right of the disponee is completed by infestment, the burden and claim of preference, constituted or reserved, will be equally effectual against the disponee and his creditors as if both rights were completed by sasine. A personal right to lands is qualified by the conditions which it contains; and the creditors of the disponee never can complete the feudal right, as coming in place of the disponee, without also completing at the same time the real burden.³

[686] Burdens by reservation are conceived either in favour of the disposer, or person who grants the conveyance; or in favour of a third party. The former may be more strictly, perhaps, called **RESERVED BURDENS**; but both sorts of burdens are designated by this term, without discrimination,—the debt in both being reserved, or excepted, from the right to be acquired by the disponee.

I.—MODE OF CONSTITUTING A RESERVED BURDEN.

A real burden is created by reservation, when, in terms appropriate, a specific sum is declared, in a disposition or settlement, to be a burden on the right of the disponee, and when this condition enters the infestment and is recorded. The ordinary case is of a conveyance to be completed by *infestment*, either on a precept *de me* for holding base; or on a procuratory for resignation in favour and for new infestment to the disponee; or on a precept *à me de superiore meo*, with confirmation: and in those cases no doubt has ever been moved, except in relation to the expression of the condition. But it is also competent to create a real burden where the conveyance is by a vassal to a superior, and the transference is completed, not by sasine, but by resignation *ad remanentiam*; for although resignation *ad remanentiam* be in one sense a mode of extinguishing, not of creating a feudal right, yet where it is an act of conveyance consented to by the superior, it is truly, in the sense of law, an infestment qualified by its conditions.⁴

In constituting, in favour either of the disposer or of a third party, a burden on the

¹ *Outram, Trustee for Evan's Crs., v Dryden*, 16 May 1816, F. C. The deed there narrated a composition which Evans had engaged to pay, the engagement of the disponees as cautioners for the deficiency, whatever it might be; and on this narrative a shop in Leith was disposed in simple terms, with a power to sell it, qualified by an obligation to account, and after relieving themselves to pay the balance to Evans. This form of security was objected to as for an indefinite debt, and on that point reported to the Court by Lord Reston on memorials; but the Court did not listen to the objection.

² See above, p. 39.

³ *Lamont v Lamont's Crs.*, 1789, M. 5494. This report, however, seems to be inaccurate so far as it appears to apply

to the creditors of the *disponer*; for the feudal right never was taken out of his person, and Mrs. Lamont was an adjudger, entitled to come in only *pari passu* with *his* creditors, though preferable to those of the *disponer*. On examining the papers, I do not find that any question was stirred as to the creditors of Lachlan, the disposer.

⁴ *Wilson v Frazer*, 1822, 1 S. 316, N. E. 292. Here, in the procuratory of resignation *ad remanentiam*, it was declared 'that the lands were resigned with and under the real lien and burden of £11,000, etc., and with and under the several provisions and declarations before written.' The procuratory was executed, and the instrument of resignation recorded, and the burden was held good. Affirmed 15 April 1824, 2 S. App. Ca. 162.

right of the disponee, so as to give to the security the force of a real right, these rules must be observed :—

I. *The Reserved Burden must be conceived as a Real, not as a Personal Debt.*—It must be expressly declared a burden on the infertment or lands themselves; the strongest expressions, directed to the disponee merely, not being sufficient,¹ and the law rather inclining to freedom from such burdens.

1. Where the *disponer* is declared liable for or burdened with the debt, it is held that, although the conveyance be declared ‘to be granted and accepted of under that condition,’ or although the deed be expressed to be ‘under the conditions following, appointed to be engrossed in the infertments,’ the debts will form no real burden. The older decisions had rather tended to give to the expression of such condition and declaration the effect of real burdens; but the later determinations have denied to them this effect, and fixed that ‘in a clause by which singular successors are to be affected, there must be no room for ambiguity: the inclination to impose a burden on the land by reservation must be expressed in the most explicit, precise, and perspicuous manner.’²

2. It does not seem to be enough to constitute a real burden, that the lands are [687] disposed in trust, and that one of the purposes is the payment of debt.³ There is no established phraseology, no *voces signatæ*, for constituting such a burden. It is sufficient that the words declaring the burden shall be directed against the lands themselves, and so as to

¹ Stair iii. 2. 53; 1 Bankt. 519; Ersk. iii. 2. 49.

² *Martin v Paterson*, 22 June 1808, Fac. Coll., M. App. Pers. and Real, No. 5, where the above rule is laid down.

M’Intyre v Masterton, 1824, 2 S. 664, N. E. 559. Here the words were similar to those used in *Martin’s* case, and the Court decided on that precedent; and ‘in respect that, although the lands in question are conveyed under the burden of the payment of the sum of money therein mentioned, and now claimed by the pursuers, yet the same are not distinctly and expressly declared a real burden on the lands.’

The previous cases also are worthy of notice.

Ballantyne, Nov. 1685, Pres. Falc. No. 101; *Countess of Rothes v French*, 1698, M. 10288; *Allan v Cameron’s Crs.*, 1780, M. 10265, aff. 2 Pat. 572.

Stewart v Home, 1792, M. 4649. Here the Court delivered a clear opinion, that the obligation, conceived personally, was not changed by its being engrossed in the sasine. In this case, the entail was granted to and in favour of Dr. George Stewart, etc., with and under the provisions, conditions, etc., that the said George Stewart and his foresaids shall be burdened with and obliged to pay the whole just and lawful debts, etc. The Lord Ordinary held, that ‘whatever annuities or debts are mentioned in the entail, as a burden on the estate entailed, must restrict the claim of terce.’ Lord Justice-Clerk Macqueen agreed to this principle, but it did not apply to the case. The heir is burdened with the debts, but the lands are not. A purchaser or adjudger would take the lands free. The burden is laid on the disponee and his heirs. The engrossing in the infertment will not alter the words, or their legal import. Decisions have settled this doctrine. Lord Dreghorn said that it is not a mere *questio voluntatis* whether a burden be real. It must be imposed in a certain way, and by the use of fixed terms. The disposer seems here to have intended to burden the lands, but he has not done it. The case of *Cameron* affords an example of a burden intended, but held ineffectual, in a very hard case. Lord President Campbell agreed to that doctrine. All that is engrossed in

the infertment is that Dr. Stewart shall be burdened. An adjudger would take these lands free from any burden. It was also observed, that in so far as the debts were indefinite, there was another objection to the security. Baron Hume’s Session Papers, and notes.

It may be observed that, in some of these cases, there were debts both of an indefinite and general description, and of a specific nature. We shall immediately see that the indefinite nature of the debt affords an effectual bar to its being considered as real; but the above cases, as applicable to the definite burdens imposed on the disponee, establish that something more than a personal obligation on the disponee is necessary.

In the case of *Forresters*, 28 Jan. 1798, a settlement was made, ‘with and under the burden of payment of the legacies and provisions following, which I bind and oblige my heirs and said disponees and executors to pay.’ This was held to make no real burden.

In the case of *Colquhoun*, 28 Feb. 1797, the deed burdened the *disponer* with the payment of the following sums of money. It was held no real burden.

³ In the *Ranking of Redcastle*, a question arose on the effect of a trust-deed executed for the purpose of discharging debts contained in a signed list, which was ordered to be recorded along with the infertment. To the case, as it decided the effect of such a list so recorded in removing the objection of indefinite security, we shall attend hereafter (see below, p. 729). But eminent judges took occasion to say that, supposing the security in other respects unobjectionable, the words did not seem sufficient to constitute a real burden. The conveyance was to Sir Hector M’Kenzie and John Tait, and their assignees in trust, in order that they might levy the rents, etc., and sell, etc., for the uses and purposes, etc. for payment of the debts in the list. Lord President Campbell held these clauses not to be fitly framed for making the debts real. Lord Eskgrove concurred with this opinion. *Chalmers, etc. v Crs. of M’Kenzie of Redcastle*, 15 Feb. 1791, Baron Hume’s Session Papers, and 3 Pat. 417.

leave no room for doubt. In settling this point it has not been held that there is any good distinction between a conveyance of lands 'under the burden of debt,' and 'under the burden of payment of debt.' Either of the expressions is sufficient, provided in other respects the burden be well constituted.¹

3. Where, in a disposition and infeftment, a burden is imposed, by providing that a sum [688] shall be paid by the disponee, and that 'in case it should not be paid the right shall be void,' it is held a real burden.²

4. As personal conditions, however strongly expressed, are ineffectual to make a real burden, much less can the strongest declaration in a backbond, the disposition being *ex facie* absolute, constitute such a right.³

II. *The Debt must in the Dispositive Clause of the Deed be properly expressed as a Burden on the Lands.*—The Court held in one case the burden to be real, although in the dispositive clause it was clearly expressed as a personal debt only.⁴ But the general rule which regulates the construction and effect of conveyances mainly by the dispositive, is not to be considered as shaken by that decision, which has always been held questionable. It may be laid down, 1. That if the dispositive clause be perfectly clear in its expression, it will regulate the nature of the right, and scarcely can be controlled or qualified by any other clause or indication in the deed.⁵ 2. That if there be ambiguity in the dispositive, but nothing inconsistent with the indication from the other clauses, the burden may be held real or otherwise, as the general strain of the deed and words of the precept of sasine point out.

III. *The Burden must also be so expressed and incorporated in the Sasine, in order to be*

¹ This is a distinction which appears to have been much, but unsuccessfully, insisted on by Lord Arniston, as reported by Lord Elchies in the case of the *Crs. of Smith* in 1738, and of the *Children of Sir R. Murray v E. of March* in 1739. *Elchies. Pers. and Real*, Nos. 1 and 2; *Elchies' Notes*, p. 329.

In the following cases, touching the above distinction, there were other points involved, which were corrected by the course of decisions in the note, p. 727, note 2.

Innes of Coxton's Crs. v Duff of Dipple, 1719, M. 10244, Rob. 355. 'A disposition was granted to Innes of Coxton, with and under the burden of the payment of the disposer's debts, cum et sub onere solutionis omnium legitimorum debitorum.' The disponee expedes a charter containing all these burdens thus expressed; but, without being infeft, he sold the lands, and the purchaser was infeft upon the assigned precept. The debts were found real burdens.

Crs. of Prestonhall v the Donator of Fraserdale's Escheat, 24 Dec. 1719, Rob. 372. Lord Prestonhall, in his entail, provided and declared, that Hugh Master of Lovat's fee of the entailed lands, and Alexander M'Kenzie's liferent, 'shall be affected and stand burdened with the payment of all the tailzier's lawful debts.' This was found a real burden.

In both these cases the decision was overturned in the House of Lords on another principle, viz. the inefficacy of all indefinite burdens on land. 1 April 1721. In the Dict. vol. ii. p. 67, there is no notice of the reversal. The judgments on appeal have been published in Robertson's Reports of Cases on appeal from Scotland, 355 and 372.

Crs. of Smith v his Brothers and Sisters, 10 Jan. 1738, Dict. vol. ii. p. 67. The disposition here bore: 'As also, these presents are granted with the express burden of the payment of 8000 merks Scots, which the said James Smith, by acceptance hereof, binds and obliges him, etc., thankfully to content and pay to John, Gilbert, etc., my younger children, equally

among them.' The Court decided that the above clause makes the provision real. Lord Elchies says: 'The Lords found that, by the conception of the clause, the debt was a real burden, albeit expressed with the burden of the payment. Arniston was much against this part, but it carried by a great majority.' *Elchies' Notes*, p. 329.

The same in the case of *Sir R. Murray's Children v E. of March*, Notes, p. 329; *voce* in *Ms. Real Burden*. Mr. Morrison has classed it under Personal and Real.

Mr. Erskine's conclusion from these cases, so far as regards the expression of the burden, is: 'That where a deed is expressly granted, (1) with the burden of a determinate sum therein mentioned, or (2) with the burden of the payment of that sum, or (3) where there is a clause declaring the right void, if payment be not made against a precise day therein specified, the burden is accounted real.' *Ersk. ii.* 3. 49.

² *Cumming v Johnston*, 1666, M. 10234. [The author afterwards saw reason to doubt the accuracy of the doctrine as stated in the text, and suggested that the case put was rather that of a suspensive condition than a real burden. *Shaw's Bell*, p. 920; *Baird's Trs. v Mitchell*, 8 D. 464.]

³ *Fleming*, 15 June 1795.

⁴ *Geddes v Younger*, 1729, M. 10244. The dispositive clause bore only a personal obligation: the precept of sasine, 'with the burden of my lawful debts.' The debts were held to form a real burden good against singular successors.

⁵ *Allan v Cameron's Crs.*, 1780, M. 10265; *aff. in H. L.* 15 May 1781, 2 Pat. 572. Here, in the dispositive clause, the condition was merely personal, though in the clause of warrantance and precept of sasine, as well as in a separate deed, the plainest intention was shown of making it a real burden, the condition being ordered to be engrossed in the infeftment under the pain of nullity. The debt was held personal, not a real burden.

effectual as a real security against the creditors of the disponee infest.¹ In one case already referred to,² the Court decided that the burdening clause affected the lands in preference to the creditors of the disponee's son, although the condition did not enter into the sasine, 'otherwise than by a general reference to the provisions in the disposition, its warrant.' In this decision the creditors acquiesced; but Mr. Erskine justly remarks³ that this is a [689] doctrine not only contrary to some former decisions, but also irreconcilable with the rule, that all burdens must be discoverable by creditors and purchasers. In later cases,⁴ accordingly, the question has been settled the other way.

¹ It will be remembered, however, that while the disponee continues uninfest, the burden is effectual against him and his creditors, as a qualification of the personal right. See above, p. 726.

² *Crs. of Smith*. See above, p. 728, note 1.

³ *Ersk.* iii. 3. 51.

⁴ *Stenhouse v Innes and Black*, 1765, M. 10264. Stenhouse disposed lands to his son, with the burden of all his debts, and referring to an heritable bond granted to him by the son of the same date, mentioning the names of the creditors, but not the sums due. A competition arose between two heritable creditors, one of the disponee and another of the disponent. The Lords found, that the clause in the disposition granted by John Stenhouse in favour of his son, by which the disponee is burdened with the whole just and lawful debts then due by the father, without mentioning either the names or the sums due to them, did not create a real burden upon the lands disposed *quoad* these debts, and found that the defect was not supplied by the heritable bond granted of the same date, nor by the infestment following.

This report is not quite so satisfactory as it might have been, since the distinction is not properly marked between the question respecting the indefinite amount of the debts (which the strictest scrutiny, even into the heritable bonds, could not have removed), and the question respecting the vagueness of the reference in the sasine.

Broughton v Gordon, 1739, M. 10247; *Elchies, Personal and Real*, No. 2; 5 *Brown's Sup.* 665. 'A father having disposed his estate to his eldest son in his contract of marriage, with the burden of his debts in general, as contained in a list or inventory therein referred to, the general burdening clause was also engrossed in the procuratory of resignation, and the list registered in the books of Council and Session. It was notwithstanding found, that the particular debts not being expressed in the contract, nor the list registered in the register of sasines and reversions, the said clauses in the contract and procuratory of resignation did not render these debts real burdens upon the lands conveyed by the father to the son.'

Lord Elchies says: 'The Lords found the children's provisions, though contained in that list, were not real burdens, chiefly because the list of debts and provisions was neither inserted in the disposition nor registered in the register of sasines, but only in the books of Session.'

Lord Elchies in his Notes says: 'I was in the Outer House when the cause was advised, and I am told the Lords pretty unanimously found the children's provisions not real burdens. I am also told the grounds were two: 1st, That the disposition was not with burden of these debts, but with the burden of the payment of debt; and this was Arniston's opinion; but the majority were not of that opinion. The 2d was, That the list of debts was not insert in *græmio* of the disposition, nor

registered in the register of sasines, but only in the books of Session. This deserves to be well considered.' Notes, p. 329.

The *ratio decidendi* given in this case seems to imply, that if the list had been recorded in the register of sasines, even separately, the debts would have been held real burdens. The reverse, however, was decided in the case of *Chalmers v the Crs. of M'Kenzie of Redcastle*. See below, in this note.

Douglas of Dornock, 1765, 5 Br. Sup. 906. A trust-deed was granted, but there was no list of debts recorded. Lord Kennet held, that as the trust-disposition and infestment does not mention the names of the creditors, nor the sums, nor the total amount, but only disposes to the trustee for behoof of the disponent and his creditors, with directions to apply rents and prices to debts in a list subscribed, this did not create any real lien. On a hearing in presence, the Court found that the creditors had no preference on the disposition. Stated in the Sess. Paper in case of *Chalmers v Crs. of Redcastle*.

Chalmers v Crs. of Redcastle, 1791, Baron Hume's Sess. Pap. and 3 Pat. 417. M'Kenzie of Redcastle conveyed his estate, in trust, for the payment of his debts, as enumerated in a separate list subscribed by him, relative to the disposition, which was ordered by the deed to be registered along with the infestment, and which was entered on record accordingly. The trustees accepted and acted; but afterwards they divested themselves, and redispensed with and under burden of the debts for payment of which the trust was made. Lord Justice-Clerk Macqueen, 'in respect the trust-right contains a power to the trustees to give up the same, and as they did not carry the trust into execution, but gave it up, and that the lands have been sold by authority of this Court, sustains the objection to the trust-disposition, and finds that the trust creditors have no right to claim under the same.' When the case came before the Court, it was held that the creditors in the list had no real security, and were not in a situation different from the general body, on the ground that the list made no part of the sasine itself, but was only referred to in that instrument; and that the separate registration was no sufficient incorporation of the burden, so as to qualify the feudal right with the debts in the list. The judgment was in these words: 'In respect that the debts were not rendered real burdens on the lands by the trust-right, and in respect that the trust-right has been given up and abandoned.'

Place v Trs. of M'Nab, 1821, Hume 544. The circumstances were these:—M'Nab of M'Nab disposed his estate, under 'burden of the payment of the whole just and lawful debts, both heritable and moveable, due by me at the date hereof; of which debts, so far as known, etc., a list has been made up and subscribed by me as relative hereto, amounting to £30,922, 13s. 8d.' Then they are declared to be a real burden, and appointed to be engrossed in the infestment. Sub-

IV. *Both in the Disposition and in the Sasine the Burden must be SPECIFIC, in the Amount and in the Creditor's Name.*—This requisite has two objects: 1. That creditors may know the precise amount of the burden; and, 2. That they may know whether it be paid or extinguished. In the case of Coxton, and in that of Lord Prestonhall's creditors,¹ the burdens were at first found to be real, although indefinite; but those decisions were both reversed in the House of Lords, on the principle that no perpetual unknown encumbrance can be admitted upon lands.² In 1730 the question occurred again in the Court of Session, for the first time after the reversal of the former decision, and was argued by our ablest lawyers; but the Court avoided a decision of the general point,³ and it was not till 1734 that the matter was held to be settled in the Court of Session. This was in a case mentioned shortly by Mr. Erskine,⁴ where it was held that no indefinite or unknown burden can be created on land. And this doctrine has, in many cases since that time, been held as a settled rule of law.⁵ But admitting the general principle, it was much doubted whether a conveyance, creating a burden of the granter's debts, as contained in a particular list, was effectual to constitute a real burden; and in two remarkable cases, in one of which the amount was stated in the sasine, it has been held that there is no real burden in such a case.⁶

In creating reserved burdens, it is the common practice, besides a reservation in the conveyance, to take a separate bond from the disponee, mentioning in the disposition that it has been granted.⁷ It has been held that the assignee of such a bond, although the real burden was not mentioned in the bond or in the assignation, has the legitimate title to discharge the burden.⁸ On such bond adjudication may be raised; and it may contain a power of sale, to give to the holder of the reserved burden a more active species of security than the real burden confers.

II.—NATURE AND EFFECT OF THE RIGHT.

[691] 1. The security depends on the disponee's sasine. There may seem to be some room for a distinction in this respect between burdens reserved in conveyances, where the burden is in favour of the disponent himself, and where it is in favour of a third person. Where a person selling land allows a part of the price to remain a debt in the hands of the

joined to the disposition, and recorded along with it, was the list containing the names and sums. The sasine bore, 'under the burdens, provisions, and declarations, faculty and reservation before specified, and no otherwise.' M'Nab afterwards executed a trust-deed under which his trustees sold his land; and the purchaser, in order to clear his title, suspended the payment of the price until it should be decided whether the debts in the list were made real burdens. The case was, at the desire of the parties, reported to the Inner House; and the Court held the debts not effectually constituted as a real burden on the estate, and refused the bill.

¹ See above, p. 728, note 1.

² 1 April 1721, Robertson's Cases on Appeal 355 and 372. [Erskine v Wright, 1843, 8 D. 863; Baird's Trs. v Mitchell, 1846, 8 D. 464, where it was held that an obligation to pay surface damages could not be constituted a real burden.]

³ Ranking of the Crs. of Calderwood of Pitieddie, M. 10245. The competition arose between the trustee for the creditors of Lowes of Merchiston, a creditor of the disponent, and Elizabeth Moyes, etc., creditors of the disponee.

⁴ Creditors of M'Lellan, July 1734, n. r.; Ersk. ii. 3. 50. M'Lellan settled his estate upon Samuel M'Lellan, his younger brother, etc., 'under the burdens after-mentioned,' etc. The burdening clause declares: 'That these presents are granted

by me, with the burden of all my just and lawful debts, contracted, or to be hereafter contracted, by me.' The affairs of Samuel M'Lellan having gone into disorder, a competition arose between his creditors and those of the disponent (both sets of creditors having led adjudications against the estate). The creditors of the disponent contended for a preference under the above clause of burden, but the Court found the burden not real upon the lands, and preferred the creditors of the disponee.

⁵ Stein's Crs. v Newnham, Everet, & Co., 1789, M. 1158; aff. in House of Lords, 25 Feb. 1791, 3 Pat. 345. And also, same case, 1793, M. 1427; aff. 10 March 1794, 3 Pat. 347.

⁶ Gordon v Crs. of Broughton, and Place v M'Nab's Trs., *supra*, p. 729, note 4. [Tod v Dunlop, 1838, 1 D. 231.]

⁷ See Juridical Styles, vol. i. [It has since been determined, that neither the transfer to an assignee, nor the conveyance of the property to a third party, has the effect of discharging the granter from the personal obligation contained in the deed. This doctrine is chiefly important in relation to ground-annuals, and obligations to relieve a purchaser of feu-duties and public burdens. The leading cases are: Millar v Small, 1853, 1 Macq. 345; Royal Bank v Gardyne, 1 Macq. 358; King's College, Aberdeen, v Hay, 1854, 1 Macq. 526; Elmalie v Brown, 1855, 2 Macq. 40.]

⁸ Baillie v Laidlaw, 1821, 1 S. 113, N. E. 108.

purchaser, secured as a burden in favour of the seller; or where, in a settlement or other conveyance, the maker of the deed reserves his own liferent, or an annuity to himself, it has sometimes been held that the original infestment constitutes the security.¹ But there is no true distinction to be taken between reserved burdens in favour of the disponent, and in favour of a third party. The principle on which the preference in either case depends is the same, and the forms of assignation and modes of rendering the security available for payment similar.² A burden constituted according to the requisites already fully explained, forms a condition of the disponee's right, and so qualifies it, that in all questions with purchasers or creditors, deriving their titles from the disponee, the debt thus secured is preferable. The transference of the real security to a new creditor is not (as in the common heritable bond) completed by sasine. A simple assignation intimated to the holder of the burdened infestment is sufficient to transfer the right of the debt, and is followed by the real lien as an accessory. Lord Stair considers an infestment so burdened as a wadset, only differing as to the effect of the right held by the creditor, in so far as relates to the active right of possession.³ But he, at the same time, holds the right of the creditor transmissible by assignation, either voluntary or judicial, by arrestment and decree of forthcoming. In practice, a simple assignation, intimated to the debtor, is held sufficient, though frequently the assignation is registered in the register of sasines and reversions.⁴ The registration does not, however, appear to be necessary in order to complete the right. Were a [692] competition to arise between the first assignation intimated, and a second subsequently recorded, there does not appear to be any ground for holding that the latter would be preferred. A general service transmits the burden to the heir of the creditor.⁵

2. To make the security effectual in producing payment, the creditor in the reserved burden has no means of entering into possession, or title to raise action of mails and

¹ Bell's Conveyance of Land to a Purchaser, 83.

² In this argument, the analogy of a liferent reserved, taken as an illustration of the right of the granter of a reserved burden, is apt to mislead. The liferenter's sasine may well subsist without incongruity along with that of the fiar: for it is the very same right which the liferenter originally held; to be exercised in the same way; and limited only as to endurance, and as to those powers of which the exercise might evacuate the fee. But the right of a creditor is quite different in nature from that enjoyed under the original infestment. It is a mere pledge or right in security, depending for its existence on the debt. A general service has been held a sufficient title to authorize a discharge of such a burden. *Cuthbertson v Barr*, 1806, M. App. Serv. and Conf. No. 2.

³ Stair ii. 10. 1; Stair iv. 35. 24. See below, p. 732, notes 1 and 3. [*Andrews v Laurie*, 1849, 12 D. 344.]

⁴ *Miller v Brown*, 1820, Hume 540. Robert Lyle disposed to his son, John Lyle, certain heritable subjects, under the burden, *inter alia*, of paying to his sister Margaret Lyle £100. By the disposition this sum was declared to be a real burden on the property, and it was engrossed in John Lyle's infestment accordingly. Margaret Lyle, in 1801, assigned the £100 to James Cameron, in security of a debt due by her; and Cameron intimated the assignation to John, the debtor, and also recorded the assignation in the register of sasines. In 1804, Mr. Brown purchased from John Lyle part of the subjects, Margaret Lyle having previously granted a discharge and renunciation of the real burden, without taking any notice of the previous transference to Cameron. Brown paid the full price, and there seemed no reason to doubt that he was ignorant of Cameron's right. Miller, after some inter-

mediate transactions, which are here immaterial, acquired Cameron's right, upon which a decree of adjudication in absence against Brown had been taken; and brought a process of mails and duties in the Sheriff Court against Brown's tenants, with the view of recovering the amount of Margaret's provision. The cause was advocated by Brown, who at the same time brought a reduction of the decree of adjudication in absence. Lord Gillies found, that the assignation by Margaret to Cameron, though effectual to convey the personal right to the debt, was not effectual to convey the heritable right; and that this right was effectually discharged by Margaret's subsequent discharge and renunciation. He therefore reduced the decree of adjudication in absence, and dismissed the action of mails and duties. But on advising a reclaiming petition (in which the principles established in the case of *Cuthbertson* were founded on) and answers, the Court *unanimously* found, 'That the real burden or security created over the subject in question in the person of Margaret Lyle, not being clothed by infestment in her person, *nor capable of it*, could be validly transferred by her and her husband, by the disposition and assignation in favour of James Cameron, duly intimated and recorded in the register of sasines; and that such disposition and assignation is effectual, and preferable to the discharge and renunciation founded on by the respondent; and therefore alter the interlocutor of the Lord Ordinary reclaimed against,' etc. A reclaiming petition was refused, with answers.

Although the *recording* of the assignation is taken notice of in this judgment, it does not appear to have been relied on as making an essential part of the case. It is mentioned only as the fact of the case happened to be so.

⁵ *Cuthbertson v Barr*, 1806, M. App. Serv. and Conf. No. 2.

duties.¹ But he has these remedies: 1. Poinding of the ground, the nature of which has already been explained;² and, 2. Adjudication, not subject to the law of *pari passu* preference.³ The lands burdened, when sold to another, continue still charged with the debt. The purchaser is not personally a debtor to the creditor in the burden; the lands may be adjudged for the debt.

3. As to the ranking of debts secured by real burdens, these points seem to be fixed: 1. That, in competition with the creditors of the *disponer*, the creditor whose debt is reserved as a real burden is preferable, whether the disponent be infert or not.⁴ Before sasine, his debt is a condition of the personal right; after sasine, it is a charge on the feudal right. 2. That where the creditor is a third party, he is preferable to all posterior debts of the disponent, from the date of the sasine in the disponent's favour, although the disponent may have given heritable securities to the posterior creditors.⁵ 3. That it is probable this [693] difference would be made between the creditors of the disponent and those of the disponent: That in a competition with the former, the preference of the creditor whose debt was declared real would depend on the date of the disponent's sasine; since the disponent is not divested, and his estate, therefore, is still liable to the diligence of his creditors till infertment in favour of the disponent: in a competition with the latter, the preference might be held complete, although no sasine were taken; on the principle already explained, that the debt is a qualification of the disponent's right, whether still personal or made real by infertment. 4. That among themselves, creditors, whose debts are made real burdens, are preferable according to the diligences which stand in their person,⁶ if the fund reserved turn out inadequate. And the proper diligence for affecting the debt seems to be adjudication, notwithstanding what Lord Stair has said in a passage already quoted.⁷

¹ Lord Stair draws this distinction between the right acquired by infertment in security, and that which arises from such a burden as that in question: 'That the infertment for satisfaction of sums is immediately effectual for mauls and duties, or for recovering or for maintaining possession of the profits till the sums be paid; but sums wherewith a real right is burdened have not those effects, until adjudication be used upon the sums, and infertment, or a charge thereupon, which is drawn back to the date of the security burdened, and is preferable to prior adjudications upon personal debts, in the same way as adjudications upon infertments of annualrent have effect from the date of the infertment of annualrent.' Stair ii. 10. 1. See also Stair ii. 3. 58.

² See above, p. 724, note 2. Stair iv. 23. 5; Ersk. iv. 1. 11. Lord Kilkerran says, where a disposition is granted with the burden of this or that particular debt, although the creditor in that debt has an infertment, yet the practice is for poinding of the ground to proceed in such debts. Kilk. 445.

³ Stair ii. 3. 58: 'Generally all real burdens of lands contained in infertments, though they give no present right to those in whose favour they are conceived, nor cannot give them any fee of the lands, yet they are real burdens, passing with the lands to singular successors, though they bind them not personally, but the ground of the land, by apprising or adjudication: as, if lands be disposed, with the burden of an annualrent furth thereof, to such a person and his heirs, this will not constitute the annualrent, but may be a ground of adjudging an annualrent out of the lands.' And again (iv. 35. 24) he says: 'If an infertment be granted with the

burden of a sum, it makes that sum a real burden, whereupon the fee may be apprizd or adjudged; and the apprizing or adjudication thereon will be preferred as of the same date with the infertment burdened,' etc. See also Hope's Min. Prac. tit. 11, secs. 1 and 3; Ersk. ii. 3. 49.

⁴ *Crs. of Ross* competing, 1719, M. 10243. See also above, p. 726, as to the effect of the burden on the personal right.

⁵ *Barclay v Gemmill*, 1731, M. 10245. Here, a father having disposed his estate with the burden of 5000 merks to his creditors, conform to bonds in their favour, after sasine in the disponent's favour he granted infertment of annualrent upon the lands disposed to several of his creditors, and a competition arose between them and a creditor under the real burden. The two points were pleaded: 1st, That the disponent, being completely denuded by the disponent's infertment, could do nothing in burdening the estate anew; 2d, That whatever his power might be, in so far as the amount stipulated was not exhausted, the debts existing before the disposition were made real burdens, and consequently preferable to all posterior debts, even when followed by infertment. The Court found, that no debt posterior to the disposition could come in competition with the debts prior to the same.

⁶ In the above cited case of *Ross' Creditors*, the Court having preferred the creditors with whose debts the disposition was burdened to the disponent's creditors, 'preferred them among themselves according to their respective diligences, and those upon which adjudication had been obtained to such as were not adjudged for' (M. 10244).

⁷ See above, and correct Stair's doctrine by the decision in the preceding note.

SECTION III.—PREFERENCES DEPENDING ON CONDITIONS IN REAL OR IN PERSONAL RIGHTS TO LAND.

One very important example of this kind of security has just been considered in Burdens by Reservation. But others occur in practice, the nature and operation of which it is of importance to mark.

1. In contracts of feu for the purpose of building, it is no unfrequent transaction by the proprietor of the land, desirous of encouraging builders, to advance money for enabling them to carry on their operations, and to look for reimbursement on the sale of the property. To make such a transaction safe, it is stipulated in the contract that the feuar shall not be entitled to demand a charter until he shall have paid up the money advanced. And, 1. There can be no doubt of the efficacy of this stipulation to secure the creditor both against creditors and against purchasers: those who come into the feuar's place, in either character, acquire only the right to take the subject as a personal fee, not without the burden of the condition stipulated. 2. It would seem that even for advances made from time to time subsequently to the feu-contract, though the amount should not be stated in the contract, there will be an effectual right to withhold the charter, on the general stipulation that the charter shall not be demanded till all advances shall be paid up. And, 3. Against the general creditors of the feuar, it would seem that the charter may be retained until all advances shall have been paid up, although there shall not be any stipulation to that effect in the feu-contract.¹

2. Conditions in conveyances to land effectually qualify the right while it remains personal, and whether in the hands of the original disponee, or of a creditor, or of a purchaser. The right to the subject will be effectually restrained by the operation of the condition. But the moment that the conveyance is made real by sasine, it stands effectual, purged of all conditions as against purchasers or creditors, unless care has been taken to make the condition a real burden.

3. Lands may be burdened, either expressly or by implication, in warrandice of the conveyance of other lands. When lands are exchanged, or, in the language of the [694] law, reciprocally conveyed in Excambion, it is an implied condition of the conveyance, that on eviction the person who is deprived of the land recurs to his former right, and may recover his own land. When lands are conveyed by one whose title seems questionable, the purchaser sometimes receives a conveyance to other lands in Real Warrandice, and to indemnify him against the eventual challenge. There is an important difference in the nature of these two rights, which ought to be observed. The security in the former rests on the original sasine, which was in the person of him who is deprived of the lands given in exchange for his own. The security in the latter depends on a new sasine in the disponee's person. The right transferred in excambion is conditional; and if the condition appear on the face of the titles, it is effectual against singular successors.² The right conferred by an infestment in real warrandice is a right in security.³ The consequences of this are: 1. That there arises an immediate right in the person suffering eviction in excambion, to enter again into possession of his own land, and to have direct action of mails and duties, etc.; whereas the real warrandice gives the disponee no right but that of an heritable creditor. 2. That a liquidation of the damage is requisite on the part of the disponee in real warrandice; and the disponent, by paying that damage, frees his land; whereas in excambion, the condition being purified by eviction, the excambied lands return to their former proprietor. 3. That, in case of partial eviction, the matter may easily be extricated under real warrandice; while under excambion much difficulty may arise.

1. EXCAMBION.—The more correct way of making excambion of lands is by a contract,

¹ See above, Of Absolute Disposition, p. 724.

² *E. Melrose v Kerr*, 1628, M. 3677; *Wards v Balcombie*, 1629, M. 3678.

³ *Blair v Hunter*, 1741, Elchies, Warrandice, No. 5. This report, however, is erroneous, and should be corrected by the note (Notes, p. 505). See also *Menzies v Campbell*, 1675, M. 10652.

though it is sometimes done by separate unilateral deeds. The procuratory and precept are commonly for sasine to both reciprocally, and so bear *in græmio* the nature of the correlative right. The sasine, therefore, as it appears on the record, stands burdened with the condition. But sometimes there are two separate procuratories and precepts, even where the form of a contract is used; and where the parties dispoise in separate deeds, the sasine may be extremely defective in conveying information of the limited nature of the right. And as it is a general rule, that no real burden can affect land without appearing on the record, it is extremely doubtful whether the implied condition of excambion would be effectual against singular successors.¹

2. REAL WARRANTICE.—The conveyance in warrantice must be completed by sasine duly recorded. But although the burden must thus appear on the record, there is one danger to which the purchase and transmission of all land is exposed; namely, that beyond the years of prescription the land may have been disposed in real warrantice, and may still be effectually bound in case of eviction: for it is only from the time of the eviction that the prescription for freedom from a disposition in real warrantice begins to run. The Court, however, has held that the fear of this liability, where set up as a pretence for not paying the price of lands over which an infestment in real warrantice extends, is in equity subject to a reasonable limitation.²

SECTION IV.—GENERAL REVIEW OF THE CHIEF OBJECTIONS THAT MAY BE TAKEN AGAINST THESE SECURITIES.

[695] The chief objections to securities may be reduced to three classes: 1. Objections which affect the debt secured; 2. Objections which rest upon some defect in the constitution of the security; or, 3. Objections grounded on the laws relative to insolvency.

I.—OBJECTIONS TO THE DEBT.

If the debt itself be objectionable, the security will be ineffectual; as, 1. Where the debt is of a nature which the law does not sanction, as a smuggling contract, or a game debt.³ These exceptions against personal debts we had formerly occasion to consider.⁴ 2. Where the debt is tainted by usurious stipulations, the security will in the same way be rendered ineffectual.⁵ It was held in one case⁶ that this statutory nullity is effectual against assignees; and in England it had been held effectual against the endorsee of a bill of exchange for value, and without notice of the usury.⁷ But this, as already observed, was altered by statute.⁸ 3. The debt may be objectionable on the footing of the negative prescription.⁹ 4. A security granted by a cautioner may be liable to a fatal objection, on the ground of the limitation of cautionary engagements, by the statute 1695, c. 5, already ex-

¹ See *Balfour v Moncreiff*, 1788, M. 10267.

² *Calderwood Durham's Trs. v Graham*, 1800, M. 16641. Where lands had been sold which a purchaser discovered to have been disposed in real warrantice more than a century before, he refused to pay the price; but the Court held him to be too scrupulous.

See also *Lawrie v Drummond*, 1676, M. 3215.

[As to implied real warrantice, see *Balfour v Moncreiff*, 1788, M. 10267; *Paterson v D. of Hamilton*, 1843, 5 D. 1313.]

³ *Johnson, Tr. on Nisbet's sequestrated estate, v Robertson*, 1791, M. 9554. An heritable bond was here objected to as a ground of preference to Robertson. Nisbet, the granter, was a merchant in Eyemouth, and had entered into a contraband trade with Pillans, who not only furnished him with goods, but advanced him money for repairing the vessel in which the goods were smuggled into this country. For the debt which

thus arose to Pillans, the heritable bond was granted over the estate of Gunsgreen, and Robertson had bought it from Pillans for full value. An objection was stated on the ground of illegality of the original debt; and first Lord Justice-Clerk Macqueen, afterwards the whole Court, found the security not entitled to a place in the ranking.

⁴ See above, p. 317 et seq.

⁵ See above, p. 327.

⁶ *Cleland v Hamilton*, 1741, M. 16428. Under the old statute 1597, c. 24, it was otherwise: the nullity was not effectual against assignees. *Campbell v Chalmers*, 1739, M. 16427.

⁷ *Low v Waller*, 1781, Douglas 708. See also *Parr v Eliason*, 1 East's Rep. 92.

⁸ 58 Geo. III. c. 93. See above, p. 330.

⁹ 1469, c. 29; Acta Parl. vol. ii. p. 95, c. 4. 1474, c. 55; *ib.* vol. ii. p. 107, c. 9; *ib.* 1617, c. 12, vol. iv. p. 543.

plained.¹ It is fixed, that when the proper diligence has been used, the effect is only to prolong the claim to the extent of the principal sum, and seven years' interest.²

II.—OBJECTIONS TO THE SECURITY.

The objections which attach to the deeds of security themselves, are objections to the execution of the bond, conveyance, or other deed of security; or on account of vitiations; or breach of the Stamp Laws; or radical defects in the sasine, as proceeding on an illegal and defective warrant, as being improperly given, as being defective in the statement [696] of the ceremony, etc. Some of these objections have been touched on already; but one or two points may find a place here.

1. *Want of Stamp*.—Objections on the Stamp Laws are fatal to certain instruments beyond remedy; as in bills and policies of insurance. But in other cases, the stamp, if annulled or wrong, may be supplied after the instrument is produced in judgment. Nay, it has been held suppliable even after adjudication has been led.³ By analogy, it would seem that after a competition begun on a deed of security not stamped, the objection may be removed by having the stamp supplied.

2. *Exhausting of Precept of Sasine*.—It is a rule, that a precept of sasine, when once duly executed, is exhausted, and cannot authorize sasine to be taken again. Where the precept is not duly executed, the remedy is by a new act of sasine on the precept as unexhausted. And, 1. This seems to be competent where there is a fatal error in the act of sasine, as not rightly taken; as not on the lands; or not by the proper symbols; or not to the right party; and so forth. 2. It seems also to be competent where there is a defect in the instrument; and so there is not full and legitimate evidence of the execution in due form, and in all points. But, 3. Where the act of sasine is correctly performed, and the instrument in all points unexceptionable, except in not having been recorded in due time, it has been greatly doubted whether the precept is exhausted; whether a new sasine may be taken, and a new instrument recorded; or whether recourse must not be had to other means of remedy. The difficulty here rests on the words of the statute. Had it been declared that a sasine not duly recorded should be *null*, there could have been no doubt that the precept must have been held as unexhausted, and capable of authorizing a new sasine.⁴ But the Act only declares the instrument, if not duly registered, 'to make no faith in judgment, etc., in prejudice of a third party;' adding, 'but prejudice always to them to use the said writ against the party maker thereof, his heirs and successors' (1617, c. 16). The main argument against the competency of a new sasine, and the principle on which a precept is held to be exhausted, is, 'that where sasine is once taken, the fee is full; and that the fee is full though sasine be not recorded, as appears in a question with the granter or his heirs.' But it cannot be correctly said that the fee is full where the sasine is not in all respects perfect and effectual. If the fee were full, no creditor of the granter could adjudge the estate. But that is competent, for this reason, that there is no infeftment, and so no constitution of a fee as to third parties. But if to any one effect the sasine is null, the precept

¹ See above, p. 374, etc.

² So strongly did the opinion formerly prevail, that the cautioner became liable for all arrears and interest till payment, that Erskine lays down this doctrine. But the Court, contrary to the judgment of Lord Justice-Clerk Macqueen, in the case of *Reid v Maxwell*, 1780, M. 11043, on a hearing in presence, solemnly found 'the cautioners liable for no more than the principal, and seven years' interest.' See an interesting discussion on the bench, 2 Hailes 850.

This was confirmed in the case of *Douglas, Heron, & Co. v Riddick*, 1792, M. 11032.

³ *Lamont v Lamont's Crs.*, 1789, M. 5494. An objection was here stated to an adjudication in a ranking, that the decree of constitution proceeded on a will not stamped. 'The objection arising from the writing not being stamped, was considered as one that could be removed at any time.'

⁴ So it is with regard to one species of sasine, the resignation *ad remanentiam*, by which a superior is re-invested. By the Act 1669, c. 3, it is declared that the resignation shall be null and void if the instrument be not duly recorded.

cannot justly be held exhausted; the whole mandate has not been complied with so as to convey the fee; there is no sasine, or effectual execution of the precept, so as to exclude third parties. And so, when a creditor comes to adjudge and to execute the precept in his charter of adjudication, the former infestment cannot be opposed to him. The statute says it bears no faith; and so the fee is not full.¹ But it is said, 'The sasine is good, and to all intents and purposes effectual, during the sixty days, or till the moment when it is erroneously entered in the record; and that it cannot, as in relation to the precept, be converted at once from a good execution of the mandate into a bad.' This, however, is a mere subtilty. Until the instrument is recorded, the execution of the mandate may be considered as a mere faculty in the hands of the disponee, to be completed into a perfect right or not, as he pleases. He may burn it, or annihilate it by withholding it from the record. And if he do record it, and an error is committed that is fatal to it, the fair construction is, that the act intended to perfect the right is not done, in not being rightly done; and so may be abandoned and commenced of new, if no mid-impediment or *jus quæsitum* stand as a bar. Unfortunately there is no case which in all respects can be considered as a precedent to settle this important point; but the weight of authority and of judicial opinion seem to authorize the conclusion that the precept in such a case is unexhausted.²

3. *Special Precept*.—A precept of a special nature or extent cannot authorize a sasine different in character. Thus, 1st, A precept to give sasine in trust, or in security, cannot be the warrant of a sasine in fee or property. But the converse does not hold. A precept for sasine in fee or property may be assigned to the minor effect of taking a sasine in liferent or in security.³ In practice it is so held; and this practice has been sanctioned by the Court.⁴

¹ Perhaps the particular turn of expression in the Act may be accounted for by looking back to 1599 (4 Acta Parl. 184; Acts of Sederunt, pp. 29, 30), 1600, c. 36. There was by that old Act an absolute nullity declared by way of exception: if the instrument was not registered within forty days, 'none of the said evidents to be of force, strength, or effect to any intent, but to be null, and of nane avail.' The correctness which an adherence to this severe rule would have produced, yielded so far to the equitable view, that, as between the parties themselves, it should not be applied; and to introduce this relaxation appears to have been the sole object of the Legislature in altering the phraseology as in 1617, c. 16.

² In a ms. collection of Lord Pitfour's opinions I find this consultation: 'Where any mistake has happened in such registrations, it is proper to take a new sasine, and put it on the proper record. But it is said you cannot execute the precept a second time, as it is exhausted. The answer is: This would be good, if it were properly recorded; but where not, I think it may be done.'

This accords with an opinion of Sir James Stewart: 'A sasine not duly registered is null by Act of Parliament, except against the heir of the granter, as to whom only it is good, because he cannot quarrel his author's deed. But it will not hold as to a successor in that benefice, because he does not represent his predecessor.' Ans. to Dirl. 275.

The late Lord Meadowbank said correctly on this point: 'Lawyers have held those unregistered sasines may be of some avail to the person infest. But it is certain they do not stand in the way of a person getting a proper right. The lawyers have not stated their opinion correctly; for the true view of the thing is, that the sasine is absolutely null and void, though some persons may not be entitled to plead the nullity. But this is of no consequence. Take it either way, and supposing that it is not absolutely null and void, but only

quoad the interest of onerous third parties, it will be the same thing to this argument.' *Kibble v Stewart & Speirs*, 16 June 1814, Fac. Coll. In that case, a purchaser of land was infest on the precept in his disposition, and it was confirmed; but the instrument was wrongly recorded, there being a fatal error in the name. To cure the defect, he resigned on the procuratory, and was infest on the charter of resignation. And the Court held it competent. Lord Justice-Clerk Boyle and Lord Robertson assented to the opinion of Lord Meadowbank, that the precept was not exhausted. So that, although this be not precisely a decision on the point, it is of great importance in balancing the weight of authority on the subject.

Baxter v Watson, 15 May 1818. Lord Gillies, on great consideration of this case, held the precept to be unexhausted where the instrument had not been recorded till the sixty-seventh day; and the Court adhered. But, on a petition, doubts having been expressed by Lord Balgray, the matter was settled out of Court.

³ *Mitchell v Adam*, 1767, M. 14335. This case is erroneously reported. The objection was, that the precept in a disposition could not authorize an infestment of annualrent, a right different in nature, and transmitted by different symbols—a penny money, instead of earth and stone. This objection was not sustained (as the report bears), but repelled. So Lord Hailes states it, vol. i. p. 185. Lord Pitfour's ground is, that a procuratory and precept are assignable *qualifié*, and that in practice an opposite doctrine threatens danger to hundreds of heritable bonds and adjudications. I have seen an extract of the decree, which confirms this statement.

⁴ *More v Bonthorn*, 29 May 1805, Baron Hume's Sess. Pap. Here a liferent annuity was constituted, and a subject assigned in security, as contained in a feu-contract, with an obligation to infest, and an assignation to the unexecuted pre-

2d, A precept of *clare constat* is given only to the heir, and cannot be assigned to [698] another. 1. *It is strictly confined to heirs-at-law, and cannot competently be granted to an heir of provision*; so that a title made up, as not unfrequently happens, by precept of *clare constat*, in favour of an heir in a destination, is exceptionable. 2. It is confined also to the immediately next heir alive at the time. Such a precept, for example, to the heir in liferent, and the next heir in fee, will vest no right in the fiar; nor will his survivance give effect to an infestment which shall have been taken on such an erroneous precept during the proper heir's life.¹ And, 3. Although an open precept in a disposition is a good warrant for infesting the disponee, or his assignee, or an adjudger acquiring right to the unexecuted precept by his diligence, provided the assignation or adjudication be produced, and read, and recited in the instrument of sasine, this will not hold good as to a precept of *clare constat*, which is limited to a character not transmissible.

4. JUS ACCRESCENDI.—This doctrine is of great importance in considering the principles on which preferences depend. A sasine may be taken on the warrant of a person having in him only a personal right to lands, to the effect that, by the subsequent completion of his feudal right, the sasine already taken will become effectual. The completed right is in such a case said to accresce to the sasine. This is a part of a more comprehensive doctrine, *Jus superveniens auctori, accrescit successori*. The general rule expressed in this maxim entitles one, to whom a conveyance is made with warrandice, to the benefit of every supervening right acquired by the disposer after the transmission.² But the point that demands attention in the present inquiry is, In what circumstances will the real right accresce *ipso jure*, so that a provisional completion of the disponee's right shall *ipso jure* be completed by the completion of that of the disposer? 1. If a precept be contained in a disposition or heritable bond, by one not himself infest, or granted in a character not yet established in his person (as a vassal giving a precept for a public holding), such precept, with sasine following on it, as proceeding *a non habente potestatem*, is quite ineffectual to convey the feudal right.³ 2. If the granter hold the personal right as a disponee, or if as heir he be entitled to complete his title by service, his imperfect right will enable him to give a precept to which the doctrine of accretion will apply. 3. If he have no right whatever to the land, and afterwards acquire it by a title originating after the date of his precept, the sasine which has proceeded on his precept will not be made valid by accretion. And if the sasine proceed on the precept of the ancestor uninfest, the heir's infestment will not cure the defect.⁴ The effect of accretion is attended with little difficulty where there has been one conveyance only. But where other interests interfere, nice questions arise. Wherever a right is completed on the part of another, previous to the completion of the disponee's or heritable creditor's right, it is a bar or mid-impediment to the accretion. But where there are more rights or securities than one, it is important to determine whether the rule operates according to priority, or all at once, so as to give them preference according to their dates, or *pari passu*. And, 1. The infestment first in date will be first completed, 'because the disposer's right,' says Stair, 'accresceth *ipso facto*.'⁵ 2. Where the infestment of the common author proceeds [699]

cept in the feu-contract. Sasine taken on this warrant was objected to as inept. The security was cut down on another footing, and this objection was little taken notice of; but some of the judges, who at first held the sasine bad, on reconsideration, and looking to the practice, and the sanction given to sasines in liferent taken on assigned precepts in fee, thought the objection unworthy of notice.

¹ *Finlay v Morgan*, 1770, M. 14480. Here a precept of *clare constat* was granted to James Shaw (the heir) in liferent, and his son John in fee. Infestment followed in these terms. After James' death, John granted heritable bonds, and afterwards adjudication was led. On John's death, titles

were made up to the person who stood last infest before the precept of *clare constat* was granted, and in a reduction the heritable bond and adjudication were held null and void.

² *Stair* iii. 3. 1; *Ersk.* ii. 7. 3. [See *Innes v Gordon*, 1844, 7 D. 141; *Glassford's Exrs. v Scott*, 1850, 12 D. 893; *M'Gibbon v M'Gibbon*, 1852, 14 D. 605.]

³ [The author seems to have changed his opinion on this point. See note to Principles, sec. 882.]

⁴ *Keith v Grant*, 1792, M. 2933. [But see *contra*, *Swan v Western Bank*, 1866, 4 Macph. 663.]

⁵ *Stair* iii. 2. 3. *Paterson v Kelly*, 1742, M. 7775, *Elchies' Notes* 238; *Nelson v Gordon*, 22 Dec. 1738.

upon the diligence of any party, Stair also thinks the completion of it effectual only to him who does the diligence. This has been held doubtful; and in one case, where the disponent's title has been completed by the voluntary act of a second heritable creditor, though for the sole purpose of giving effect to his own right, that completion of the title has been held to accresce to a prior creditor.¹ It is necessary or advisable on this footing, in completing the right for the purpose of giving effect to a security only provisionally completed, to act so cautiously as to confine the operation strictly to that security.² But it may fairly be questioned, on the fundamental principle of the doctrine of *jus superveniens*, whether in any case after bankruptcy, or where the completion of the common debtor's title is made by a trustee for creditors, that act can be available *jure accrescendi* to creditors whose securities are otherwise ineffectual. The whole doctrine rests on the ground of warrandice of the right of the grantee, and accordingly there is no accretion in those cases in which warrandice is not stipulated, or at least implied. But from the moment that bankruptcy attaches to the person, every action which he does is exceptionable, in so far as it confers on one creditor a preference over the rest. He cannot be compelled to it on his obligation of warrandice. And it would be a strange anomaly to hold, that what a trustee for creditors generally does, in order to complete their right, should be construed as an act of the bankrupt, done in the fulfilment of an obligation which he is prohibited from fulfilling.

III.—OBJECTIONS IN RELATION TO INSOLVENCY.

The chief of these rest on the statutes of 1621 and 1696; of which hereafter.

In contemplation of insolvency also, there is another ground of objection under the statute of 1661, c. 24, relative to dispositions, bonds, and conveyances granted by apparent heirs, in prejudice of the rights of the creditors of the predecessor, to whom the heir has succeeded. By this Act heirs are prohibited from granting within a year from their predecessor's death, to the prejudice of the predecessor's creditors, any right or alienation of the predecessor's heritable estate. This law is grounded on the equitable principle, that every man's estate should in the first place be liable for his own debts. The regulations for securing the full operation of this principle will be the subject of a commentary hereafter on the respective rights of the creditors of the ancestor and those of the heir. See below, Sect. 5, Subsect. 2.

Another objection falling under the same class may be grounded on the indefinite nature of the debt, which is the object of the security. We have already (p. 730) had occasion to consider the cases in which it was held that no indefinite unknown burden can be created on land. But it may be questioned, Whether this objection lies against a security granted to a cautioner in relief of debts for which he has become bound? In the case of *M'Lellan v Barclay*, a distinction was taken in argument between this case and that of a reserved burden of all the granter's debts. In the case of *Langton*,³ the Court 'found a disposition, granted for security and relief of all engagements the grantee had come under for the father, and especially declaring that all bonds wherein they stood jointly bound were the proper debts of the father, upon which disposition infestment followed, was a valid and legal security to the grantee upon the estate disposed for his relief, of all debts wherein he stood jointly bound with the father preceding the date of the disposition, notwithstanding [700] the particular debts were not specified.'

EFFECT OF OBJECTIONS.

The effect of the objections now shortly referred to may be very different.

1. Those which attach to the debt itself, or which annul the deed of security, and consequently annihilate the real right, have, when applicable to a single creditor, the effect of

¹ *Allison v Chalmers*, 1708, M. 7773.

² *Henderson v Campbell*, 5 July 1821, Fac. Coll. 433.

³ *Crs. of Cockburn of Langton v Crs. of Cockburn, jr.*, 1762, M. 10220.

excluding that creditor altogether from the ranking, or from a preference. Where such objections attach only to one of several creditors combined in the same security, as where a joint disposition is granted to several persons in security of debt, the benefit of the objection accrues not to the general creditors, but to those conjoined in the security in the first place; upon this plain principle, that the security of each creditor extends over the whole subject, so that the annulling of one of the claims augments the fund of security to others.¹

2. Those objections which are competent only to a particular creditor, have no other effect than to prevent the creditor who holds the objectionable security from ranking, to the prejudice of him who is entitled to maintain the objection; but it does not destroy the title to rank as against other creditors. Such is the effect, for example, of an objection on the ground of inhibition. The arrangements necessary for bringing out the true force of such objections will be particularly considered in treating of claims of preference on the ground of exclusion.

SECTION III.

OF PUBLIC BURDENS, LAND-TAX, ETC.

There are certain public burdens attending the right of a proprietor, on which a question may be raised in competitions of creditors, whether they be *debita fundi* and preferable. These it may be proper to explain.

1. LAND-TAX.—The land-tax, after several revolutions from aids and subsidies to a permanent tax (the proportion of which between England and Scotland was settled by the Treaty of Union), was at last fixed at £47,954, to be levied out of the land rent of Scotland for ever, subject to a power of redemption.² This burden on the land rent is payable partly from burghs and partly from shires; the former being assessed by stentmasters on the inhabitants of burghs, according to their rents and income; the latter being assessed on the inhabitants of counties, according to the yearly revenue of their land and other real property.³ But this tax, although called land-tax, and although a burden accompanying the land, is still, strictly speaking, no more than a personal tax on the owners of land, in proportion to the amount of their land revenue, and not properly a *debitum fundi*. So it was held with respect to the Scottish land-tax in the seventeenth century;⁴ and there seems to be no ground for a different judgment now.

But although, properly speaking, the land-tax is no *debitum fundi*, still it is a tax [701] which accompanies the land. Whoever has the land is liable to the tax as it arises. Creditors, therefore, or a purchaser from them, are responsible for the tax; and this has the same effect in giving a preference for the tax falling due after bankruptcy, as if the tax were *debitum fundi*. There is no preference, however, for arrears. They are secured only by the remedies competent for Crown debts against the personal estate.

2. REPAIRS OF CHURCHES, ETC.—The expense of repairing churches, ministers' manses, etc., and the relief due to heritors from whose land a glebe has been designed to the minister of a parish, are also burdens which accompany the land, but are not properly *debita fundi*.

¹ Blackwood of Pitreavie v E. of Sutherland, where infetment having been given to several joint disponees,—the precept as to one of them being for infetting representatives, without naming or describing them,—and having as to him been found null, a competition arose between an adjudging creditor and the other joint disponees. The latter were preferred. 1740, M. 14140.

² 38 Geo. III. c. 60; 39 Geo. III. c. 6 and 21; and the consolidating Act of 42 Geo. III. c. 116.

³ [Now assessed both in burghs and counties, according to the annual value of lands and heritages, as ascertained by the Lands Valuation Act, 17 and 18 Vict. c. 91.]

⁴ Graham v Heritors of Clackmannan, 1664, M. 10164.

Singular successors and creditors, or a purchaser from them, are not liable for the arrears of those burdens belonging to past years; but they are subject to them, if falling within the time of their being proprietors of the land.¹

CHAPTER II.

OF JUDICIAL SECURITIES OVER LANDS AND HOUSES.

JUDICIAL securities are of two kinds: one preventive, in the nature of a prohibition against voluntary conveyances, called INHIBITION; another, in the nature of a real right in security, or burden, and depending for its preference in competition on a recorded sasine, or certain equivalents introduced by statute. This last sort of security is called ADJUDICATION, and forms the proper subject of this chapter. The former will be more properly discussed hereafter. There is also another judicial security forming an anomalous sort of real burden in burgage subjects, called JUDGE and WARRANT.

SECTION I.

HISTORY AND NATURE OF THE SIMPLE ADJUDICATION FOR DEBT.

Execution against property for debt, which under the Roman law extended to lands as well as to moveables, was for a long time, both in England and Scotland, confined to moveables, and at last was extended to land in very different degrees in the two countries.

In England, a writ of execution called ELEGIT was in the reign of Edward I. invented for the attachment of land; and this seems to be the only form of execution by individual creditors against land at this day. It gives to the creditor possession of one-half of the debtor's land, to be delivered over to him by apprizement; but in no shape authorizes either an absolute and irredeemable sale of the land, or even a redeemable transference of it.

It seems to have been prior to the beginning of the thirteenth century that the execution against land for debt was first introduced into the practice of Scotland. In the time of Alexander II., who began to reign in 1214, it was established by express statute, that if there be no moveables, the sheriff should give notice to the debtor to sell his land within fifteen days, failing of which they should be transferred to the creditor in satisfaction of his debt.² At this time, the sale for a price, or, failing a sale, the transference of the goods or [702] land to the creditor, was absolute and irredeemable. But in 1469 a statute was passed, which, by giving to the debtor a power of redemption within seven years, produced a most important alteration upon the execution against land.³ While the execution against land was thus established in the alternative form of a sale for money, with which to pay the debt, or a transference of the lands themselves to the creditor (but the sale and the transference qualified by a right of redemption), it was not to be expected that the sale should be very successful, or indeed anything more than a name; and gradually the diligence came to be restricted to a redeemable transference of an apprized portion of land.

¹ Blair of Kinfauns v Fowler, 1676, reported by Gosford as a leading case, M. 10168.

² Stat. Alex. II. c. 24. It has been well observed by Mr. Ross (vol i. p. 408), that 'the execution against land was

thus both earlier and more complete in Scotland than in England.' Edward I., under whom the *elegit* was introduced, began to reign in 1272; Alexander II. about sixty years before.

³ 1469, c. 3, in Acta Parl. vol. ii. p. 94.

Upon the change in the forms of judicial proceedings, which was occasioned by the institution of the College of Justice, the *briefe*, under which causes were formerly tried, fell into disuse; and instead of it, a writ called a summons was introduced, which being followed by a judgment or decree, was put to execution, in virtue of letters issued in the name of the king, called Letters Executorial. Those directed against land had the special name of Letters of APPRIZING. They were issued only upon judgments of the Court of Session. They were at first directed specially to the sheriff within whose territory the lands to be apprizied lay; and while it was so, the appreciation was conducted with that degree of attention and care which its importance required.¹ But afterwards those letters were directed to messengers-at-arms as sheriffs in that part. They were men ignorant and irresponsible, and everything went into disorder. The sale gradually vanished; the intimation to the public, which was at first most carefully made, fell into neglect; the appreciation itself was carelessly done; and the lands were assigned over to the creditor at great under-value. At last the whole ceremony was transferred to Edinburgh, where men of skill and impartiality might be procured as a jury upon the rights of the parties. But in this stage of the declension of the diligence from its ancient purity, the expense of bringing up witnesses to prove the value of the lands gradually put an end to the appreciation; and the creditor was allowed to enter, without any inquiry, upon a general redeemable right, to the whole lands, of which during the term of redemption he drew the rents, without accounting. His right was completed, if the property was feudal, by charter and sasine; if not feudal, by the execution of the apprizing.

In this barbarous state the execution against land continued for a century, and creditors who were first in the order of time carried off the whole funds of their debtor.²

The first step taken to remedy the grievance was in 1621, when Parliament declared that the rents drawn by apprizers, above the value of the interest of their debts, should [703] be imputed "*pro tanto* in discharge of the principal sum."³ But this was not sufficient. Still the evils of a preference by priority of apprizing were great, and another remedy was adopted: all apprizings led before, or after and within year and day of, the first effectual apprizing, were placed upon an equal footing, or ranked *pari passu*, as if one apprizing had been led for the whole. The first effectual apprizing was defined to be that upon which the first feudal right was completed by sasine, or by a charge to the superior to enter the adjudger as vassal. And the expense of the first effectual apprizing was made a common burden, to be defrayed by all who should claim the benefit of it.⁴

So far as creditors were concerned, this was in some measure a remedy for the evils against which it was directed; but something more was necessary to secure the debtor himself from injustice. With this view, an alteration on the form of the diligence was

¹ Balfour (Comprizing, c. 3, p. 402) and Sir Geo. M'Kenzie (Observ. 5th Parl. Jas. III. c. 37) have preserved some notes of the rules of appreciation followed in those inquests.

² To the debtor the injustice and hardship were intolerable; for the possession being allowed to go for the interest of the money, inability to discharge the debt within the years of redemption was inevitably followed by the loss of the estate, however great the disproportion of its value above the debt; and many families in Scotland had to deplore the loss of their estates in this way. But to posterior creditors the injustice was equal. If, indeed, it happened that a posterior creditor was able to pay off the first apprizor's debt during the term of redemption, he was entitled to step into his place; but if he was unable to do so, he had nothing better to expect than the debtor himself had, and was forced tamely to see the property, which should have afforded him the means of payment, irredeemably transferred to a prior creditor at an under-value.

In form, the apprizing bore hitherto an alternative of a sale and of a transference; but to give the full value of this alternative, it would have been necessary to restore the irredeemable sale, which both in the Roman law and with us in early times was the chief part of the execution against land for debt. This might have redressed at once all these evils; but to such a measure the Legislature had a strong repugnance. Commerce was not yet much advanced; the necessity was not so pressing as it afterwards became; and the strength of Parliament being with the landholders against the moneyed interest, no remedy was ever proposed which could shake the established right of redemption. The Legislature turned themselves a thousand ways rather than consent to the demolition of this right.

³ 1621, c. 6 and 7.

⁴ See the statute 1661, c. 62, Acta Parliam. vol. vii.

proposed by Lord Stair, President of the Court of Session; and the Legislature adopted his suggestion. Instead of letters of apprizing, execution against land was to proceed by ADJUDICATION; a new form of action before the Court of Session. This action was to be of the nature of an amicable suit, in which, dropping even the form of the alternative sale and apprizing, the debtor should appear as defender in the action; produce the title-deeds of his estate; concur in a fair trial for ascertaining the value of the land; and in setting off, to be adjudged to the creditor, subject to a power of redemption, a quantity of land precisely equivalent to the debt, and a fifth part more, in consideration of taking land for money. After all this was done, the debtor was to renounce the possession of the part thus adjudged to the creditor, and consent to the transference, under a power of redeeming within five years.

As this new form was intended for a relief to the debtor, from the hardship of the universal right acquired by the old apprizing, and as it proceeded upon the idea of the debtor's concurrence in this measure for his own benefit, the Legislature thought it not unjust to leave those who did not choose to take the benefit of it to all the evils of the former law.¹ For this purpose it was ordered that adjudications for debt should contain an alternative of a Special and a General Adjudication. The special adjudication was the diligence already explained. The general was in the nature of a penal alternative, in which no trial was to be taken of the respective values of the land and of the debt, and no allotment of a precise portion to the creditor; but a general and indefinite adjudication was to be pronounced (as in the degenerated form of the apprizing) for the principal sum, interest, and penalty, without including, like the special adjudication, a fifth part more. The penal nature of this proceeding induced the Legislature, however, to lengthen the term of redemption, and make it equal to double the time allowed in the special adjudication.²

[704] Thus, instead of execution by apprizing, a proper action of adjudication was introduced, which, although in form an action, differs entirely from the action for debt. It is properly a form of execution, and cannot proceed unless the debt has been already constituted, and its precise amount ascertained by a judgment, or by a legal written voucher. The summons of adjudication, after stating the debt and the debtor's refusal to pay, libels on the statute of 1672, and concludes: *First*, That as much of the debtor's estate as may be equivalent to the debt and interest, and a fifth part more, as accumulated into one principal sum at the date of the decree of adjudication, shall be adjudged to the creditor, redeemably, in security and payment of the debt; and that the debtor shall, for that purpose, appear,

¹ This was not, indeed, in the original plan of the statute; for Sir George M'Kenzie tells us, that 'this Act came into Parliament simply in these terms' (viz. that adjudication for the principal, annualrents, and a fifth part more, should be substituted for apprizing); 'but it being strongly urged by the lawyers, burgesses, and other members who were moneyed men, that it was most unreasonable to force the creditor to take land, unless the debtor should produce to him a good progress and security; for both to be forced to take land, and yet to want a sufficient right thereto, was altogether unreasonable: Therefore the Parliament ordained, that if the debtor did not compare and produce a sufficient progress, and renounce the possession, the creditor might adjudge the whole estate, as formerly he comprized it.' *Observations*, 2d Parl. Chas. II. Sess. 3, c. 17.

² Act 1672, c. 19, Acta Parliam. vol. vii. It may perhaps at first sight appear strange, that almost from the first moment that this boon was granted to debtors, down to the present day, it has been neglected, and the penal and general adjudication preferred. But the explanation of this is, 1. That, even in the least involved case that can be supposed, the

debtor has an advantage by the general adjudication; as the term of redemption is of double length, and as the general possession which it entitles the creditor to take of the whole lands is burdened with an obligation strictly to account for every farthing of the rental; while in the special adjudication, the value of the land and of the debt being supposed equal, the creditor's possession goes for the interest. 2. It commonly happens that the debtor's affairs are so much involved before adjudication is begun against him, that it is not easy for him to clear off the encumbrances, and give the adjudger an unexceptionable title. In the year 1681 it was proposed to overturn all this, and to restore apprizings, but without success. 'There was an Act (says Lord Fountainhall, vol. i. p. 156) brought in to the Articles, at the mediation of the writers to the signet, for taking away the new Act of Adjudications introduced in 1672, and bringing back the form and practice of comprizings again. This was opposed by the President of the Session (Lord Stair), 1mo, Because he was author of the said Act anent adjudications. 2do, His son being a clerk of the Session, had much benefit by these adjudications. —By the proroguing of this Parliament, this motion ceased.'

produce his title-deeds, consent to the adjudication, and renounce the possession: or, *Secondly*, That a general adjudication of all and sundry the lands, etc., shall be made to the creditor, redeemable, on payment of the sums of money, penalty, and interest, but without any addition of a fifth part more. Upon this summons the debtor is cited to appear and defend himself; and the action proceeds with particular forms of intimation, etc., to decree.¹

The alternative conclusion is still preserved, but the only use ever made of it is to procure delay in the pronouncing of the decree of adjudication. For although there are not on record more than two or three instances of the special adjudication, it still unquestionably is the privilege of the debtor to elect whether he shall not comply with the requisition to produce his title-deeds, and consent to a special adjudication.²

The decree pronounced by the Court adjudges the lands, etc. to the creditor redeemably, and orders the superior to receive him as vassal. It is accompanied by an *ABBREVIATE*, or abridged statement of the decree, containing the names of the creditor and of the debtor, the full enumeration of the subjects adjudged, and the words of the decree of adjudication. This is now (1 and 2 Geo. IV. c. 38, sec. 17) signed by the extractor, and within sixty days of its date is recorded in a register appointed for the purpose.³ If the recording have not been made in due time, the Ordinary has been allowed to pronounce a new decree before extract, so as to enable the adjudger to record within the sixty days.⁴

The decree of adjudication supplies in law the want of a voluntary conveyance [705] from the debtor. Where the property, though of an heritable nature, does not require sasine to its transmission, it is fully vested in the adjudger (redeemably) by the decree of adjudication alone. Where the property is feudal, and sasine is requisite, the right of the adjudger is completed by sasine on a charter of adjudication from the superior; or is held, as in competition with other adjudgers, to be completed by certain steps against the superior refusing a charter.⁵

The right acquired by the adjudger is redeemable; the time of redemption being five years in the special adjudication, ten years in the general. The debt may be extinguished by intromission with the rents of the estate, where the adjudger has entered to possess on a general adjudication. In the special adjudication, the rents go for the interest, and the debtor must pay the debt, with a fifth part more, before he can redeem his land.⁶

The adjudger's right is converted from a redeemable security into an absolute and irredeemable right of property, by a decree of *DECLARATOR OF EXPIRY OF THE LEGAL*. The *LEGAL* is an elliptical expression for the 'Legal term of redemption;' and the *declarator of EXPIRY* is an action before the Court of Session, in which the adjudging creditor calls on the

¹ [Special adjudications were abolished by the Acts 10 and 11 Vict. c. 48, sec. 18, and c. 49, sec. 10, now incorporated in the Titles to Land Consolidation Act. The procedure in processes of adjudication has been further simplified by these statutes, and the Court of Session Act, 1850.]

² A great contest arose between *Lesly of Balquhain* and the *Administrators for Irvine of Drum*, wherein the latter endeavoured to have *Lesly's* adjudication restricted to a special one, by offering him a progress. *Lesly* objected to the titles, 1. As defective; 2. As encumbered. These objections were repelled. But *Irvine* being nearly an idiot, could not validly renounce; and his administrators had not the power of tutors and curators to renounce for him. And so the general adjudication proceeded. 23 Dec. 1692, 1 Fount. 538.

So, in a case where the creditor showed considerable damage by the delay, the Court found the debtor entitled to a term to produce his titles. *Pedie*, 1776, M. App. Process, No. 2.

³ While apprising was in use, an allowance or decree confirming the apprising was written on the back of it by authority of the Court of Session, and was the warrant for letters of horning against superiors, charging them to enter the apprizor. These 'allowances,' or 'decrees conform,' were ordered to be entered on record by 1661, c. 31. On the introduction of adjudications, it was first ordered that an allowance, and afterwards an abbreviate in place of the allowance, should be entered on record. Reg. 1695, art. 24; Additional Reg. 1696, art. 3. But it may be remarked that these regulations are so far imperfect, that an adjudication which never has entered the record may be perfectly effectual in particular cases.

⁴ *Seton v Glass*, 1750, M. Sup. Vol. 10, Kilk. 18, Brown's Sup. 373. [*Bruce*, 1828, 6 S. 620; *Cathcart v MacLaine*, 1846, 9 D. 305; *Key*, 1855, 17 D. 681.]

⁵ See below, p. 756.

⁶ *Baillie v Watson*, 1737, M. 88.

debtor to exercise his right of redemption, otherwise to have it judicially declared to be foreclosed. The debtor may in this action require the creditor to account for his intrusions with the rents, so as to have the balance ascertained, on payment of which the land may be redeemed.

Where the decree of declarator has been pronounced in absence, it has been thought doubtful whether it can be opened up again, like a decree for an ordinary debt. At first sight, the cases are a little perplexing. But the following distinctions seem to explain and reconcile them: 1. An irregularity in the original diligence of adjudication will entitle the debtor to open up the decree of declarator; which is considered only as an accessory, partaking of the nature of its principal. 2. Irregularity in the proceedings or decree of declarator will entitle the debtor to relief. Or, 3. If the debt was paid off or extinguished within the legal, the debtor will be relieved against the decree of declarator.¹

Formerly it was held, that by the mere expiration of the term of redemption the right of the creditor became absolute and irredeemable, except in cases where, on equitable grounds, the debtor should still be permitted to redeem. But an opposite doctrine was afterwards sanctioned by a determination of the Court of Session. On a very ample discussion, it was solemnly held that the debtor has a right to redeem at any time previous to a decree of declarator of expiry of the legal.² Since that time the point has been considered as fixed.³ It must not, however, be concealed, that doubts have been entertained respecting this doctrine by judges whose opinions are entitled to the greatest respect. In a case which occurred in 1811, the late Lord Meadowbank took occasion to say, that even at the hazard of encountering a principle which ought to be sacred,—namely, that uniformity should be preserved in decisions,—it well deserved consideration whether the above rule did not shake [706] one of still greater importance, undermining the security of the proprietors of land? He stated it as a fundamental rule of Scottish law, that property should stand secure against latent challenges; and that, on the whole, it were wiser and better to adhere to this great doctrine, with all its consequences, than to follow a determination which he considered as proceeding on unsound reasoning: that the right of the creditor is not in the nature of a penal foreclosure of the debtor, but a right of property under a power of redemption within a certain period. To this opinion Lord Newton assented. But, on the other hand, Lord Robertson, Lord Glenlee, Lord Justice-Clerk Boyle, and Lord Craigie, held that the rule had been well settled, and ought to be adhered to, both as a precedent and on principle; and that after the confirmation it had received in the case of Ormiston, decided under Lord President Blair, it was not to be questioned.⁴

¹ In examining the cases, it will be found, 1. That in *Lan-dales v Carmichael*, 1794, Bell's Ca. 109, there was a *pluris petitio* in the adjudication. 2. That in the case of *Bracken-ridge*, in 1809, n. r., the proceedings in the declarator were objectionable, as against a minor without calling his tutors. 3. That in *M'Lellan v M'Rae*, 1806, M. App. Adjud. No. 15, the judgment may in some degree be ascribed to the declared purpose of the defender to oppose the declarator, which was defeated by a mistake known to the pursuer or his agent. And, 4. That in *Aitken v Aitken*, Jan. 1809, the debtor was abroad, and, at least during part of the term which had elapsed after the decree of adjudication, a minor.

² *Campbell v Scotland & Jack*, 1794, M. 321.

³ *Ormiston v Hill*, 7 Nov. 1809, Fac. Coll. 155.

⁴ *Stewart v Lindsay*, 26 Nov. 1811. This case is not reported; but it seems to be a great deal too important to be left unnoticed. [See 15 F. C. 155, 439.]

I do not know that Lord Chancellor Eldon was aware of this case when he decided the case of the Duke of Athole in 1815. But he took occasion then to say, that 'he could not

perceive where, in what statute at least, is to be found prescribed the necessity for a declarator of the expiry of the legal.' And speaking by analogy, he added: 'With reference to what passes in our own courts, if you consider an adjudication as in the nature of a mortgage, the practice is familiar enough. By our mortgages the money is to be paid within a given time; and if it be not paid within the time, the instrument upon the face of it declares that the title of the mortgager is gone. But we nevertheless hold that the title of the mortgager is not gone, without a judgment of a court of equity that it is gone. And accordingly, when a party wishes to have that title which upon the face of it is declared to be absolute, in substance and in fact absolute, he applies to a court of equity for (I may use the very words) a declarator of the expiry of the legal; that is, to have it declared that if the other party does not pay the money in six months he is totally foreclosed; and that which is described in the instrument as a legal title shall be considered as an equitable title also. But where length of time is to form the title, although there be no such decree of foreclosure, no such

But although it must now be held as law, that the mere expiration of the legal term of redemption will not be enough to foreclose the debtor, it remains as a very important question, whether something less than a decree of declarator may not be sufficient? And, 1. It is settled that an adjudication followed by charter and sasine, and forty years' possession subsequently to the expiration of the legal, makes a good irredeemable title to land. It must be admitted that the point has not been settled by a series of solemn determinations; but a rule has long been established, uniformly assumed, and granted in all discussions, and incorporated with the practical jurisprudence and conveyancing of Scotland, that a charter of adjudication, with sasine and possession for forty years after expiration of the legal, has the full effect of an irredeemable right to land. This rule has for nearly half a century been understood as settled; and as such I well remember to have heard it laid down by the late Lord Justice-Clerk Macqueen, the greatest feudal lawyer of modern times. In the case of *Gedd v Baker*,¹ it seems to have been held, 1. That within the forty years it was competent to prove payment or satisfaction of the debt within the legal; 2. That the expiration of forty years after sasine saved the creditor adjudger from any challenge on the ground of objection to the sasine; and, 3. That it would require the expiration of forty years from the end of the legal term to secure the creditor adjudger from all challenge. The doctrine was, without contradiction, affirmed in a case in 1758.² In a case in 1791, judgment proceeded on the assumption that a charter of adjudication, with infeftment and possession for forty years after expiration of the legal, would, without a decree of declarator, have [707] been a perfectly good title.³ In a still later case, in 1809, the same doctrine was delivered as law under Lord President Blair, a judge eminently qualified to determine on matters of feudal law. The doctrine reported as delivered in that case was, 'That it must now be considered as settled law, that to convert an adjudication into an irredeemable right, and extinguish the right of the reverser, it is necessary that the adjudger shall either obtain decree in a declarator of expiry of the legal, or regularly invest himself with charter and sasine upon the adjudication, and possess thereon for forty years.'⁴ But besides these cases, there are two in which the question was directly determined.⁵

Thus, during a long series of years, and in every case where the point had been stated in argument or raised for decision, it has been assumed at the bar and on the bench, or expressly decided by the Court, that the right of the debtor to redeem an adjudication is extinguished by the expiration of the legal, followed by forty years' possession on charter

declarator, if I may say so, of the expiry of the legal; yet if there is an adverse possession for twenty years, that shuts out all question, and dispenses with any such decree or declarator; and my present impression is that it may be so in Scotland.' *General Robertson v D. of Athole*, 10 May 1815, 3 Dow 114.

¹ *Gedd v Baker*, 1740, M. 10789. Elchies, Adjudication, No. 28; Prescr. No. 22.

² *Anderson v Nasmyth*, 1758, M. 10676.

³ *Caitcheon v Ramsay*, 1791, M. 10810.

⁴ *Ormiston v Hill*, 7 Feb. 1809, 15 Fac. Coll. 155.

⁵ *Johnston v Balfour*, 1743, 1 Falconer 94, M. 10789. This is reported as a direct determination that a charter of adjudication, with sasine and forty years' possession after expiration of the legal term, is a good irredeemable title. But the report has been said to be incorrect; in proof of which reference was made to Lord Elchies. That eminent judge, however, has reported it the same way in his Dictionary, *voce* Prescription, No. 26. It is only in his Notes that an account somewhat different is said to be given, of which, however, it is not easy to perceive the inconsistency. And on examining the papers, I found that on both sides the doctrine in law was held undeniable; the only doubt being whether the fact of

possession, as under the charter of adjudication, was sufficiently proved.

Spence v Bruce, 21 Jan. 1807. The action was brought to recover an estate which had been adjudged, and where a charter of adjudication with sasine, in March 1747, had been followed by possession for forty years. The chief question was, Whether possession had in fact followed *on this title?* for the possession having been by a tenant whose lease had been granted jointly by the person in the right of the adjudication, and by one holding a right of liferent, it was doubted whether it was to be held as the possession of the adjudger. The chief distinction, in short, between this case and that of *Johnston and Balfour* was that the doctrine in law, which was taken for granted in that case on both sides of the bar, was in this case discussed, and an attempt made to establish a distinction on the ground of the decision in *Scotland and Jack's* case. The judges held, 1. That the possession was sufficiently proved to have originated and continued under the adjudger; and, 2. That the positive prescription applied so as to complete the adjudger's right.

My note of this case I find confirmed by that of Baron Hume.

and sasine. This rule has accordingly been held by conveyancers as settled; and in many parts of the country, particularly in the north, but also in Mid-Lothian and in Ayrshire, many valuable estates rest upon titles no better than a charter of adjudication and sasine, confirmed by prescription; and finally, the doctrine has received the sanction of the House of Lords, after a careful inquiry on the part of Lord Chancellor Eldon, and may now be regarded as settled.¹

[708] If the right of the debtor is to be considered as grounded in equity merely, he should be barred by personal exception, wherever he has consented to, or acquiesced in, any extraordinary improvements made by the creditor in possession after the legal. But this point cannot be considered as settled; nor is there, indeed, any authority to be found on the subject, on which reliance can be placed.

Adjudications for debt are either, 1. Adjudications for enforcing payment of debt; 2. Adjudications in security merely; or, 3. Adjudications on *debita fundi*.

SECTION II.

ADJUDICATIONS FOR COMPELLING PAYMENT OF DEBT.

The common adjudication is that of which the history has been sketched in the preceding section. It is the ordinary form by which a creditor, for a debt already due, attaches the land or other heritable property of his debtor, for operating payment of what actually is due to him.

¹ *General Robertson v D. of Athole*, 10 May 1815, 3 Dow 114. In this case, a decree of adjudication was obtained in 1677 against Robertson of Lude, comprehending the lands of Inchmagreenoch, and those of Clunes and Strathgroy. In the former, the adjudger was infeft on a charter of adjudication from the superior; in the latter, he was not infeft. In 1688 the adjudication and lands were conveyed to the Marquis of Athole, who was superior of Clunes and Strathgroy. Those lands were, in the subsequent progress of the titles, included in the Crown charters of the earldom: Inchmagreenoch specially, as acquired by charter of adjudication; Clunes and Strathgroy only generally, under the description of the earldom. Such charters were passed in 1691 and 1725, and were followed by sasine and forty years' possession. The Court of Session decided that the Duke had a good title by prescription.

In the House of Lords, judgment was suspended for further inquiries into the law of Scotland on two points, which I shall state in the words of a note drawn up by Mr. Leach, now Master of the Rolls, to be transmitted to Scotland for information. '1. As to Inchmagreenoch:—If a creditor have adjudication against the land of his debtor, and afterwards obtain a charter of adjudication from the superior, and infeftment follow thereon, and the creditor continue in possession for forty years after the expiry of the legal, but without any declaration of that expiry, Does the creditor acquire by prescription an irredeemable title by force of the Act 1617? The short argument against the irredeemable title is, that the Act of 1617 is to confirm the title appearing upon the heritable infeftment by force of a possession of forty years, and not to convert, by force of that possession, an apparent redeemable title into an irredeemable title. The Lord Chancellor asks, How is the case of an adjudication distinguished from a wadset, where it is stipulated that, if the debt be not

paid at a day certain, the right of reversion shall be irritated; in which latter case it is admitted, that if the creditor continued in possession for forty years from the expiration of the term of redemption, without any previous declarator, the right of the reverser is cut off by prescription? The supposed answer is, that the difference is found in the stipulation for redemption at a particular day, etc. For if the money be not paid at the day, the title of the creditor, as it appears upon the heritable infeftment, is irredeemable, and therefore is within the protection of the Act 1617.

'2. As to Clunes and Strathgroy:—The superiority of land is part of an earldom. The superior obtains an adjudication against his vassal, and enters into possession of the land upon his adjudication. All subsequent infeftments are of the earldom generally, and no particular mention made of the adjudged lands, and no declarator of the expiry of the legal. Does the superior, by forty years' possession after the expiry of the legal, acquire, by the Act of 1617, an irredeemable title to these lands? It is objected that the Act of 1617 gives no title by prescription except after the land is enjoyed by virtue of an heritable infeftment; and that in this case there never was an infeftment of the property, or *dominium utile*, after the adjudication, but that the infeftments were of the superiority only.'

In Mr. Dow's report of this case, the judgment seems to imply that a charter of adjudication without infeftment is sufficient to constitute an irredeemable right. But that is a point which I do not understand to have been expressly determined, and which seems to demand a great deal of consideration. For while there is no authority for such a doctrine in the books of Scottish law, the simple question cannot be taken to have been determined in a case which, on that branch of the contest, admitted of so much reasoning on various points.

Three cases may be distinguished, as leading to variations on the form and proceedings in common adjudications for payment of debt: 1. Where the debtor is alive, and the subject to be adjudged is his own proper estate; 2. Where the debtor has succeeded to an heritable estate, but has not hitherto completed his titles to it; and, 3. Where the debtor has died, leaving an estate.

SUBSECTION I.—ADJUDICATION OF PROPERTY VESTED IN THE DEBTOR.

The adjudication of property feudally vested in the debtor himself, is the simplest species of the adjudication; and as it is the form which, in the preliminary sketch of this diligence, has been kept in view, no further explanation will be necessary.

It may, however, be observed, that no adjudication is competent of a *spes successionis*.¹

SUBSECTION II.—ADJUDICATION OF PROPERTY TO WHICH THE DEBTOR HAS SUCCEEDED.

The difficulty of the second case arises from a peculiarity of the Scottish law of [709] succession. The right of the heir, in Scotland, is not completed by the mere operation of law. Certain forms are necessary, both to enable the heir to convey voluntarily the property to which he succeeds, and to entitle his creditors to attach it.

The estate descendible to the heir consists of subjects vested feudally, or of subjects not feudally vested in the ancestor; and these are carried to the heir by different forms of investiture. If the property was vested by sasine in the ancestor, the heir either obtains an entry voluntarily from the feudal superior, by precept of *clare constat*; or he purchases a brieve, gets himself served heir in special as to that property; and, upon the retour of the verdict, proceeds to compel the superior to grant him a charter, and so to complete his right by infeftment. If the ancestor have neglected to take sasine, a general service puts the heir precisely in his place; and he proceeds to complete his title by executing the procuratory of resignation or precept of sasine, the warrants under which a feudal investiture is bestowed; or if the ancestor's title contained neither of these warrants, he proceeds to supply their place by adjudging in implement.

A creditor, whose debtor has succeeded to heritable property, can have no difficulty in adjudging, if the debtor choose voluntarily to take up the succession: For,

1. When the debtor has served himself as heir in general, all the property unvested by sasine in the ancestor is open to adjudication by his creditors, the personal title to the feudal subjects being carried by the adjudication; and the adjudger being equally well entitled, as the heir himself would have been, to complete his feudal investiture upon the unexecuted warrants for sasine.

2. When the debtor has served himself heir in special, and completed his feudal title by sasine, to lands in which his predecessor was vested, the case as to the adjudger is the same as if the debtor had been originally proprietor of the estate; nay, even where the heir has not been actually infeft, but, having served heir in special, has charged his superior to enter him, the creditor may proceed to adjudge as if the title were complete.²

But the difficulty was to find a remedy where the debtor did not choose to enter to his ancestor's estate. There was a time when no remedy for such a case seems to have been

¹ *Beaton & M'Andrew v M'Donald*, 1821, 1 S. 49, N. E. 53. This was an attempt to adjudge such parts of the lands, etc., with all right, title, etc., as Alexander M'Donald, younger, has, or may claim, as heir-apparent or otherwise, of A. M'Donald, his father. The father was a lunatic, and in right of the lands. The adjudication was dismissed by Lord Allover as incompetent, 'in respect that, although Alexander

M'Donald is the eldest son of his father, there is no right vested in him as his heir-apparent, the right not opening till the father's death; and in respect that this proceeding is altogether new, in so far as the Lord Ordinary knows, in the law of Scotland, in which there has been no previous attempt made to adjudge a *spes successionis*.'

² *Dickson*, 25 Nov. 1629, Durie 469.

known; when the refusal or non-compliance of the heir with the request of his creditors, that he should take up the succession, and enable them to attach it, was irremediable by the creditors. But a statute in 1540, c. 106, which was passed with a view to the creditors of the ancestor only, was by a declaratory Act in 1621 applied to this case of the heir refusing to do justice to his creditors by entering to his ancestor.¹ The mode in which this is accomplished is so fully described in the former statute, that a less minute explanation will be sufficient.

1. Where the land has been invested by infeftment in the ancestor, the creditor, upon production of his grounds of debt, obtains letters of special charge from the signet; which, proceeding upon a narrative of the debt, and of the heir's refusal to enter, to the disappointment [710] of the complainer's diligence, authorize a charge against the debtor to enter heir in special to the predecessor, and to complete his right within forty days, so that the complainer may obtain execution by adjudication. The penalty or certification if he fail is, that the complainer shall be allowed to proceed with his diligence as if the debtor were actually entered.

2. Where the subject has not been feudally vested in the predecessor, the form is different; and a distinction, in name, accompanies it. As the former was called a *special* charge, so this is called a *general special* charge; the general special charge,—although it points only to a general service,—containing a specification of those subjects which are to be adjudged by the creditor, and which must be thus enumerated, in order to give effect to the certification.

3. The heir is not obliged to answer to these charges before the expiration of the *annus deliberandi*; and consequently the statutory certification cannot till then take effect, unless it can be shown that the debtor has already assumed the character of heir, by possessing the estate, or granting conveyances of it.²

4. After the days of the charge are expired (provided the heir has not renounced the succession), the creditor is entitled to proceed with his adjudication as if the heir were entered. The adjudication differs neither in nature nor in proceeding from adjudication in the simple case; and the right of the creditor is to be completed in the same way as if the debtor had been served heir in special.

5. In the case (to be immediately considered) of an heir succeeding to one whose debts expose the estate to the diligence of his creditors, the heir may wish to renounce the succession, and not to undertake even that implied and legal responsibility which the statute has declared to be the result of disobeying a special charge. But there is a manifest objection to such renunciation by a debtor who has succeeded to a valuable estate.³ Between the case of an heir who is required to enter upon the succession of his ancestor, in order to facilitate the payment of that ancestor's creditors, and the case now under consideration,

¹ See 1540, c. 106; and 1681, c. 27.

² This long delay, although undoubtedly very inconvenient, is not so dangerous as it may at first sight appear to be, since there is a legal preference given to the creditors of the deceased using diligence against the estate any time within three years from his death, over the creditors of the heir (see below, p. 764), and since none other of the heir's creditors can get their diligence forward any faster. There no doubt is one danger, viz. that the heir may voluntarily grant a conveyance to some one of the creditors, to the prejudice of those of his own creditors who mean to adjudge, and whose hands are tied up by the law. But besides the diligence of inhibition, prohibiting all voluntary conveyances, not only of subjects vested in the debtor, but of those which shall afterwards be acquired by him, there is a special prohibition of such deeds within a year from the death. See below, p. 770.

[By the Titles to Land Consolidation Act, the summons of adjudication is now held to imply a special or general special charge, and the *annus deliberandi* is reduced to six months.]

³ The doubt whether renunciation be competent in this case, is as old as the time of Lord Durie. Six years after the passing of the statute of 1621, by which the law of special charge was declared applicable to the heir's own debt, as well as to the ancestor's, it was questioned, in a case between the laird of Carse and his brother, Whether a renunciation was in such a case competent? The debt being established by a registered obligation, the laird of Carse was charged, under the statute 1621, c. 27, to enter heir in special of his father to certain lands. The laird suspended, and gave in a renunciation, which was opposed. The Lords found that he might lawfully renounce to be heir. 23 March 1627, Durie 294.

there is a marked distinction. No man can be forced to undertake, for the benefit of those to whom he owes no duty, a succession which implies burdens; but a person who is owing debts cannot renounce a succession which has opened to him, and which may supply the means of paying his debts, without unjustly bestowing upon the next heir property to which his own creditors are entitled. Another main distinction between the cases is this, that the *creditors of the ancestor* are not deprived of his estate by the refusal of the heir to enter, although compliance might have facilitated their operations: for by law they are entitled in that case to proceed directly against the *hæreditas jacens*, or unvested property itself, as coming in place of their debtor; whereas the *creditors of the heir* can attach the [711] succession only through the person of their debtor. A renunciation in the former case is therefore of little consequence; in the latter, it deprives the creditors of the fund which ought to be open to them.

SUBSECTION III.—ADJUDICATION OF THE DEBTOR'S PROPERTY AFTER HIS DEATH.

In Scotland, the estate of a debtor is in all situations liable to the diligence of his creditors, both during his life and after his death, unless it be held by him under such restraints as deprive his creditors of their remedy against it. The natural method of recovering payment of debt, after the debtor is dead, is by an application to his heir. Should he refuse to pay, the next object of the creditor is to attach in his hands whatever property the ancestor may have left; or, if the heir's titles be not completed, to force him to his election, whether to take up the succession, or to leave it at the disposal of the law, for the benefit of the creditors.

This last object is accomplished, under the operation of the Act 1540, c. 106, already alluded to, by means of charges to enter heir. This method of calling upon the heir to enter, there could have been no hesitation in making absolute, without leaving to him a choice, had it not been for the principle, that an heir who enters to the succession of his ancestor becomes personally liable for all his debts.¹

1. If the heir choose to enter to the estate of his ancestor, and to complete his titles to it, the creditors of the ancestor proceed, in the first place, to have their debts fixed against him, as representing their debtor; which is done either voluntarily, by bond, etc., on the part of the heir, or judicially, by the judgment or decree of a court. They then proceed to adjudge the estate, as if the heir had been originally their debtor and the proprietor of the estate; and they have this peculiar privilege over the creditors of the heir himself, that

¹ In the Roman law, and in that of all the nations of modern Europe who have adopted the principles of the Roman jurisprudence, the entry to the succession of a person deceased is equivalent to the assumption of his personal responsibility. The heir succeeds to all the rights, active and passive, of the predecessor; he is proprietor of all that belonged to him, and debtor in all his debts. The hardship of this universal representation, this liability to all the predecessor's debts, however much exceeding the amount of his estate, led in the Roman law to the establishment of some very important rules for the protection of the heir. 1. It was necessary that he should declare, either expressly by *aditio hæreditatis*, or tacitly by *gestio pro hærede*, that he accepted of the succession. 2. He was not required to make this declaration till a year after his predecessor's death, being allowed this term to make his inquiries, and to deliberate upon the propriety of risking the representation. And, 3. If at the end of that time he should not be satisfied of his safety, he was entitled to enter heir *cum beneficio inventarii*, to make up an inventory of the property to which he succeeded,

and beyond the extent of this inventory he was not liable. In France, where the Roman law was much regarded, the provisions for this case were in essence the same. There was only this difference in form, that the right of the legal heir was held to be vested in him from the moment of his predecessor's death, so that a renunciation was necessary to clear him from the consequences of the succession, and relieve him from the debts of the ancestor. It was only the heir by institution who was required to declare his acceptance. Pothier, *Traité des Successions*, 230; *ibid.* 126.

In Scotland the law is the same with that of Rome and of France, in giving the heir a year to deliberate, and in subjecting him to an universal representation, unless where the entry is made by inventory; but it agrees with the Roman rather than with the French law in requiring a formal entry by the heir. Indeed, it would appear that in Scotland, even more than in Rome, a formal entry as heir is necessary. The passive representation may indeed be incurred tacitly, as by *gestio pro hærede*, but the heir has not a full active title without a formal entry.

their adjudications, if completed within three years of their debtor's death, give them a preference upon the ancestor's estate.

2. If the heir, either tacitly or by express act, assume the general succession; if he behave as heir, and, taking the benefit, render himself liable as representative for his ancestor's debts; the creditors of the ancestor, founding upon that representation, bring their actions of debt against him without any previous charge; and upon obtaining decrees, [712] transferring the ancestor's debts against him, they proceed as already described, and force the heir to complete his titles, in order to validate their adjudication of the property. They charge him upon a special or a general special charge, according to the state of the titles; and as he cannot in such a case be allowed to renounce the succession, having already assumed it in general representation, he must either enter, or the certification of the statute 1540, c. 106, will supply the place of an actual entry, and enable the creditors to proceed as if the heir were served in special.

3. If the heir have not assumed the representation, then the creditors of the ancestor are to take measures for obliging him to declare his election. This is done by means of a charge to serve himself heir in general to the debtor, otherwise to be held as heir. This charge cannot, however, be given with effect till the *annus deliberandi* be expired; the heir not being obliged sooner to declare what his resolution may be. The general charge gives the heir forty days for obedience; and it has been settled that the charge may be given so that these forty days shall run along with the *annus deliberandi*.¹

4. Whether the heir choose to answer this charge or not, the creditors of the ancestor may, immediately after the expiration of the forty days, proceed with their action of constitution, for the purpose of transferring the ancestor's debt against the heir. The heir may in this action appear and answer the charge, by renouncing the succession; but if he do not, judgment is pronounced against him, as lawfully charged to enter heir to his ancestor. If he appear, and defend himself against the debt upon any plea, as in right of the ancestor, this is an assumption of the passive title in respect to that particular debt; but it will not give a right to other creditors to make him universally liable.² Neither of these passive titles, in short, reach further than the special debt in question; but as to that debt, they subject the heir, in his person and in his own estate, as well as in his right to the estate of his ancestor. If the decree on the general charge, however, be in absence, the heir will be allowed to suspend it on producing a renunciation; at least to suspend it in so far as it subjects him or his estate for his ancestor's debts. The heir cannot be deprived of this right of suspension, unless some of his own creditors have attached the ancestor's estate; in which case the heir must clear off the debt before his renunciation will be admitted.³

We shall see hereafter that there may be a necessity for hurrying on the proceedings, in order to preserve to the creditors of the ancestor the preference which law has conferred on certain conditions. This will deserve attention in selecting the court in which the action of constitution is to be raised.⁴

5. The debt being fixed against the heir by this decree, when he has not chosen to renounce the succession, the creditors of course proceed to charge him to enter in special, either by special or general special charge. The special charge cannot be given till the decree of constitution be pronounced; because 'the special charge is a part of and preparation for the execution of a sentence, and so cannot precede the sentence.'⁵ Yet it is no objection that the special charge was executed before *extracting* the decree of constitu-

¹ *M'Culloch v Marshall*, 1628, M. 2168, Durie 376. [*M'Kintosh v Macqueen*, 7 S. 882.]

² *Auchintoul v Innes*, 1674, M. 12055; *Carfrae v Telfer*, 1675, M. 9711.

³ *Ersk.* iii. 8. 93.

⁴ See below, p. 767.

⁵ On this ground, a comprizing following on a special charge raised and executed before the decree of constitution was found null. *E. of Cassillis v M'Martin*, 1627, M. 2167.

tion; it having been actually pronounced.¹ It is by the decree of constitution that the debt is fixed upon the heir, and therefore it is proper and regular to recite that decree [713] in the letters of special charge; but the omission of this founds no objection against an adjudication, provided the decree was actually obtained before raising the letters.²

6. Where the heir chooses to renounce, the proceeding is somewhat different. The estate of the ancestor being then abandoned by him who has the right of succession, the creditors are entitled to attach it for their debt. Upon production of the renunciation, all personal conclusion against the heir is discharged, and the heir absolved from the action; and decree is pronounced simply to the effect of declaring the amount of the debt which is to be a burden on the succession. This is called a decree *cognitionis causa contra hæreditatem jacentem et bona mobilia*; and after it has been pronounced, a summons of adjudication is raised, calling upon the heir and all others having interest to hear and see the lands, etc. adjudged to belong to the creditor, in payment of his debt. The decree of adjudication, thus pronounced, has the same effect with the adjudication for debt against the debtor's own estate. It entitles the creditor to complete his right by infeftment, and to enter into possession. This adjudication was by 1621, c. 7, first declared redeemable by posterior creditors, either of the ancestor or of the heir. Prior to that Act, it was doubted whether the heir himself could redeem; but it is thereby fixed that he cannot, unless minor at the date of the renunciation. The method of redeeming, if he wish to do so, is to grant a trust-bond, on which the trustee adjudging may redeem.³

7. It may be observed, before leaving this point, that by the Act 1540, c. 106, it is declared that the heir, in order to be subjected to this sort of coercion, shall 'be of perfect age.' But M'Kenzie remarks,⁴ that minors may notwithstanding 'be validly charged to enter heir *de practica*;' and that 'by our constant practice they may be charged, since this is necessary for completing the creditor's diligence.' But, at least, if such charge be competent, no effectual proceedings can take place in the action of constitution, unless either tutors or curators have been cited; or, if there be none, the creditor take care to have a tutor *ad litem* appointed to watch over the interests of the pupil.

8. It may happen that the Crown, as *ultimus hæres*, is the successor of the deceased debtor; and it seems doubtful how the Crown can be subjected to the operation of the statutes under consideration. Both Craig⁵ and Stair⁶ hold that the debt may be made effectual *contra hæreditatem jacentem* by adjudication, calling the officers of state and the king's donator. And more recently this question having been tried, the Court held a summons competent against the officers of state, concluding for a decree of cognition for constituting the debt, and adjudication of the estate of a bastard debtor.⁷ It is not, therefore, by a charge against the officers of state that the creditor is to proceed; for the Crown succeeds *ipso jure coronæ*, and the officers of state may at once be called in an action for constituting the debt, and fixing it as a debt on the succession.

Of the forms of attaching the estate of a deceased debtor, that in which the heir takes up the succession, and that in which he subjects himself to the diligence authorized by 1540, c. 106, were regular and known forms of diligence by appraising in 1672; and when the Legislature in that year substituted adjudications before the Court of Session, instead of the old form of appraising, the adjudications in these cases were, along with the simple adjudication for debt, included in the law. The third kind of diligence, *contra hæreditatem jacentem*, never appeared in the form of an appraising, but from the first in the shape of an action [714] for adjudging the *hæreditas jacens* to belong to the creditor. When the Legislature then substituted adjudications in place of appraisings, and declared the Court of Session the only

¹ *Catrine's Crs. v Baird*, 1738, M. 107, 2173.

² *Sir Thomas Maxwell v Paterson*, 1751, M. 176.

³ *Ersk. ii.* 12. 49.

⁴ *Obs. James v. Parl.* 7, Act 106.

⁵ *Craig ii.* 17. 12 and 16.

⁶ *Stair iii.* 3. 46.

⁷ *Reid v Officers of State*, 1747, M. 1355, Elch. Bastard, No. 1.

competent judicatory for those substituted adjudications, it did not mean (at least so it has been decided¹) to include adjudications *contra hæreditatem jacentem*; and they, accordingly, have always been held competent before the sheriff, as all apprizings formerly were. This is the first peculiarity that deserves notice in the adjudication *contra hæreditatem jacentem*. A second is, that in adjudications *contra hæreditatem jacentem* before the sheriff there is no absolute provision for recording or publishing. The abbreviate of the adjudication, which enters upon the record, is a mere substitute for the allowance of the appricing. But there never was any decree conform, or allowance, pronounced upon adjudications *contra hæreditatem jacentem*.² When abbreviates, therefore, were introduced instead of allowances, by the regulations 1695, art. 24, adjudications *contra hæreditatem jacentem* were not included. This omission, in so far as regarded such adjudications when led before the Court of Session, was supplied by the additional regulations 'concerning the Session,' 1696, art. 3; but the remedy extended not to those which proceeded before the sheriff. It has, indeed, been the practice to have abbreviates signed by the sheriff, and to record them, like the abbreviates of the Court of Session, in the register of adjudications; but the judges have thought themselves entitled to go no further than to refuse issuing letters of horning against superiors when this has been omitted.³

SECTION III.

ADJUDICATION IN SECURITY.

Before adjudications were substituted for apprizings, this process had been adopted by the Court of Session as an equitable remedy in cases where appricing was not competent. The adjudication in security was thus introduced; and with the exception of the *pari passu* preference, none of the statutory provisions applicable to ordinary adjudications reach this diligence.

We have already seen that, by the law of Scotland, creditors in future and even in contingent debts are entitled to take measures of security against the impending insolvency of their debtors, and to insist that a share of his inadequate fund shall at least be set apart for their satisfaction against their debt becoming due. The grounds and principles of this doctrine have already been explained.⁴ The adjudication in security is the remedy by which the debt of a future or contingent creditor, or of a creditor who is not ready to adjudge for payment, is secured against the other creditors. The libel of adjudication states the nature of the debt, the impending insolvency of the debtor, the requisition for proper security; and so concludes, that 'in security of the sums mentioned, the lands should be adjudged from [715] the said defender, and decerned and ordained to belong to the pursuer, heritably, in security and satisfaction of the said sums.'

1. The legal of this adjudication does not expire,⁵ or rather there is no legal. It is from first to last a redeemable right.

2. As a prætorian remedy in equity, adjudication in security may be applied for where the debt is not yet due, or where it is contingent, or where the creditor has it not in his

¹ *Ker v Primrose*, 1709, M. 46.

² They never had the form of appricing, but were from the first proper actions of adjudication, in order to the execution of which against the superior a separate and accompanying action was at first raised, though afterwards a conclusion for decree against the superior was thrown into the summons of adjudication *contra hæreditatem jacentem* itself.

³ *Murdoch King*, petitioner, 1742, M. 8135, 5743; *Elchies*, Adjud. No. 35. In *Guthrie's Children*: 'Abbreviates are

necessary now, by the regulations 1696, upon adjudications in implement on decrees *cognitionis causa*, as well as in adjudication introduced in place of appricing by 1672; and therefore horning against superiors was refused on such an adjudication without an abbreviate, *me referente*.' 1741, *Elchies*, Adjud. No. 29.

⁴ See above, p. 332 et seq.

⁵ *Strachan v Strachans*, 1752, *Elchies*, Adjud. No. 41; *Sir T. Wallace Dunlop's Crs. v Brown & Collinson*, 1781, M. 62; *M'Kinnel's Crs. v Goldie*, 1797, M. 312.

power to establish the amount of it; or perhaps, also, where the creditor has no proof of his debt instantaneously to produce.¹

In such cases apprizings were incompetent,² and the lawfulness of adjudications was once doubted on the analogy of apprizings; but, 1st, An adjudication by a cautioner, in security of his relief, was found to have the same effect with an infeftment in relief;³ 2^d, So of an adjudication on a bond, payable on the granter's death;⁴ and, 3^d, An adjudication in security 'for a daughter's bond of provision was found entitled to proceed and compete with the other creditors, though the term of payment was not till her age of eighteen years,' and posterior to the competition.⁵

3. This remedy, however, will not be given in all cases, but only where there is a manifest call for it in justice, as on occasion of impending insolvency, or where other creditors have begun to adjudge, and there is danger of losing the *pari passu* preference.⁶

4. On principle, it might seem doubtful whether, if the first adjudications be in security only, intimation be necessary, since this is a sort of adjudication which never can carry off the estate, and of which the legal does not expire. But still it will be remembered that a preferable security may be constituted; and the words both of the Act 1661, c. 62, extending all the rules of that Act along with the *pari passu* preference to adjudications for debt as well as to comprizings, and the words of the recent statutes,⁷ put this beyond all doubt.

5. The adjudication in security is to be completed like the ordinary adjudication for payment; the right, of course, being merely a right redeemable, and not capable of becoming absolute. There is no legal in such adjudications.

SECTION IV.

ADJUDICATIONS UPON DEBITA FUNDI.

The adjudication of a feudal subject for personal debt confers a real right only in consequence of the sasine which follows upon it. But adjudication may be led for debts which are already made real upon the estate, and which form, independently of any [716] adjudication, preferable claims upon it. The purpose of leading an adjudication in such a case is not to give the debtor further security, or even to obtain payment of the real debt, but to accumulate the debt, with its interest, into a capital bearing interest. In so far as concerns the real debt, and interest due on it, these adjudications are said to be preferable to all others. But, to speak more correctly, the adjudication does not deprive them of their natural preference as real debts.⁸ The adjudger has no preference over other adjudgers for the interest of the accumulated sum in his adjudication, since that is not a real, but merely a personal debt, being interest upon interest.

Debita fundi, which thus are entitled to a preference over all common adjudications, are such as form a real burden upon the lands, whether constituted by law or by agreement. Debts secured upon land by heritable bond, with the interest upon them; debts forming burdens by reservation; the duties due to the superior,—all are real debts, entitling

¹ *M'Niel's Crs. v Saddler*, 1794, M. 122.

² *E. of Kinghorn*, 1631, M. 96.

³ *Burnet v Veitch's Crs.*, 1685, M. 140.

⁴ *Blair*, 1771, Forbes 523.

⁵ *Mrs. Margaret Lyon v the Crs. of Easterogle*, 1724, M. 8150. See also *Crs. of Sir T. Wallace Dunlop*, 1781, M. 62.

⁶ *Nisbet v Stirling*, 1759, M. 59. This was an adjudication in security on a provision in favour of a daughter, payable at her mother's death, brought against the heir of the granter,

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a young man in trade, and so exposed to hazard. The Court held, that 'an adjudication in security before the term of payment of the sum adjudged for is an extraordinary remedy, not allowed except when the creditor is in danger otherwise of losing his debt.' And as in this case there was no sufficient ground of hazard alleged, the Court assolvied the heir.

See *Stair* i. 17. 15.

⁷ 54 Geo. III. c. 137, sec. 9.

⁸ They are expressly excepted from 1661, c. 62.

the holders of them to preference. But in order to raise the interest due upon arrears into a real debt, or *debitum fundi*, so as to be the ground of a preferable adjudication, it is necessary to use the diligence of 'poining the ground.' This, as already explained, is an action in which the proprietor of the ground, and tenants, are cited, and which concludes for decree and warrant to point the moveables on the lands, and for adjudication of the ground-right, in payment of the arrears due; and it has the effect of converting the arrears into a principal sum, bearing interest, and really secured. An adjudication following on this, and accumulating the arrears which have been the subject of this diligence, bestows a preference for the interest of the accumulated sum, as being now converted into a real debt.¹ It does not seem to be necessary to have a decree of constitution against the heir, in order to found an adjudication on a *debitum fundi*; for letters of poining of the ground proceed without any constitution, upon merely calling the apparent heir for his interest;² and the poining of the ground is a direct warrant for the adjudication.

SECTION V.

COMMENTARY ON THE STATUTES FOR REGULATING PREFERENCES AMONG ADJUDGING CREDITORS.

Such being the nature of the diligence of adjudication when used by a single creditor, those regulations next demand attention by which the preferences among adjudging creditors are regulated. In this inquiry, two cases are to be distinguished: 1. Where the adjudgers are all in one class as creditors of the same person; and, 2. Where there are two classes of creditors—the one of the ancestor, the other of the heir.

SUBSECTION I.—ADJUDICATIONS BY CREDITORS OF THE SAME DEBTOR.

Where the adjudgers are all creditors originally of the same debtor, whether the property to be adjudged belong to that debtor, or descend to him from his ancestor, or be the proper estate of the debtor *in hæreditate jacente*, their diligence is subject to the operation of certain statutes introducing equality among them. Beyond the range of those statutes the adjudications take their station in the ranking, like voluntary preferences, according to the dates of their completion.

I.—PARI PASSU PREFERENCE WHILE THE DEBTOR IS ALIVE.

[717] The spirit of the law is, that every creditor who shall obtain decree of adjudication within year and day from the date of the decree pronounced in that adjudication which shall be first rendered complete, shall be entitled to share equally with the first adjudger. At its introduction this law was very imperfect. But by certain provisions for the publication of the first adjudication, so as to put other creditors on their guard, and by provisions also for enabling creditors at less expense to take the benefit of the law, it was improved into a useful, though still a very clumsy and cumbrous, remedy against inequality.

The equalization, or *pari passu* preference of diligence against land, was first introduced by the following section of the Act 1661, c. 62: 'And because oftentimes creditors, in regard they live at distance, or upon other occasions, are prejudged and preveened by the more timeous diligence of other creditors, so that before they can know the condition of the common debtor his estate is comprized, and the posterior comprizers have only right to the legal reversion, which may and doth often prove ineffectual to them, not being able

¹ Ersk. ii. 8. 37.

² *Oliphant v Hamilton*, 1667, M. 2171.

to satisfy and redeem the prior comprizings (their means and money being in the hands of the common debtor) : Therefore it is statute and ordained, that all comprizings deduced since the first day of January one thousand six hundred and fifty-two years, *before* the first effectual comprizing, or *after*, but within year and day of the same, shall come in *pari passu* together, as if one comprizing had been deduced and obtained for the whole respective sums contained in the foresaid comprizings. And it is declared, that such comprizings as are preferable to all others, in respect of the first real right and infeftment following thereupon, or the first exact diligence for obtaining the same, are and shall be holden the first effectual comprizing, though there be others in date before and anterior to the same : and the foresaid benefit given and introduced hereby, in favours of those whose comprizings are led within the time and in manner foresaid, is only granted and competent in the case of comprizings led since the first day of January one thousand six hundred and fifty-two years, and to be led after the date of thir presents, and for personal debt only, without prejudice alwayes of ground-annuals, annualrents due upon infeftment, and other real debts, and *debita fundi*, and of comprizings therefor of lands and others affected therewith, which shall be effectual and preferable, according to the laws and practick of this kingdom now standing. And it is also provided, that the creditors having right to the first comprizing, except as is above excepted, shall be satisfied by the posterior comprizers, claiming the benefit foresaid, of the whole expense disbursed by them in deducing and expeding the said first comprizing and infeftments thereupon.' The statute afterwards proceeds to enact, 'That the benefit foresaid introduced hereby anent comprizings, shall be extended to adjudications for debt ; so that the creditors at whose instance the same are obtained, and those who have right to redeem the same, shall be in the same case as to the benefite foresaid, as if the said adjudications for debts were comprizings.'

This rule was continued as applicable to adjudication, when by 1672, c. 19, that form of diligence was substituted for apprizing. In 1793 several provisions were made for diminishing the number of adjudications, and lessening the expense.¹ These are continued in the late Act.²

The law on this subject may be explained under these heads : 1. The description of the first effectual adjudication ; 2. The term during which a subsequent adjudication may be led to the effect of conferring an equal right on the creditor ; and, 3. The provisions for rendering this remedy complete, by publishing the first adjudication, and facilitating [718] the proceedings in posterior adjudications.

1. *Description of the first effectual Adjudication.*

As voluntary conveyances and securities can be completed only by sasine where the estate is feudal, so adjudications, in order to stand in competition against such conveyances, must also be completed by sasine. But sasine is not necessary as between one adjudger and another. In this case the statute has declared it to be sufficient if the creditor shall have done diligence for forcing the superior to enter him.³ The statute describes the first

¹ 33 Geo. III. c. 74, secs. 10 and 11.

² 54 Geo. III. c. 137, secs. 8 and 9. [*Infra*, p. 760.]

³ This it may be proper shortly to explain. It has already been stated, that a decree of adjudication is equivalent to a conveyance from the debtor, with procuratory of resignation *in favorem creditoris* ; and that the adjudger is entitled, under his decree of adjudication, to apply to the superior for a charter, upon which sasine may follow. Long before superiors were bound to receive voluntary purchasers, creditors were entitled to demand an entry. Even so early as the time of Alexander II., the superior had his choice of taking the land

himself, or entering the creditor as vassal (Stat. Alex. c. 24, secs. 5 and 7). By statute 1469, c. 37, it was expressly enacted : 'That the overlord sall receive the creditor, or any other buyer, tenant till him, payand to the overlord a zieres male, as the land is sett for the time ; and failzing thereof, that he tak the land till himselfe, and undergang the debt.' This legal obligation upon the superior to enter the apprizor was in ancient times enforced by diligence proceeding against the superior, upon the decree conform, or allowance of the apprizing, the precursor of the abbreviate. At that period the common diligence for enforcing performance of

effectual adjudication to be, 'that upon which infestment shall have followed, or the first exact diligence for obtaining the same.' But it was doubted what should be held as exact diligence for obtaining an infestment. In the simple case, indeed, it was not questioned that a charge to the superior was sufficient; or the presenting of a signature in Exchequer where the Crown was superior. But in a great variety of cases the simplicity of this rule was disturbed; and although the Legislature in 1793¹ swept away all those perplexities, perhaps the spirit and effect of the statute cannot otherwise be so well understood as by a review of the questions which arose under the former law.

1. As, in admitting the charge to the superior to be a due completion of the diligence in all questions with co-adjudgers, the law proceeded merely on the ground that the creditor could do no better, and that such a regulation was necessary to prevent the rights of creditors from being exposed to the caprice or injustice of the superior; it followed, that wherever the creditor could complete his adjudication without applying to the superior, the reason of the law did not apply, and the charge should not be held as an effectual adjudication. Thus, if the debtor's right be still personal, the creditor adjudging may complete his title by taking sasine on the unexecuted precept; the adjudication carrying right to it, and also entitling the adjudger to enforce exhibition of it, for the purpose of completing his infestment.²

[719] 2. Many difficulties arose where the titles of the superior were incomplete. As a superior unentered has, in the eye of law, no feudal character, a charge against him to enter a vassal was nugatory; and our best lawyers required, to the completion of the adjudication, a charge to the superior to get himself also entered in the superiority, that he might be in a capacity to receive the vassal.³ This question of the necessity of charging the superior to enter, came several years ago to be discussed,⁴ when it was said by one of

obligations *ad factum præstandum* was by letters of four forms. They consisted of four different charges, given by officers of the law, under the authority of four warrants successively issued, and increasing in severity of requisition to the last. In the common case of an obligation *ad factum præstandum*, the last of these charges denounced against the debtor, in case of disobedience, all the penalties which the law had appointed for the punishment of rebellion. In the diligence upon the apprizing the penalty was not so formidable: it was merely that if the superior should not, in compliance with the requisition, enter the adjudger, the creditor should be allowed to go to the next superior and receive an entry from him; and so successively up to the Crown, who never refuses to enter a vassal. To prevent superiors from unjustly granting an entry to one adjudger, and refusing it to another, that statute which established the communion among adjudgers declared that diligence against the superiors should be sufficient to complete the adjudication, in so far as respected that competition.

¹ Statute 33 Geo. III. c. 74, sec. 11, continued by 54 Geo. III. c. 137, sec. 11. [See 19 and 20 Vict. c. 91, sec. 6.]

² *Pierce v Limond*, 1791, M. 244. Here several creditors of Ross of Kerse led adjudications. Limond, to complete his adjudication, charged the superior to enter him. Pierce, observing that the debtor, Ross, had never been infest on the disposition in his favour, although it contained precept and procuratory, got possession of the disposition, and took infestment by executing the precept in his own favour as adjudger. This having been done beyond year and day, the question arose, Whether Limond's adjudication was the first effectual, or whether Pierce's was not to be considered as the only effectual adjudication? The Court unanimously held, that

the adjudication at the instance of Henry Pierce was the first effectual one.

See also *Dewar v French*, 6 Dec. 1695, 1 Fount. 684.

³ By 1474, c. 58, in order to remedy the fraudulent lying out of superiors unentered, to the prejudice of their vassals, the superior was to lose his superiority during his life where he did not enter within forty days after requisition to that effect. Sir Thomas Hope, in his *Minor Practicks*, explains the proceeding under this Act to have been by a special charge issued from the Court of Session; upon disobedience to which a summons was issued against the superior and his successors for declaring the right of superiority to be lost, and ordering the next superior to infest the vassal,—a similar process being followed upwards to the Crown (tit. 4, secs. 26, 27). The process was similar in the case of apprizers. Sir Thomas Hope says: 'If the superior be not himself infest in the superiority, in that case the superior must be charged to enter to the superiority within forty days, conform to the order before expressed, in the form introduced in favour of vassals by Act of Parliament of King James III.' (tit. 9, sec. 20). Dallas of St. Martin details the practice in his *System of Styles*, part i. p. 94.

⁴ *Ranking of Kerse*, Bell's Cases, p. 3. There arose here a competition respecting the lands of Little Mill, between Mr. Pierce and Mr. Ross. Both parties mistook the state of the titles, and made up their adjudications erroneously. These lands had been held feu of Lord Cathcart by Mrs. Crawford. She had conveyed them to William Ross, and he infest himself base upon his disposition. After his death, his brother, Hugh Ross, paid his debts, and took steps for vesting his right in himself as creditor, but he never was infest. Thus it will be observed that there was a superior remaining inter-

the judges, that a charge given to the proper superior to enter the adjudger would be held to make an effectual adjudication, although his titles were not complete. But a different opinion prevailed, viz. that where the superior is unentered, it is necessary first to charge him to enter, and then to charge him to receive the adjudger; that the creditor is bound, before going to the Crown, who refuses none, to take every proper measure for forcing the superior to complete his titles. This opinion not only rests upon the solid ground, that a charge against the unentered superior to enter the creditor is inept, since the person charged is not the feudal superior; but it is supported, as we have seen, by the authority of one of our oldest and best lawyers, and sanctioned by the practice which the other lawyers of his time approved of and directed.

3. Another class of difficulties arose respecting the completion of adjudication, where the creditor adjudging was himself the superior. Lord Stair thought that in such a case no sasine was necessary, the original sasine of the superior recovering its full force when the right is brought back by apprizing;¹ but Mr. Erskine shortly and ably refutes this doctrine, and shows it to have proceeded upon a mistaken notion with regard to the nature of the feudal consolidation.² The superior must therefore be infeft upon his own precept; [720] and after the right becomes, by expiry of the legal and declarator, irredeemable, he may consolidate by resignation *ad remanentiam*.

4. Difficulties multiplied in a most distressing degree where base rights had been constituted, and the titles and connections of parties were not clear. Thus, a question occurred respecting the proper method of making an adjudication of a base right effectual where the disponee was dead. One being infeft as a Crown vassal, disposed to his son, with procuratory and precept, and died. The son was infeft base, and never made his right public by confirmation or resignation. His creditors did diligence by adjudication against the superiority, as *in hæreditate jacente*, and against the property; and a competition arose among them for the quality of first effectual. The superiority clearly was *in hæreditate jacente* of the father; the property in his son. There were three ways in which it was conceived that the adjudications ought to be made effectual: 1. By the adjudgers obtaining in Exchequer a charter of adjudication of the superiority, and then as superiors giving infeftment to themselves in the property: 2. By throwing into the signature of adjudication a clause of confirmation of the base right, so as to enable the creditors to take sasine on the adjudication, as if the right were consolidated: 3. By charging the heirs of the father to enter, and infeft the adjudger in the property. The last of these methods would no doubt have been effectual, upon the principles stated above in Kerse's case; but it was excluded here by the second method, which had been taken before, and which all agreed was good. As to the first, it was universally thought that it gave no right to the property; and the only question was, Whether, as it preceded the second, it did not serve as a mid-impediment to the confirmation? But the Court found it did not; and that although it made the first effectual adjudication *quoad* the superiority, it precluded not the confirmation, as making the first effectual against the property.³

Thus, even in the most simple cases, where the vassal had not taken sasine on the disposition, the adjudger could not complete his adjudication without possession of the disposition; and this he might find great difficulty in recovering: while in the more com-

jected between Lord Cathcart and William and Hugh Ross, viz. Mrs. Crawford, for William Ross' disposition was base. But Hugh Ross, overlooking this circumstance, obtained a disposition from Lord Cathcart; and upon the procuratory resigned in the hands of the Crown, and upon the Crown charter infeft himself and his son. Now two of the creditors followed different plans in adjudging. Mr. Ross having adjudged, applied for a Crown charter of adjudication, and was thereupon infeft. Mr. Pierce thought he had taken effectual

means for attaching the property, by charging Mr. Ross, as superior under his Crown-holding, to enter him as adjudger. But the Court found that neither of these creditors had effectually adjudged the property, since the charge ought to have been given to the heirs of Mrs. Crawford, the interjected superior.

¹ Stair iii. 2. 23.

² Ersk. ii. 12. 29.

³ *M'Kenzie v Ross & Ogilvie*, 1791, M. 275.

plicated, it was necessary for the creditor-adjudger, in order to proceed with safety, to have the most masterly assistance to direct him what step to follow, in the peculiar situation of the feudal titles of his vassal, or of the superior; and even the materials for such deliberation he could not be expected to have at command.¹

The same strictness is still required where the adjudication is to come into competition with other real rights; with heritable securities or dispositions, completed by infeftment. But in competitions among adjudgers themselves, it was necessary to have a method of completing the diligence more within the reach of a creditor, and less exposed to the collusion and fraud of the debtor, or of his superiors. Therefore, by the 33 Geo. III., continued by 54 Geo. III. c. 137, sec. 11, and subsequent statutes, 'the presenting of a signature in Exchequer, when the holding is of the Crown; or the executing of a general charge of horning against superiors at the market-cross of Edinburgh, and pier and shore of Leith, when the holding is of a subject; and recording an abstract of the said signature or the said charge in the register of abbreviates of adjudications, shall be held in all time coming as the proper diligence for the purpose aforesaid.'²

In burgage subjects (as to which there might otherwise be difficulty) this general charge is sufficient.

[721] In the interpretation of this law a difficulty may be stated: Whether it can be held to apply to the case of a superior adjudging the property of his vassal? On the one hand, there does seem to be a sort of absurdity in a person charging himself by horning to do an act which is within his own power; but, on the other, the view of the law evidently was to form a general rule for all cases, and, without regarding the peculiarities of situation or the person or state of the superior, to make a general charge recorded sufficient for supplying all deficiencies. There is a possibility at least that a superior may be mistaken as to the titles of his debtor; and that, in giving an entry to himself, he may be as far from the true line as if he had no connection with the property: there may be interjected superiors, of whom he knows nothing; and therefore the general remedy should be open to him as to others.

The first effectual adjudication, once constituted, is the criterion of the *pari passu* preference. It becomes from that moment not merely a private diligence, belonging exclusively to the individual who uses it, but a general diligence, in which every creditor who afterwards adjudges has an interest. In this view, it is not entirely at the disposal of the individual: its quality of 'effectual' remains to complete the other adjudications, although the debt upon which it proceeds may have been paid off, and the adjudication of course extinguished as an individual diligence.³

2. Term during which all Adjudgers may partake of the Preference of the First Effectual.

All adjudications which are prior to the first effectual, and all those which, being posterior to it, are dated within year and day of the pronouncing of the decree, are to be brought in equally, or *pari passu*. The expression of the Act to this effect seems to be clear; and yet it has given rise to doubts.⁴

¹ Of this distressing uncertainty, the case of *Murdoch v Cheslie* may be taken as an illustration, where the debtor appeared to be fully vested in the feudal right, and several creditors proceeded in completing their adjudications upon that idea; but a strict investigation having shown that there was an essential flaw in his title, other creditors took steps for forcing him to complete a proper title, and were preferred. 1766, M. 6923.

² [See 19 and 20 Vict. c. 91, sec. 6.]

³ *Street v E. of Northesk*, 1672, M. 248. See also *Straiton*

v Bell, 1676, 1679, M. 255. [*Forman v Nicholson*, 1832, 10 S. 365.]

⁴ The statute bears: 'That all apprizings, etc., BEFORE the first effectual appricing, or AFTER, but within year and day of the same, shall be brought in *pari passu*.' Lord Kames, in his Dictionary, states a case where an attempt was unsuccessfully made to limit the *pari passu* ranking, even as to prior adjudgers, to the term of a year and day. *Forbes v Buchan*, 1630, M. 265.

1. The year and day within which it is necessary for every adjudger to obtain his decree of adjudication, in order to entitle him to rank *pari passu*, begins to run, not from the moment of completion of the sasine, or of the diligence by which the first effectual adjudication is completed, but from the date of the decree of adjudication.¹

2. In computing the term, the year and day is to be reckoned, 'not by the number of days which go to make up a year, but by the return of the day of the next year that bears the same denomination.'² In general, it would seem that when a term is appointed [722] within which a thing must be done, the maxim, *Dies inceptus pro completo habetur*, is properly applicable to the commencing day of the term; and where, on the contrary, a term is appointed, beyond which things must have continued in a particular state, the maxim properly applies to the concluding day of the term. In the former case, it makes the term begin to run on the day following that upon which the act takes place; whereas in the latter the term begins instantly to run, and the commencement of the day after the completion of the term indicates the expiration of it. This distinction seems to be necessary, in order to give in either case the fair benefit of the assigned term.³

3. *Of the Publication of the First Effectual, and of the Provisions for Lessening the Number and Expense of Adjudications.*

To give full effect to the equalizing law, it is necessary that the first effectual adjudication should be published. This is done by means of the record of adjudications, and of the minute-book and rolls of the Court of Session, which are printed and distributed.

1. The recording of the abbreviates of adjudications is not required under the pain of nullity, and therefore there is no absolute security that the first adjudication shall be recorded.⁴ 1. Where infetment can be obtained without a charge to the superior, the adjudication may be the first effectual, without having been recorded; and it will be remembered that the year begins to run, not from the completing of the real right, but from the date of the decree. 2. An adjudger is entitled to the benefit of the *pari passu* preference, although his diligence has not entered the record. 3. The adjudication *contra hæreditatem jacentem* before the sheriff has regularly no abbreviate, and consequently is not null, though unregistered.⁵

¹ Ersk. ii. 12. 30; *Balfour v Douglas*, 1671, M. 238. This is the first and leading case, in which the Court 'found that the year is to be reckoned from the date of the first effectual apprizing.' The expression should have been, 'from the date of the first apprizing that is rendered effectual, and not from that of the diligence whereby it becomes effectual.'

See also *Rickarton v C. of Traquair*, 1678, M. 240, where the rule is correctly laid down: 'The Lords found the coming in of posterior apprizings *pari passu* with the first must be calculated year and day from the date of the first apprizing, and not from the date of the infetment.'

² *Lady Bangour v Hamilton*, 1681, M. 248. Here one adjudication was dated 30th July 1679, another 31st July 1680. The Lords found, 'That the year is not to be counted by the number of days, but by the return of the day of the same denomination of the next year; and therefore found that the creditor's adjudging being upon the 30th July 1679, and the lady's adjudication on the 31st July 1680, it was within year and day of the rest, and came in *pari passu* therewith.'

³ Sir G. M'Kenzie says that in this question, as in all others where a day is adjoined to a larger term, '*Dies inceptus pro completo habetur*.' (Observ. 1 Parl. Charles II. c. 62.) If the meaning of this be that the expiration of the year excludes

an adjudication from the *pari passu* ranking, so that, if dated on the day after the expiration of the year, the adjudication must be postponed, it may be observed that the only decision upon the point contradicts this; for in the above quoted case the first effectual was dated 30th July 1679, and the one in question on the 31st July 1680.

⁴ The statute 1661, c. 31, which first ordered the recording of the allowance of the apprizing, did not require it under the sanction of nullity. On the contrary, it was held: 1. That a comprizing, though not recorded, was still entitled to the benefit of the *pari passu* preference under the subsequent law, c. 62, of the same year. *Stuart v Murray*, 17 July 1668, M'Kenz. Observ. 2 Parl. Chas. II. c. 31. And, 2. That infetment fully supplied the want of the recording of the comprizing. M'Kenz. *loc. cit.*; *Stair* iii. 2. 25; Ersk. ii. 12. 26.

The statute 1672, c. 19, introducing adjudication, ordered the allowance to be registered in the same manner, 'and under the same certification, with the allowance of apprizings.'

And the 24th art. of the regulations 1695, appointing abbreviates instead of allowances, requires their registration 'conform to the Act of Parliament anent the recording of apprizings.'

⁵ *King v Hunter*, 1742, M. 5744.

2. But the publication of the proceedings in the Court of Session affords an additional security against the chance of the year and day expiring without notice. *First*, the printed rolls of court form a record of every action which comes into court. *Secondly*, A minute-book is kept by the clerks of court, in which all the important proceedings in every cause are daily entered; which book is also printed and distributed weekly, for the use of the practitioners, and forms another record easily consulted, in which an adjudication must appear. *Thirdly*, It was provided by the 33 Geo. III. c. 74, sec. 10, 'That the Lord Ordinary officiating in the Court of Session, before whom the first process of adjudication against any estate for payment or security of debt is called, shall ordain intimation thereof to be made in the minute-book and on the wall, in order that any other creditor of the common debtor, etc. may be conjoined in the decree of adjudication.' This was sanctioned by a declaration of absolute nullity if the intimation should be omitted; saving only the [723] validity and order of ranking of posterior adjudgers. But in 54 Geo. III. c. 137 an exception is very properly introduced, allowing the adjudication to be brought forward again in more unexceptionable form, or to be conjoined with any subsequent adjudication.¹ The publication of the first adjudication by this intimation in the minute-book and on the wall is a warning to the other creditors to secure to themselves the benefit of the equalizing law, by having their adjudications led within the year. But, at the same time, a great evil attends this arrangement. Every creditor takes the alarm, in consequence of the appearance of an adjudication; and by the accumulating expense of many adjudications, a debtor whose circumstances are in no degree desperate is plunged into irretrievable insolvency. How far the law has hitherto afforded a remedy for this evil, shall be inquired into hereafter: at present it may be sufficient to observe, that the irretrievable injury which may attend a notice of this sort makes the Court unwilling to authorize intimation, if a case can be made out by the debtor to bar the intimation. The rules are: 1. That where by a discharge, by instantly verifying a claim of retention or compensation, or in any other way *instantly* showing there are no grounds for adjudging, the order for intimation will be refused. But, 2. That where investigation and discussion are necessary, or where the adjudication is opposed only by a trust-deed, to which the adjudger has not acceded; or where, although the adjudger has acceded, the trust is neglected and inoperative, the intimation must proceed.²

It is a natural part of the provision for equalizing adjudications, that the publication of the first adjudication should be accompanied by some method of diminishing the number and lessening the expense of concurring adjudications. It has, with this view, been provided, that posterior adjudgers may be conjoined in the first adjudger's decree, instead of each leading a separate adjudication. By the statute of 1783,³ it was ordered, 1. That the Lord Ordinary, before whom *any* process of adjudication was called, should order intimation of it; and, 2. That after a reasonable time for creditors to come in, decree should be pronounced, in which any creditor ready to adjudge might insist to be conjoined.⁴ By the Act

¹ 54 Geo. III. c. 137, sec. 9. [See 19 and 20 Vict. c. 91, sec. 5.] It may be observed, however, that this section of the Act is not correctly printed; the clause, 'And without prejudice to the validity and order of ranking of posterior adjudications according to the rules of law,' being improperly disjoined from the previous and confounded with the succeeding part of the section. Perhaps the error is of no material consequence.

² *D. of Queensberry's Exrs. v Tait*, 11 July 1817, Fac. Coll. 375. Here the Court held, 1. That where investigation and discussion are necessary, intimation must proceed. 2. That where a right of retention is instantly established, warrant for intimation ought not to be granted.

Harrower's Trs. v Couper's, 1827, 5 S. 374, N. E. 347.

Here the execution of a trust-deed by the debtors for behoof of creditors, on which infetment was taken, was held no bar to an order for intimation at the instance of a non-acceding creditor.

E. of Breadalbane v M'Donald, 1824, 2 S. 621, N. E. 529. Here the adjudger had acceded, but he was held entitled to insist for intimation, as the trustees had taken no steps to realize the trust funds.

[See also *Shotton & Co. v M'Neill*, 1834, 12 S. 609. A private Act of Parliament for payment of debts is not a sufficient objection to intimation proceeding. *Campbell v Campbell*, 1828, 6 S. 1146; *Meiklam v Glassford*, 1851, 14 D. 137.]

³ 23 Geo. III. c. 18.

⁴ 22 Geo. III. c. 18, sec. 5. The object of the Legislature

passed in 1793, the law was considerably altered in two essential points: 1. Intimation [724] was made necessary only in the first adjudication; and, 2. It was required, that a creditor applying to be conjoined, should not only have his grounds of debt ready for adjudging, but that he should also have his summons of adjudication, libelled and signeted. But it was left ambiguous whether conjunction was to be allowed in any other adjudication than the first.¹

Although, under this statute, there certainly was no authority for conjoining, with *posterior* adjudications, creditors producing summonses of adjudication, with the grounds thereof; yet as the spirit and intention of the law was to lessen, by means of conjunctions, the number of separate diligences, the practice, which began under the old statute, was continued under the new one, of conjoining creditors, whether the adjudication in dependence was a first or a posterior one. Upon the words of the statute objections were taken, in several rankings, to the claims of creditors thus adjudging by conjunction with posterior adjudications; and the Court held such adjudications to be ineffectual.² This judgment was unavoidable, under the imperative words of the Act. It appeared to be expedient, that, in reviving this law, conjunction ought to have been permitted with posterior as well as with first adjudications; but the statute has not in this respect been altered, though it is not obvious what possible harm could have resulted from following out thus far the true principle of the doctrine.

It was questioned under the Act 33 of the king, whether the first adjudication, having been ordered to be intimated, and another creditor having in the meantime adjudged, this last, if good at all, was not properly the first adjudication in the sense of the law. It was held that this adjudication was not ineffectual, but that the other still continued to be the first, with which, in terms of the Act, other creditors were to be conjoined.³

Nullities, in the first effectual adjudication, may be fatal to it, considered as the criterion of the *pari passu* preference. But where a creditor comes forward under the late statute, in consequence of the first adjudger's intimation, and is conjoined in the decree, he cannot be hurt by any defect in the first adjudger's diligence. The completion of the combined decree, by a charge against superiors, will make any one of the conjoined adjudications

in this enactment seems to have been, that every adjudication brought into Court should be intimated (where there was no danger from delay, and of which the Lord Ordinary was to judge), that each might in its turn be the means of contributing to the general design of lessening the number of separate diligences. But the practice under this statute was extremely loose, and gave occasion to several questions. The intimation in posterior adjudications was generally omitted; and when the counsel came to the bar, and stated that 'this was a posterior adjudication,' the Lord Ordinary pronounced decree of adjudication at once, without ordering intimation. But as the appearance of an adjudication in the weekly rolls was a kind of intimation, other creditors frequently came to the bar, with their grounds of debt prepared, and were conjoined with the adjudger at the first calling of the cause, and where no intimation had been made. In the *Banking of Redcastle*, objections were taken to both these practices. Several adjudications within year and day of the first had been led without any intimation, and with some of them were conjoined creditors who had produced their grounds of debt at the bar. Three points were questioned: 1. Whether the want of intimation in the posterior adjudication was not a nullity under the statute? 2. Whether the conjoined creditors were to be considered as having legally adjudged? And, 3. Whether some relief was not to be afforded to postponed

creditors, who, if intimation of each adjudication had been made, would have been apprised of the necessity and opportunity of producing their grounds of debt? These questions were very fully discussed. On the first of them, the Court found the want of intimation no good objection to the posterior adjudications; and that the Lord Ordinary, having power to dispense, must in all cases be supposed to have virtually dispensed with the form. On the second question, the objecting creditors endeavoured to show that the great view of the Legislature in appointing intimation was, that the intimation might supply the place of citations, etc. by the creditors who should apply to be conjoined; and that no conjunction could therefore be lawful which was not preceded by intimation. But this view of the matter the Court did not regard. They held the conjunction by the Lord Ordinary, under the powers given him in the statute, to be effectual as an adjudication to the creditors who were conjoined. And as to the third point, the Court had no difficulty in deciding that no relief was to be given, since these creditors ought to have come in before. *De Roveray and others v Mackenzie and others*, 1793, Bell's Ca. 404.

¹ 33 Geo. III. c. 74, sec. 10.

² *Campbell, etc., v Crs. of Kinloch, 1801*, M. App. Bankrupt, No. 13.

³ *Alisons v Ballantyne*, 1805, M. App. Adjud. No. 14.

an effectual diligence, though all the rest that are conjoined with it should be null. To give any other interpretation to the statute, would not only defeat the very object of the Legislature, since no creditor would risk his debt upon the diligence of another; but it [725] would have the further effect of converting the second adjudication into the first, and subjecting it to a fatal objection, as not being intimated in terms of the statute.

The legislative provisions for promoting equality among adjudgers have been aided by the equitable facilities given to posterior creditors by the Court of Session. But although the establishment of equality is an object of much favour, the term allowed for creditors to come in is very long; while ample provision is made for intimating the first adjudication to the public. The Court, therefore, in giving every proper aid to posterior adjudgers, in order to bring them within the term, have regulated themselves in all such questions by the rules of a sound discretion. The following points may be stated:—

1. In the action of CONSTITUTION, the Court has interfered, to dispense with the ordinary term for the debtor's appearance in Court; to prevent the debtor from delaying the decree, by the discussion of his defences; and to dispense with the usual intimations subsequent to decree.—1. It is essential to the very existence of an action, and the validity of any order or decree to be pronounced by the judge, that proper intimation should be given to the defender to appear in court. The judges have never held themselves entitled to dispense with this essential part of the action, nor conceived that any decree pronounced where this was omitted could be legal or effectual. But there are cases in which equity has permitted the Court to dispense with a part of this form. Thus the second diet of appearance was dispensed with in a case where the debt against the ancestor of the defender was constituted by writing, and where the defender, having given in a written renunciation to be heir, decree *cognitionis causa* was pronounced.¹ 2. The Court pronounces decree where delay is hazardous, reserving to the defender the full effect of all his defences, as objections *contra executionem*.² 3. By Act of Sederunt 20th January 1671, it is provided, 'That no act or decree done either in the Inner or Outer House shall be extracted until twenty-four hours elapse after the same is read in the minute-book.' It may sometimes be of importance to dispense with the reading in the minute-book, especially as the Act of Sederunt 5th June 1725 appoints the reading of the minute-book to begin on the sixth sederunt or court day of each session; and the Court, in particular cases, grant dispensations permitting the decree to be instantly extracted. Such dispensation seems justifiable in all cases where the decree is merely for constitution of a debt, on the same principle on which the Court reserves the consideration of defences.³

2. In the ADJUDICATION itself, the Court also interferes to abridge the unessential forms. 1. The Court interfered to dispense with the second diet of compareance in a posterior [726] adjudication.⁴ Now, by 50 Geo. III. c. 112, sec. 27, there is only one diet where the

¹ *Cannan v Greig*, 1794, M. 12005. The common form of citation in all actions was to the debtor to appear upon two different days; formerly, by two citations upon separate summonses,—the act for the second citation being pronounced under the jurisdiction which attached to the debtor, upon the expiration of the first term. But while matters continued on this footing, a second citation was held to be essential only where the debt was not established by written evidence, and where a proof by witnesses was necessary. After the union of the two summonses, the double diet of appearance was still kept up; but, as formerly, the second was not held essential where the debt was established by writing. And this rule was held strictly to apply to the modern form of proceedings.

² *Sir John Sinclair v Sinclair*, 1792, Bell Oct. Ca. 1. [*Bontine v Graham*, 1829, 8 S. 87 and 263; *Cowan*, 1832, 11 S. 130; *Meiklam v Glassford*, 1851, 13 D. 803.]

³ Thus, in the above-mentioned case of *Sir John Sinclair*, the Court remitted to the Lord Ordinary to pronounce a decree in the action of constitution, to dispense with reading in the minute-book, and to call the action of adjudication and pronounce decree in it, reserving all defences. See also Common Agent, in the *Ranking of Polquhain v Corrie*, 1795, M. 12190.

At the same time, it should be observed that the judges were much moved by the consideration that here the only person interested in the judgment had renounced, and that no one could have appeared to bring it under review.

⁴ *Hamilton v Blackwood*, 1761, M. 6864. This was decided on the principle that, the debt being established by writing (which must always, of course, be the case in adjudications), and the benefit of the alternative of a special adjudication, which alone could have required a proof, being forfeited to

defender is in Scotland. 2. The defences against adjudication are reserved to be stated as objections wherever prejudice can arise from delay; and this even in a first adjudication.¹ The privilege of the special alternative cannot be *reserved*; and the debtor has been thought entitled to take a day for producing his titles in a first adjudication, even where the adjudication was by a creditor of the ancestor, and where there was danger of losing the preference of the Act 1661.² But this seems to deserve consideration; for although it is seldom that there can be any interest for hastening on a FIRST adjudication, it may by possibility happen; as where the adjudger is a creditor of the ancestor, and the three years of preference are nearly expired. But the privilege of demanding the alternative is forfeited by having already allowed a general adjudication to pass.

II.—PARI PASSU PREFERENCE WHERE THE DEBTOR IS DEAD.

The doctrine of equality among adjudgers, as applicable to the case of an adjudication after the death of the debtor, will not require much explanation.

1. Where the creditors of the deceased debtor alone are in the field, some of them having adjudged during his life, and others not till after his death, the adjudications against the heir, for the ancestor's debt, or proceeding upon his renunciation of the succession, are entitled, if within year and day of the first effectual adjudication against the ancestor, to be placed on an equal footing with that adjudication.³

2. But the heir may refuse to answer the charge to enter till the expiration of the *annus deliberandi*; and so, where creditors have adjudged during the ancestor's life, the term of the *pari passu* preference may expire, before posterior adjudgers can obtain their decrees, and get the benefit of the equalizing rule. The remedy is an equitable one. The Court will allow those adjudications to proceed as if the heirs had renounced.⁴

III.—PREFERENCE OF ADJUDICATIONS AFTER YEAR AND DAY.

1. The statutes already commented on, confer on all comprizings and adjudications within year and day of the first effectual, the same right 'as if one comprizing had been deduced and obtained for the whole respective sums contained in the foresaid comprizings.' But adjudications which are subsequent to that term derive no aid from those statutes, and must therefore be completed as if no rule to this effect had been introduced. Hence arose a question, Whether, after a year from an adjudication made effectual by sasine, it was necessary to complete new adjudications by sasine? This, again, was held to depend on the question, Whether there remained with the debtor, after adjudications completed by sasine, anything more than a personal estate of reversion? And at the time when the question occurred, adjudications having been regarded as sales under reversion, the Court held, that without sasine an adjudication subsequent to the year was good to carry the

the debtor by his having allowed a first adjudication to pass against him, it was not an action which required, according to the old rule, a second diet. See *Pedie's case* below, note 2.

¹ *M'Kenzie's Reps. v Liddel*, 1741, 5 Br. Sup. 219.

² *Pedie*, petitioner, 1776, M. App. Process, No. 2. This case did not present the point pure for decision, for the *induciae* had not expired. They expired on 11th January, which being within the Christmas recess, and the three years expiring three days after, a petition was presented to the Court, praying a warrant to a Lord Ordinary to decern in the adjudication, without allowing the defenders to take a day to produce. This petition was refused.

³ *Sinclair v E. of Caithness*, 1781, M. 268.

⁴ This difficulty was stated in the above case, and thus answered: 'Such an inconvenience and injustice might be rectified by allowing the diligence of the other creditors to proceed within the year, in the same manner as when the heir, in favour of particular creditors, has renounced the benefit of the *annus deliberandi*.' *Ersk.* iii. 8. 55. And the reporter adds this note to the case: '*N.B.*—All the judges who spoke declared their opinion, that a creditor in danger of losing his preference by the death of his debtor, after an effectual adjudication had been led by another creditor, would obtain relief in the way suggested by the respondents.'

personal right.¹ It may be fairly questioned, now that a different view of adjudication has been adopted (namely, that for which Lord Kilkerran and the minority in that case argued²), whether the rule would not now be reversed. Mr. Erskine's doctrine (Ersk. ii. 12. 28 and 33) proceeds on the same principle which guided the Court in the case quoted below; and it was not till long after his time that the doctrine was abandoned, and an adjudication held to be a *pignus prætorium*.³

2. The old rule holds, that preference is according to priority in all adjudications beyond the year and day from the date of the first effectual decree.

SUBSECTION II.—PREFERENCES AMONG ADJUDGING CREDITORS OF DIFFERENT CLASSES; VIZ. OF THE ANCESTOR AND OF THE HEIR.

The ordinary rules of preference among adjudgers will not regulate every case of competition. Where the adjudging creditors of the ancestor, to whom the estate formerly belonged, come into competition with those of the heir, the former are in justice entitled to a preference, on the principle that every man's estate should be liable in the first place to his own debts. This principle has been admitted to control the *pari passu* preference of adjudications, as established in ordinary cases, but with such modifications as have seemed to the Legislature necessary for doing justice also to the creditors of the heir. And perhaps this is the fittest occasion on which to enter upon a commentary on the statute by which the relative rights of the creditor of the ancestor and of those of the heir are settled.

COMMENTARY ON THE STATUTE CONFERRING A PREFERENCE ON THE ANCESTOR'S CREDITORS.

The estate of which a man is possessed, and which he has an uncontrolled power to alienate to his creditors, or to make the subject of securities to them, naturally becomes a source of credit on which he may obtain money or goods. Such credit is readily given by dealers and money-lenders, without taking specific security over the estate or effects, and [728] trusting only to that right of attaching the property which they know can at any time be exercised for their payment. This right of attachment ought not at once to cease on the death of the debtor. If his heir is unwilling to undertake the debts, he ought to leave the property untouched for the creditors; if he take up the succession, he should reckon on being liable for the debt which belongs to it. And the creditors of the heir can in justice take no better right than he himself has, that is to say, the reversion of the ancestor's estate, after his debts are paid. This is so natural a consequence of the credit acquired in reliance on the uncontrolled power of a proprietor, that it has found admission into every system of jurisprudence, where no peculiar territorial policy has interfered with it. The principles of the feudal law opposed it while that system was in its strength; for they admitted not of a free exercise of the power of alienation or of execution against land. And in some countries this effect of the feudal system remains after the rest of the structure is gone. In ENGLAND this has been the case. The heir in the real estate is freed from simple contract debts, on the feudal principle that he takes the land not from the ancestor, but under the original feudal contract: that the executor alone, therefore, is answerable, so far as he has assets; but the heir not at all, in respect of the lands descended. And

¹ *Monro v M'Kenzie*, in *Ranking of Tulloch*, 1756, M. 250, and *Kilk.* in 5 *Brown's Sup.* 310. This was a competition, after the expiration of the year and day, between certain adjudgers, who had done nothing to complete their adjudging, and a subsequent adjudger, who had obtained charter of adjudication and sasine. 'The Court preferred the decrees of adjudication according to their dates to the adjudication with infeftment, upon the single medium' (says Lord Kilkerran, who had

reported the cause to the Inner House), 'that nothing was left with the common debtor but a personal reversion.'

² *Campbell v Scotland & Jack*, 1794, M. 821, *Bell's Ca.* 11; *Buchanan v Purdon Grey*, 10 July 1809.

³ The rule was laid down too absolutely in the former edition of this work (vol. i. p. 623), that the sasine on the first effectual saves the necessity of completing posterior adjudication beyond year and day.

although the introduction of the power of alienation made some invasion on this doctrine, still the distinction has been kept up, that the assets in the executor's hands are liable universally. Those in the hands of the heir are answerable only to debts of record, in respect of the lien created by the judgment on the lands themselves, or to debts by specialty in which the heir is named; while simple contract debts do not bind the heir. It is to be regretted that the exertions of the late Sir Samuel Romilly, who devoted much of his attention to the improvement of the law, had before his death made so little progress in dispelling the prejudices which guarded this ancient error. In SCOTLAND, while the feudal forms are maintained in their simplicity and purity as a system of mere conveyancing, these absurd effects of it have been entirely dismissed.

But the HEIR, in his turn, acquires credit in reliance on the lands and effects to which he succeeds, whether his titles and possession be completed, or he be seen as apparent heir to possess for a course of time in undisturbed tranquillity.¹ It is just, therefore, to his creditors, that the preference should not be continued in point of time to the creditors of the ancestor without limitation.

Out of these two opposite views has resulted in Scotland a system of rules for regulating the preference of the creditors of the ancestor in competition with those of the heir. The law, as it has been established in Scotland, has been moulded on the prætorian doctrine of the Roman law, which permitted to the creditors of the ancestor the privilege of demanding a SEPARATIO of his estate from the estate of the heir, provided it was done within five years after the death.² The first statute in Scotland relative to this matter was passed in the middle of the seventeenth century, 1661, c. 24; and was intended to regulate, in respect to the real or heritable estate, the competition of diligences raised by the creditors of the ancestor, where they came to clash with those raised by the creditors of the heir; or to guard the ancestor's creditors from the danger of being excluded by the heir's voluntary conveyance to his own creditors. Towards the close of that century, also, a remedy on the same principle was applied in relation to the moveable succession. It had first been [729] administered by the Court of Session in decisions and Acts of Sederunt, proceeding on grounds of equity. Afterwards a law was passed by the Legislature, in which the term of indulgence to the creditors of the ancestor was very justly limited to a much shorter period than in the case of the real estate.³

The statute relative to heritage, after a preamble, 'That appearand heirs, immediately after their predecessor's death, do frequently dispoise their estate, in whole or in part, in prejudice of their predecessor's lawful creditors, before their death come to their knowledge, or before they can do lawful diligence against the said appearand heirs; and which dispositions the saids appearand heirs do often make before they be served heirs and infet; or otherwise by collusion they suffer their predecessor's estates to be comprized or adjudged from them for payment of their own proper debts, real or simulate, without respect to their predecessor's creditors; and how just it is that every man's own estate should be first liable to his own debt, before the debts contracted by the appearand heirs,' proceeds, 1. To 'declare that the creditors of the defunct shall be preferred to the creditors of the appearand heir in time coming as to the defunct's estate: Providing alwayes, that the defunct's creditors do diligence against the appearand heir, and the real estate belonging to the defunct, within the space of three years after the defunct's death.' 2. The Act further proceeds on a preamble, that 'it were most unreasonable that the appearand heir, when he is served and retoured

¹ It is upon this principle, that by the statute 1695, c. 24, the debts of those who have possessed for a certain term as apparent heirs are made to affect the estate. See above, p. 708. And it may be observed, that the term of three years adopted in that Act appears to have been suggested by the space

allowed for the preference of ancestor's creditors in the statute now to be considered.

² See Dig. de Separationibus, lib. 42, tit. 6; Voet, h. t. vol. ii. p. 811, sec. 2.

³ See a commentary on this law under Preferences on the Moveable Estate, vol. ii.

heir, and infest *respective*, should for the full space of three years be bound up from making rights and alienations of his predecessor's estate; and yet it being as unreasonable that he should dispoise thereupon immediately or shortly after his predecessor's death, in prejudice of his predecessor's creditors, he having year and day to advise whether he will enter heir or not; therefore it is hereby declared, that no right or disposition made by the said appearand heir, in so far as may prejudice his predecessor's creditors, shall be valid, unless it be made and granted a full year after the defunct's death.'

In commenting on this statute, these two provisions may be explained in their order :
 1. The provisions for enabling the creditors of the ancestor, as adjudgers of his estate, to secure to themselves a preference over the adjudging creditors of the apparent heir; and,
 2. The provisions for preventing the heir from interfering, by voluntary conveyance or deed, with the just rights of his ancestor's creditors.

1. *Competition of Diligence by Creditors of the Ancestor and of the Heir.*

Supposing the rights of the respective creditors to be left undisturbed by any attempt of the heir to confer on his own creditors preferences by voluntary conveyance, it is requisite on the part of the ancestor's creditors, if they mean to claim preference over those of the heir, that they shall do diligence against the apparent heir, and the real estate belonging to the defunct, within the space of three years after the defunct's death.

This law applies only to the heritable or real estate. The preamble speaks of comprizing and adjudication; the enacting clause, of the appearand heir and real estate. But in the real or heritable estate is comprehended not only land and houses, but all heritage descending to the heir or requiring adjudication, and whether the subject be heritable by mere destination or *sua natura*.¹ The Court of Session, says Lord Kames, extended the [730] principle of this Act to moveables, and so 'completed the remedy,' which he holds the Court as a court of equity well authorized to do.² But in the cases to which he refers there seems to have been no intention on the part of the Court thus to extend the law or complete the remedy; and all our lawyers agree in reprobating Forbes, the reporter of one of the cases referred to by Lord Kames, for so representing the case.³ The moveable estate is regulated by other statutes already alluded to, of which hereafter.

The Act, in speaking of apparent heirs as those whose creditors are to be postponed to the creditors of the ancestor, is not to be held as confining the remedy strictly to the case where the heir is still in apparenecy. The Act itself shows that the term 'apparent heir' is not meant to be applied to the exclusion of an heir served and retoured, while the principle of the remedy applies equally to a case in which the heir has completed his titles, as to the case of a mere apparent heir. The Act seems equally to include the case of an heir succeeding by the settlement or disposition of the ancestor.⁴ But where the heir is infest during his predecessor's life, the Act has been held not to apply.⁵

One great difficulty in the construction of this part of the Act is to settle what diligence is requisite. The words of the Act are very vague: Provided always, 'that the defunct's creditors do diligence against the appearand heir, and the real estate belonging to the defunct, within the space of three years after the defunct's death.' In the construction of these words, it is to be observed, 1. That there is no express requisition that the diligence shall be *completed*. 2. That it seems a fair construction of the Act, that merely to *commence*

¹ *M'Kay v M'Kay's Reps.*, 1783, M. 3137. Here the Court 'were clearly of opinion that the statute 1661 applies to heritable subjects indiscriminately, whether they be such *destinatione* or *sua natura*.'

² 1 *Princ. of Equity* 371. This seems exceedingly doubtful as a general proposition.

³ *Ersk.* iii. 8. 102; *Bankt.* iv. 43. 3; *Kerr of Chatto v Scott of Harden*, 1712, M. 609.

⁴ *Graham v M'Queen and Drummond*, 1711, M. 3128.

⁵ *Laird of Arniston v Lord Ballenden*, 1685, 2 Br. Sup. 92.

diligence should not be held a due compliance with the condition; otherwise, instead of a space of three years, during which the heir's creditors should be barred from effectually attaching the estate, nothing short of the long prescription would have limited the privilege, which certainly was not the meaning of the Legislature.¹ But, 3. This construction of the Act seems to admit of limitation, in so far as the operations of the ancestor's creditors are barred either by the act of the heir, or the prohibition of the law itself. This leads to a question of very considerable practical importance.

1. The creditors of the ancestor are not held, by acceptance of bills or bonds of corroboration from the heir, to renounce this privilege as against the creditors of the heir.² But neither would this probably be held as fulfilling the requisite of the Act, which is to vindicate the privilege by diligence done within three years.

2. It seems to be settled, that where there has been no obstruction or impediment to the diligence, it must be rendered complete; and that, to make it so, the adjudication must be followed by infeftment, or by a charge within the three years.³ Inhibition would perhaps be held complete diligence in the sense of the Act.⁴

3. It may often happen, without any fault or undue delay on the part of the [731] ancestor's creditors, that unless they are enabled to proceed with greater rapidity than the ordinary course of the law allows, they cannot get the diligence completed within the term. In such cases the creditor will be allowed to urge forward his diligence without the impediment of discussing his debt in the action of constitution, or abiding all the forms of the ordinary process; and such objections as may lie against his debt will, on the principle already explained, be reserved *contra executionem*. Among the delays which would thus be dispensed with, the Court would probably allow a first adjudication to proceed, without abiding the expiration of the term of intimation.⁵

4. But it may happen that, by vacations of the Court, it may be impracticable to have the debt constituted in the Court of Session, and the diligence completed in due time.⁶ And where it is so, without any undue delay previously, or any fault imputable to the ancestor's creditor, it is a very serious question, Whether the construction to be put upon the Act shall be so strict, that the ancestor's creditors, without fault of theirs, shall suffer a loss of their preference? This would be a harsh effect, scarcely to be inferred by mere construction, where the words do not unequivocally import as much, which the spirit of the law so clearly applies with favour to the creditor. A creditor of the ancestor, for example, intending to do diligence, is stopped during the *annus deliberandi* from proceeding with his adjudication; and in the progress of his proceedings the heir dies, and the proceedings

¹ Stair ii. 12. 29. 'Albeit the being complete be not expressed in the statute, yet by the design thereof it must be so understood; for if diligences inchoated in these three years, though perfected thereafter, would be sufficient, the preference would not be for three years, but might come to be for forty years.'

² Ranking of the Crs. of Cult, 1781, M. 3137.

³ Stair ii. 12. 29; Ersk. iii. 8. 101; *L. Ballenden v Murray*, 1685, M. 3127. 'The Lords found that the defunct's creditors ought to do exact and complete diligence against his estate within three years after his death, unless they could make it appear that their diligence was retarded without any fault of theirs, by opposition from the heir or other creditors, or the surcease of justice, or the like.' This doctrine was cited with approbation in *Taylor v L. Braco*, 1747, M. 3132. But the doctrine has not always been received without objection. See *M'Lachlan's case*, below, p. 770, note 2.

⁴ [In *Menzies v Murdoch*, 1841, 4 D. 257, it was held that inhibition is not diligence in the sense of the statute 1661, c. 24, and does not, though used against the heir by a creditor

of the ancestor within three years after his death, create any preference in favour of the inhibitor over those creditors of the heir whose debts were contracted prior to the inhibition.]

⁵ See above, Of Adjudication, p. 762.

⁶ In such cases it may be possible, in the inferior jurisdictions, or in Admiralty if the debts be mercantile, to get decree of constitution more quickly than in the Court of Session. Even the adjudication itself may be led *contra hæreditatem jacentem* before the sheriff. *Marshall's Crs. v Pencaitland*, 1709, M. 47; *Graham's Crs. v Hyslop*, 1753, Elchies, Adjud. No. 45. But not only is that not a method likely to be attainable in such competitions, since it is necessary to adjudications *contra hæreditatem jacentem* that the heir should have renounced the succession; but it is also to be observed that an entry cannot be forced on that sort of adjudication. *Murdoch King v Hunter*, 1742, M. 5744.

It also would appear that such adjudication, if the first, could not now proceed before the sheriff, since the Act of Parliament requires intimation in the first adjudication, and there is no intimation possible before the sheriff.

must be revived. It seems not consistent with the spirit of the Act, that this should forfeit to the creditor his preference as a creditor of the ancestor. Accordingly, to a certain extent, indulgence has been given. Whether the creditor is obstructed by the heir himself, or by the creditors of the heir, in those proceedings which he is carrying on in compliance with the Act; or where there has been a surcease of justice (an evil not belonging to these times, though not unfrequent in the confusions of our early history), the benefit of the preference is not lost.¹ The conclusion to which this would seem to lead is, that unless the creditor were chargeable with *MORA*, as in other cases of competition, he should not be held to forfeit the benefit of his preference. And *mora* never is chargeable in diligence, where the creditor has used all due exertion which circumstances or judicial rules permit. On this principle a decision of the Court of Session seems questionable, where it was held absolutely, as reported by Lord Stair, that 'the diligence upon the defunct's debt could not be preferred to a prior diligence on the apparent heir's bond, unless the diligence on the defunct's debt were within three years of the defunct's death, and that no impediment could continue the three years.' And again, as reported by Lord Fountainhall, that 'the Act is not [732] to be understood of *anni UTILES*, but *CONTINUI*.'² In a case fit for raising the question, the Court would probably hold themselves bound to consider whether the impediment were not such as to entitle the diligence of the creditor to the character of due diligence used within the three years.

Entry *cum beneficio inventarii* is not to be held as diligence for the benefit of the ancestor's creditors.³

5. The chief difficulty arises from the laws intended to abridge the expensive proceedings of creditors adjudging, and to introduce an economical and effectual system of sale and distribution in cases of insolvency. It will be recollected that in 1661, when the ancestor's creditors were required to do diligence within three years, in order to preserve their preference over the creditors of the heir, there was not only no general process of judicial sale or sequestration for selling and dividing the estate among the creditors, but the law of *pari passu* preference was not yet introduced; and on the introduction of those several remedies to the existing evils of distracted and expensive proceedings by creditors, the rules of preference or ranking (which by this time were established) were expressly saved. It is of importance, then, to observe how the policy of those several laws may best be preserved in the administration of justice under them.

First, In regard to the *PARI PASSU PREFERENCE*, the ancestor's estate being open to both classes of creditors, the creditors of the ancestor being entitled to charge the heir to enter and make up a title, and so to adjudge on an actual or presumed compliance, and those of the heir to charge him to enter and take up the succession for the benefit; both sets of creditors may be proceeding at the same time. It never has been doubted that the laws of *pari passu* preference were intended to apply to such a case, and to prevent the necessity of more than one creditor proceeding to complete his adjudication, as first effectual, for the benefit of all the rest. But several cases require to be distinguished. And—

(1.) The first effectual adjudication by a creditor of the ancestor, will entitle all the other creditors of the ancestor to the benefit of the *pari passu* preference, without the necessity of their severally completing their adjudications. But it will not follow, that the first effectual being thus completed within the three years, it will have the effect of bringing under the privilege of the Act 1661 those whose adjudications, though led within year and

¹ See *L. Ballenden's case*, *supra*, p. 767, note 3, M. 3127.

² *Paterson v Bruce*, 1678, M. 3126-7. In this case the impediment pleaded by the ancestor's creditor was merely that his debt was *future*. But that was truly no impediment, since he might have done diligence in security. The doubt, there-

fore, which seems to arise on the construction of the Act, extends not to the decision of that particular case, but to the gratuitous decision of a point not necessarily included, that not only *this*, but *no* impediment, can continue the three years.

³ See above, p. 707, note 1.

day of it, are not led till after the three years have expired. On the contrary, in such a case, the ancestor's creditor who had adjudged within the three years would enjoy his preference; the other creditors of the ancestor adjudging within year and day, but beyond the three years, would have nothing but the *pari passu* preference along with the other adjudgers of both classes adjudging within year and day.¹

(2.) If, on the other hand, the first effectual adjudication be led by a creditor of the heir, it seems to be sufficient compliance with the Act 1661 that a creditor of the ancestor shall have adjudged within year and day, so as to take the benefit of the completion of the first effectual, provided his adjudication be also within the three years. If the heir have completed his titles by infestment in his ancestor's estate, the creditors of both classes [733] adjudge from him; and the first adjudication, whether by a creditor of the one class or of the other, will be the first effectual to both. If, instead of having completed his titles, the heir is still in apparency, the creditors of the ancestor as well as his own must proceed to adjudge by means of a charge to enter heir; and if the heir enter, the adjudication must of course proceed as in the case already mentioned; while, if he should neither enter nor renounce, but allow the statutory presumption to take place, the adjudication proceeding on the charge will serve as the first effectual to both classes of creditors. That adjudication by a creditor of the heir must be available to the creditors of the ancestor, so as to make it unnecessary for them to complete their diligence separately, cannot be doubted, where the three years have expired, and all distinction between the creditors of the ancestor and those of the heir has vanished; and there seems to be no ground for admitting any other rule where the three years have not expired.

Secondly, In the case of a JUDICIAL SALE or SEQUESTRATION, it should seem on the same principles that the requisites of the Act 1661 are sufficiently complied with by the creditors of the ancestor, provided they claim their preference within the three years, the ancestor's estate being duly carried by the sequestration, or included in the sale.

(1.) A JUDICIAL SALE, whether at the instance of a creditor, or at the instance of an apparent heir, is declared to be equivalent to an adjudication as of the date of the first deliverance, for all the creditors who shall afterwards be included in the decree of division, and no adjudications are allowed to proceed during the dependence of a judicial sale.² When such action of judicial sale has been commenced, whether by the apparent heir, or by a creditor of the ancestor, or by a creditor of the heir himself charging him to enter, it is competent for every other creditor, both of the ancestor and of the heir, to appear and claim a share in the division; and every creditor of either class is forbid to adjudge. It cannot be doubted that it is quite sufficient to preserve the preference to a creditor of the ancestor, if he should enter his claim in the ranking and sale within the three years; and that his diligence will in the sense of the Act of Parliament be held complete.

(2.) Much more ought this to be held where a SEQUESTRATION under the 54 Geo. III. has been awarded, and the estate of the ancestor has been adjudged or conveyed to the trustee. This is the most complete of all diligence, and supersedes and bars every other,³ whether awarded on the application of the heir himself, or of a creditor of the ancestor, or of a creditor of the heir. It should be observed, however, that it is necessary, in order to give effect to the sequestration as an adjudication of the ancestor's estate, that, in confirming the trustee, that estate should be specially adjudged or conveyed in terms of the 29th

¹ The practical solution of this difficulty is more proper for consideration afterwards. It will proceed thus :—All the adjudgers, including the first effectual, will be ranked in the first place *pari passu*; and by a subsequent operation of arithmetic, there will be deducted rateably from each adjudger, after the first effectual, what is required to make up to him full payment of his debt in virtue of his preference under the Act 1661.

² 54 Geo. III. c. 137, sec. 10.

³ See 54 Geo. III. c. 137, sec. 42. [By the Bankruptcy Act, 19 and 20 Vict. c. 79, it is declared, sec. 102, that sequestration shall operate as complete diligence. As to adjudication in implement, see *Wood v Scott*, 1833, 11 S. 355.]

and 30th sections of the Act; and that such adjudication has by the 42d section preference over every other led or made effectual subsequent to the date of the first deliverance. The creditors of the ancestor entering their claims in such a sequestration within the three years as preferable creditors, have their preference completely preserved to them. The doctrine now laid down was at one time held doubtful,¹ but may now be considered as settled;² and [734] the creditors of the ancestor, provided the trustee has been confirmed, and provided they shall lodge their claims within the three years, are entitled to the full privilege of the Act 1661, c. 24. Many difficulties had suggested themselves as the inevitable consequence of the principle adopted in the first of the cases quoted below,—namely, that the preference given by the statute 1661, c. 24, rests on the ground of a *separatio* of the estates of the ancestor and of the heir as in the Roman law, instead of holding it to be a mere privilege. But the principle which ruled the last of these cases went to remove those difficulties; to prevent the possibility of the ancestor's creditors, or any part of them, starting aside in the course of a sequestration to adjudge the ancestor's estate as separate; and to secure the fair course of administration, and the operation of the true spirit of those laws, which have been so wisely made for restraining the diligence of individual creditors, and introducing *pari passu* preference.

2. Inefficacy of the Heir's Voluntary Conveyance to defeat the Creditors of the Ancestor.

The second part of the Act is directed against the attempts of the heir to disappoint the creditors of the ancestor, by granting voluntary dispositions to their prejudice.

In commenting on this part of the Act, it is proper to recollect, 1. That the heir has the privilege of deliberating for a year whether he will enter as heir, during which time no adjudication is available against him, or against the estate; 2. That the heir may notwithstanding enter to the estate, and complete his right by infestment, immediately after his predecessor's death; and, 3. That the creditors of the ancestor at common law had no remedy but by inhibition to prevent the heir from conveying away the estate to their prejudice. It seems to have occurred to the Legislature, that a remedy was requisite for the protection of the creditors of the ancestor, who might be ignorant of their debtor's death, and could not therefore use inhibition; but that, in justice to those who might deal with the heir, entered or not entered, this implied inhibition should not continue longer

¹ *Bennet, Tr. for Crawford's Crs., v his Father's Crs.* adjudging, 25 May 1820. On 1st February 1816 the estate of James Crawford was sequestrated. He was feudally infest as heir of his father, John Crawford, in an heritable debt due by Blair of Blair. The trustee got from the bankrupt on the 30th March a general disposition, which he completed by adjudication in implement and charge against the superior, Blair. The father, John Crawford, was owing large debts, and died 3d August 1813. Subsequently to the sequestration and title in the person of the trustee, those creditors of the ancestor raised constitutions, and adjudged within three years of the ancestor's death. The trustee in the sequestration of the son's estate opposed these adjudications as incompetent subsequent to sequestration. Decree of adjudication was pronounced, reserving all objections *contra executionem*, and the adjudications were completed on 2d August 1816. The debtor in the heritable bond raised an action of multiplicity. Lord Alloway preferred the creditors of the father adjudging, and the Court adhered, holding the effect of the Act 1661 to be to separate the two estates, and reserve the ancestor's for the diligence of his own creditors.

² *M'Lachlan v Bennet*, 1826, Fac. Coll., 4 S. 712, N. E.

717; aff. 3 W. and S. 449. This question arose in the same competition of John and James Crawford's creditors. Besides the subjects in which adjudication had, as in the above case, been completed within the three years, there were other estates of John Crawford to which no title had been made up. They were included in the sequestration of James Crawford, and the trustee was confirmed with a general adjudication only. Creditors of the ancestor, John, proceeded to adjudge; but the summons having been taken out to see by the trustee, the diligence was not completed till after the expiration of the three years. But claims by the ancestor's creditors were lodged in the sequestration within the three years, and a preference was demanded under the Act 1661. The Court held, that the Bankrupt Acts have the effect of making the trustee in the sequestration the sole and exclusive organ of diligence for completely attaching the estate for both sets of creditors, and with full reservation to each of all their privileges; and that in this case the general adjudication in his favour was sufficient in the competition to bestow on all the creditors of the ancestor, who had lodged their claims within the three years, the privilege of the Act 1661.

than the prohibition to adjudge should as a privilege to the heir endure. It was on this view of the matter that the second provision of the Act 1661, c. 24, seems to have been framed, relative to voluntary deeds by the heir.

The preamble of this part of the Act has in contemplation, as the evil to be remedied, those conveyances frequently made by heirs in prejudice of the ancestor's creditors, before the ancestor's death is known, whether made during apparenacy, or after the title as heir is completed by sasine. And the enacting words are, 'That no right or disposition made by the said apparent heir, in so far as may prejudice his predecessor's creditors, shall [735] be valid, unless it be made and granted a full year after the defunct's death.

1. The prohibition in this Act extends to all conveyances or securities whatever; as, a sale for a full price, or an heritable bond for money lent to the heir; and not merely to such deeds as are granted in favour of the creditors of the heir. The title of the Act, 'Concerning apparent heirs, their payment of their predecessor's and their own debts,' seems indeed to indicate an intention only to exclude voluntary deeds in favour of the heir's creditors; and with this seems to accord that part of the preamble which declares the great principle of the Act to be a consideration, 'how just it is that every man's own estate should be first liable to his own debt before the debts contracted by the apparent heir.' Our authorities also, in speaking of this Act, say that the only view of the Legislature was to favour the creditors of the ancestor before those of the heir.¹ But while this remedy would be very imperfect in preserving to the creditors of the ancestor the estate on which their credit may have rested, if it did not act as a prohibition of all conveyances whatever, since an heir willing to disappoint his predecessor's creditors would only need to sell or borrow money on the land, and distribute the price or loan among his creditors, the enacting words are perfectly general, and apply without qualification to such a case. Accordingly, not only is there a recorded opinion of the Court, delivered recently after the Act, very strongly inferring that a disposition to a stranger for onerous cause is objectionable within the year, since the Court there held that a conveyance to the heir's creditors is bad, though beyond the year;² but the question has been frequently determined, and sales made by heirs reduced at the instance of the creditors of the ancestor.³ The effect of this prohibition in the statute is similar to that of the diligence of inhibition. The conveyance is not void, but only not valid 'in so far as may prejudice the predecessor's creditors.' Therefore, 1. If the price were a fair and full price, and unpaid, there seems to be no doubt that the sale would stand, the ancestor's creditors having right to their payment out of the price. 2. If the price were inadequate, or, being inadequate, if it had been paid over to the heir, the ancestor's creditors would be entitled to insist either for a new sale of the lands, or that, to the extent of their debts, the purchaser shall make up the price, or pay a second time.

¹ Ersk. iii. 8. 102.

² *Harcarse* (2 Br. Sup. 93) says: 'The defunct's creditors doing diligence within three years are preferable, even where the heir disposes after the year; otherwise the heir's creditors would have more advantage by a voluntary disposition than they could have by legal diligence, which were absurd.'

³ *Taylor v L. Braco*, 1747, M. 3128, 3133. Geddes of Essel died in August 1697. His son and heir, within a year from the father's death, sold the estate to Duff of Dipple, and in his disposition gave a procuratory for making up titles and procuring him infeft, which was afterwards done, and the purchaser's title completed. Taylor was creditor of the father and son. The debt consisted of a loan to the son, and was constituted by a bond of borrowed money, in which the father had joined; and this debt having lain over for more than forty years (prescription having been saved by minorities),

an action was brought by Taylor's representatives against Lord Braco, as Duff of Dipple's representative, for reduction of the right to the lands on the Act 1661, c. 24. The defence was grounded on the want of diligence within the three years. But the Court held that, though this would be a good defence against creditors if the disposition were after the year, it is no defence at all where the disposition is granted within the year, the creditors being entitled to plead the statutory nullity though they have done no diligence; and they found the reason of reduction relevant and proven.

Mags. of Ayr v M'Adam, 1780, M. 3135. Here Campbell, proprietor of a land estate, died indebted to the town of Ayr. His son made up titles and sold the lands within the year; and more than three years afterwards the Magistrates of Ayr brought a reduction against M'Adam, the purchaser, for setting aside the sale on the statute. The Lords reduced the sale.

2. To give to the creditors of the ancestor, where there is no competition with those of the heir, a right to avail themselves of the objection to the deed, it is not necessary that [736] they shall have done diligence within the three years. The inhibition of the Act has been held available against the purchaser, *first*, where the creditors have done no diligence by adjudication or otherwise; and *secondly*, where the challenge has not been made till after the expiration of the three years.¹ But,

3. Where there is a competition between the creditors of the ancestor and those of the heir, and the ancestor's creditors have not done diligence within the three years, it may be questioned whether the ancestor's creditors can reduce a conveyance granted within the year, to the effect of having their debts paid preferably out of the proceeds. Mr. Erskine seems to think that the prohibition to alienate was introduced purposely into the latter part of the Act, that it might remain unaffected by the limitation which confines the privilege by diligence within three years, and serve as a general inhibition in favour of the ancestor's creditors, to which they should in all circumstances be entitled to trust. In that view, a disposition to a purchaser not being available against the creditors of the ancestor, they would be entitled to demand payment if the price were adequate, or, if not, reduction of the sale, as an inhibitor would, without being under the necessity of communicating the benefit to the creditors of the heir, who have no right to avail themselves of the statutory inhibition; but, on the other hand, if the price were adequate and still unpaid, the creditors of the heir might attach it, and so gain a preference, unless within the three years the ancestor's creditors should do diligence in terms of the Act.

4. A conveyance by the heir in favour of the creditors of the ancestor has been held not objectionable under the Act.² In so far as the heir thus interferes to aid *all* the creditors of the ancestor, no objection can be stated to his proceeding. But it seems very doubtful whether Erskine has not too indiscriminately extended the doctrine of the Court, as laid down by Harcarse, when he says that a conveyance to *a creditor* of the ancestor is unexceptionable.³ If such a conveyance to a single creditor were challenged by the body of creditors of the ancestor, the Act would unquestionably entitle the rest to challenge the deed; if, on the other hand, there were no other creditor of the ancestor to object, the conveyance would be effectual.

5. A conveyance by the heir to one of his own creditors is not challengeable by the rest of his creditors.⁴

6. A disposition to one of the heir's own creditors, executed beyond the year, is ineffectual to defeat the diligence of the ancestor's creditors within three years of the death of the ancestor. This is laid down by Harcarse as held by the Court soon after the date of the Act.⁵ It is an extension of the Act for which there is no warrant in the express words of the law; but it seems to be supported by its spirit and intendment, since the heir would otherwise have it in his power, by a private deed, to destroy that preference which the Legislature had been at so much pains to establish. The doctrine is accordingly approved by Erskine and all our other authors.⁶

¹ See Castlehill's Practices, No. 81, title Alienation. This case is founded on by Harcarse as law in the following passage:—'A disposition within the year would be postponed to the defunct's creditors, though they do no diligence within the three years; such dispositions being prohibited, in so far as they prejudice the defunct's creditors, where no diligence or time is limited or required.' No. 144, note, p. 31.

See also the case of *Taylor v L. Braco*, *supra*, p. 771, note 3, as to which Lord Elchies (8vo ms. 26 Nov. 1747) says: 'The question was, Whether a disposition by an heir, or apparent heir, *intra annum*, is, upon 1661, c. 24, void in competition with a creditor of the defunct's, though he has not

done diligence within the three years. The Lords unanimously found the disposition void and null, though no diligence was done within the three years, agreeable to a decision in Harcarse, subjoined to Decis. 144 (see above, p. 771, note 2). Dec. 9 adhered, and refused a reclaiming bill as to this point.'

² Harcarse, p. 219; 2 Br. Sup. 93.

³ Ersk. iii. 8. 102.

⁴ *L. Ballenden v Murray*, 1685, 2 Br. Sup. 93.

⁵ See above.

⁶ Ersk. iii. 8. 102. [In *Christie v Royal Bank*, 1839, 1 D. 745, 2 Rob. App. Ca. 118, it was determined that a bond and

SECTION VI.

GENERAL REVIEW OF THE OBJECTIONS THAT MAY BE TAKEN AGAINST ADJUDICATION FOR DEBT.

Objections may be stated to an adjudication, either by the debtor himself, for [737] the purpose of preventing the adjudication from being converted into an irredeemable right of property; or by creditors, the debtor being bankrupt. But in a competition of creditors, objections which have not a stronger effect than this are comparatively of little value, since the diligence will still be sufficient to maintain the adjudger in his place among the competitors.¹

The objections which are available to creditors are: 1. Those which destroy and annul the whole adjudication; or, 2. Those which restrict the extent of the claim that might otherwise be made under cover of the heritable security.

In distinguishing between these two classes of objections, it may not be incorrect perhaps to say, that wherever the defect is in mere form, and on a point not essential to the efficacy of the diligence, or where there is a trifling error or innocent omission respecting the amount of the debt, or an error in the calculation and accumulation of the sum, the objection has only a restrictive effect, converting the diligence into a security; while every objection to the debt upon which the diligence stands—every essential defect in the evidence of its existence—every exorbitant and wilful overcharge—every defect in the essential parts of the diligence, as in the citation, destroys the adjudication, and either entirely annuls it, or restricts the extent of the claim.

SUBSECTION I.—OF THE NATURE AND DESCRIPTION OF AN ARTICULATE ADJUDICATION.

Where more than one debt is included in an adjudication, care is taken to discriminate clearly between the several debts, so that instead of one complex diligence for a sum composed of the amount of the several debts, it shall present several separate adjudications and distinct decrees, each complete in itself, and capable of standing alone, whatever exceptions may be competent against the others which are combined with it. The articulate adjudication is thus strictly a congeries of single adjudications carried on as one action to avoid expense. The writers of systems, who study the greatest possible simplicity, in order to reach the principle upon which the institution they mean to illustrate proceeds, and who have their minds so frequently abstracted altogether from the difficulties and perplexities of practice, have considered adjudications in the simple shape of diligence for a single debt; while, in practice, the compound form of the diligence is well known and established. This omission has sometimes led to doubts whether there really be such a distinction in adjudications, but it is now fully established.²

1. The most distinct example of articulate adjudication is that in which several creditors conjoin their adjudications under the legislative provisions already explained.³ In such conjoined decrees of adjudication, the debtors are quite separate and independent; the

disposition in security by an heir, within a year and day of the ancestor's death, in favour of one of his own creditors, was reducible under the Act 1661, c. 24, as being to the prejudice of the ancestor's creditors. A majority of the whole judges of the Court of Session were of opinion that a bond and disposition in security in favour of a creditor of the ancestor would be objectionable under the statute; but in the view taken of the case in the House of Lords, the question did not arise for decision.]

¹ This is well illustrated by the case of *Sinclair & Doull v. E. of Caithness & Innes*, 1781, M. 268, where an adjudication, reduced to a security on account of an objection, was found still the first effectual in a competition, regulating the preference of all the rest.

² *Landales v. Carmichael*, M. 305; and *Camelford's Trs. v. Maxwell*, M. 309, p. 774, note 3.

³ See above, p. 667.

[738] summonses are distinct; and the decree is made specifically applicable to so many different articles, as if each were entirely independent of the rest.

2. Another example of articulate adjudication, is that in which a person adjudges as trustee for several creditors, and perhaps also for himself, and distinctly details the respective debts in the summons, and has them separately accumulated in the decree.

3. Where the adjudication proceeds at the instance of a single individual, for several debts of his own, standing upon different grounds, and these are distinctly detailed and articulately decerned for, the parts of the adjudication are as capable of separation as where there are several creditors concerned.

In the doctrine relative to articulate adjudication these points seem to be fixed: 1. In order to make an effectual articulate adjudication in the person of one who is the creditor in all the debts, it is necessary that the debts should be accumulated separately; and, accordingly, the Court found an adjudication, including several debts not so accumulated, null as to the whole, in consequence of an objection applicable only to one of them; the creditor having illegally adjudged for a fifth part more of the sum contained in the bill by which that debt was constituted.¹ 2. A different rule prevails where the adjudger acts only as trustee for others; the adjudication is held as articulate for each debt so adjudged for.² 3. The conclusions of the libel regularly ought to bear the articulate nature of the decree which is intended to follow; and when the judge in such case 'decerns in terms of the libel,' the extractor has full authority to extract the decree of adjudication articulately. But it does not seem competent, under any other form of conclusion, to extract an articulate decree. 4. Sometimes the conclusion is alternative,—'as the said debts shall be jointly or separately accumulated.' Under such a summons, a decree of adjudication, either cumulative or articulate, is competent; but the judge must pronounce decree in an articulate form in order to give it effect as such. The extractor cannot make out the decree in an articulate form, where the interlocutor of the judge merely 'decerns in terms of the libel.'³

SUBSECTION II.—OBJECTIONS TO THE GROUNDS AND WARRANTS OF ADJUDICATION.

[739] Documents of debt, bonds, bills, contracts, assignations, and decrees of constitution, etc., are called GROUNDS of the decree of adjudication; general and special charges, and other preliminary steps of proceeding, are called WARRANTS of the decree. Objections to adjudications may be considered, 1. As affecting the constitution of the debt; or, 2. As affecting the preliminary steps and warrants of the adjudication.

¹ *Crs. of Catrine v Baird of Cowdan*, 1738, M. 107. It was much urged by some of the Lords, 'that where an adjudication proceeded upon different debts, notwithstanding its having been found null as to one debt, it ought to be sustained at least as a security for the other debts, with respect to which there lay no objection to the diligence.'

² 'An adjudication, proceeding among other debts upon a bill which bore penalty and annualrent, was found null and void only *quoad* that bill, and sustained as to the other debts, in respect the endorsation to the adjudger bore that it was endorsed in trust for behoof of the endorser.' *Kilk.* p. 2.

³ *Landales v Carmichael*, 1794, M. 305. Here, in the summons of adjudication, the conclusions were alternative: the Lord Ordinary decerned in terms of the libel; and the extractor extracted the decree articulately. On this adjudication, which was duly completed, the creditor entered into possession of a considerable estate for a small debt; and in absence obtained, on expiration of the term, a decree of expiry of the legal. In a reduction by the heir of the reverser, the adjudication was objected to as null in consequence of a *pluris*

petitio in one of the claims; and the question was, Whether the decree was legitimate by an articulate decree of adjudication, or to be restricted to a security for the sums truly due on an accounting? The Court held 'that this is not an articulate adjudication, and proceeds on a *pluris petitio*, and can only be sustained as a security for the principal sums truly due, and interest thereon.'

L. Camelford's Trs. v Maxwell, 1789, M. 309. Here the several sums claimed arose out of one debt, and the conclusions of the sums were not articulately set forth. The Lord Ordinary 'adjudged, etc., in terms of the libel;' and the decree was, by the operation of the extractor, extracted articulately. In a competition the adjudication was objected to on account of a *pluris petitio* in one of the sums of interest; and the question was, Whether the objection should affect that sum only, or reduce the adjudication as an accumulating diligence, and restrict it to a mere security for principal and interest of the whole debt? The Court found the adjudication not articulate; and the objection was applied to the whole.

I.—GROUNDS OF THE DECREE OF ADJUDICATION.—CONSTITUTION OF THE DEBT.

Although adjudication be in form an action, it is strictly and properly a diligence. It is an action of execution merely, in which the Court cannot try the amount of the debt, or admit it to proof. The debt must previously have been constituted, and its exact amount fixed, either by a legal written document or voucher, or by the judgment of a competent court. And it must be precisely liquidated, not merely a rule or principle fixed by which it may be reckoned.

I. ADJUDICATION ON LIQUID DOCUMENT.—1. By a liquid document is to be understood a bond, or bill, or other obligation in writing.¹ It is not necessary that a bill should be protested or registered. The document is sufficient liquidation of the debt.² If it bear a clause of interest, or if interest be due *ex lege*, the adjudication may proceed for arrears of interest without constitution.³ Of course, every objection to the debt itself, want of authenticity of the voucher, want of a stamp, etc., are available against an adjudication. As to the stamp (required only for the purposes of revenue), the want of it may in most cases be supplied in the course of an action of constitution, though in the case of bills and policies of insurance (*supra*, pp. 337–8) the stamp cannot afterwards be affixed. It seems very doubtful on principle, whether, in answer to an objection to an adjudication extracted, it be competent to have the stamp supplied. But this has been decided in favour of the adjudger in a ranking, where an adjudication was held to be validated by the proper stamp being affixed.⁴

2. The debt adjudged for must be still a subsisting debt at the date of the adjudication. 1. If the debt was discharged or paid off at that time, the adjudication will be annulled, in whose hands soever it may now be. Nay, if the evidence produced be so imperfect as to lead to a presumption or suspicion that the debt may have been paid, the adjudication seems to be objectionable.⁵ 2. But it is no sufficient objection that the debt is compensated [740] by another debt due by the adjudger, for compensation takes not effect *ipso jure*; nor does it operate as an extinction of a claim unless when pleaded.⁶ It is sometimes difficult, however, to draw the line between a claim of compensation and the extinction of the debt.⁷ 3. If prescription have run against the debt before the adjudication, it will be a fatal objection to the adjudication. A bond, for example, against which the negative prescription of forty

¹ *Porteous v Sir J. Naesmith*, 1784, M. 132; affirmed on appeal, 4 April 1785. The obligation of a tenant to pay rent, as constituted in a contract of lease, was here held a good ground of adjudication for arrears, without any previous decree of constitution.

Here the distinction was taken between arrears under a lease and rents on tacit relocation, which, as not established by written voucher, were held to require constitution by decree.

² *Ferguson v Robertson*, 20 Feb. 1816, Fac. Coll. 99. [The rule does not, of course, extend to the case of a prescribed bill or note. *Scott v Brown*, 1828, 7 S. 192.]

³ This seems to have been taken for granted in *Porteous'* case. See above, note 1.

⁴ *Lamont v Lamont's Crs.*, 1789, M. 5494. The Court, in a ranking, found the objection that the document of the debt on which adjudication had proceeded was not stamped, capable of being supplied at any time. A remit was made to the Lord Ordinary to sist proceedings till the deed was stamped; and on its having been stamped accordingly, the objection to the adjudication was repelled.

In an election case it was held that a title to vote, which at the time of enrolment was defective, sasine being taken on a disposition having a wrong stamp, was rendered unexception-

able by the subsequent affixing of the proper stamp. 16 Feb. 1819.

⁵ In *Hay v Fleming*, M. 280, Bell's Ca. 47, the judges seem to have held (when the point was accidentally started) that a decree of registration is not sufficient to support an adjudication, unless accompanied by production also of the bill; and upon this ground, that the evidence of the debt being still unpaid is not complete, the want of the bill tending much to weaken the legal presumption of its subsistence.

On the same principle seems to rest the decision in the case of *M'Guffock v Edgar*, 1762, M. 131, in which a bond, payable on requisition, was found no good ground of adjudication, as there was no evidence of requisition.

⁶ *Grant v Grant*, 1680, M. 100; *Wright v E. of Annandale*, 1683, Harcarse, Comprizing, 66; M. Sup. vol. 56.

⁷ *Crs. of Alison v Auchinlecks*, 1759, M. 114. It is not marked distinctly in the report, that the rents which the creditors said ought to have been allowed were the rents of certain lands to the possession of which the adjudger had entered on a lease before the existence of the debt on which the adjudication was led. The adjudication was held to subsist only as a security for principal, annualrents, and necessary expenses accumulated at the date of the adjudication.

years has run without interruption, will not sustain an adjudication led after that term had expired; although no objection has been stated to the passing of the decree of adjudication. In the same way, if the ground of debt on which the adjudication has proceeded be a bill on which the sexennial prescription has run, a good objection will lie to an adjudication led upon it, for the law declares such bill 'to be of no force to produce any diligence or action;' and although it might have been competent to prove the debt by the oath or writ of the debtor in an action of constitution, it will not be a sufficient answer to an objection against an adjudication, that the debtor is now ready to acknowledge the debt. Nor will it even be sufficient that the debtor has appeared in the action of adjudication, and judicially admitted the debt; for this is an essential part of the constitution of the debt, which must precede the adjudication. And although there are some objections which may be cured at any time, no objection can be included under this description, which goes to the essential evidence of the debt.

3. An adjudication may proceed on an English penal bond, without any previous decree of constitution;¹ but a penalty cannot be adjudged for besides the principal and interest.²

4. An adjudication cannot proceed on a personal obligation by a wife; and although an heritable bond by a wife is a good security to affect her estate, an adjudication cannot be led on it: for that diligence, where it proceeds on an heritable bond, rests on the personal obligation, which is null when granted by a married woman.³

II. DECREE OF CONSTITUTION.—1. A decree of constitution is necessary as the ground of an adjudication in all cases where the debt is not liquid;⁴ where there is no written document of the debt; where it is ambiguous, or dependent on a condition; or where the [741] written document, though existing, does not appear; or where it has been lost.⁵ A decree of registration will be a sufficient constitution; but as it affords no evidence of the debt being still subsisting, unless accompanied by the bill or other document of debt, it may be necessary, in answer to any objection of this sort, to produce the document, or to raise an action of constitution.⁶ The summons of adjudication is not issued at the signet, without a warrant from the Lord Ordinary on the Bills; and this warrant is applied for by a short petition or bill, along with which must be produced the written voucher of the debt, or the extracted decree by which it is constituted. When the adjudication is called in Court, the grounds of debt must be produced along with it, to give an opportunity to the debtor of seeing and objecting to them; and where the decree has passed, and is produced in a ranking, those objections may still be stated as nullities, which formerly might have been pleaded in bar of the action.

2. The action of constitution must be regular and correct; and, 1. The Court must be

¹ *Ranking of York Building Co.'s Crs.*, 1783, M. 228; and 1783, M. 229. The adjudication in these cases was held good, without any previous decree of constitution, for an accumulated sum not exceeding the penal sum in the bond, and for the interest of such accumulated sum.

² *Forbes and Attorney v York Building Co.*, 1800, M. App. Adj. 23.

³ *Robertson v Watson*, 1772, M. 5976, 1 Hailes 508. Lord Pitfour says: 'The maxim of law is, that an adjudication proceeds on this, that the debtor had become bound to pay, and had neglected to fulfil his personal obligation. There was no personal obligation on the wife, and therefore an adjudication cannot proceed against her lands.' The Court held, 'that adjudication cannot proceed on the personal obligation of the wife.' [*Thomson v Stewart*, 1840, 2 D. 561. As to adjudication for attaching the *jus mariti*, see *Menzies v Gillespie's Crs.*, 1761, M. 5974; *Calder v Steele*, 19 Nov. 1818, F. C.]

⁴ The Court has held a decree of constitution to be neces-

sary, even in a ranking and sale. *Scott Moncreiff v Innes*, 1821, 1 S. 73, N. E. 74. This will deserve notice afterwards, in speaking of ranking and sale. It will also require very grave consideration should the question occur again.

⁵ *Hay's Crs. v Fleming*, 1794, Bell's Ca. 49, M. 280. Here a bill had been sent abroad to procure payment, and there was produced to ground the adjudication only a copy of the bill, with a protest on it taken in London, but without any decree of constitution. Decree was obtained in a conjoined adjudication, reserving objections *contra executionem*. The bill was afterwards produced in the ranking. The Court sustained an objection to the claim. It was said on the bench that an adjudication 'can proceed only on a decree of constitution or a liquid document. The copy and protest show that the bill once existed, but not that it is resting-owing.' [See also *Barclay v Alexander*, 1846, 8 D. 549; *Wilkie v Flowerdew*, 1850, 12 D. 1818.]

⁶ [Which may now be combined with the adjudication.]

competent by which the decree is pronounced.¹ And although an action may be unexceptionable if the jurisdiction be prorogated, this must be done by one entitled so to act.² 2. Where no citation was given to the tutors and curators of a minor, the decree of constitution was held inept, and the adjudication set aside entirely.³

3. Where the creditor is uncertain of the amount of his claim (*e.g.* where it depends upon a settlement of accounts not yet balanced), it will not validate his adjudication that he has raised an action of constitution, and obtained decree for a random sum, reserving all objections; or at least he must, in competition, support the adjudication to the full extent of the sum adjudged for. In such a case there seem to be two remedies. One is to adjudge articulately for such sum as certainly is due, with a random conclusion for the uncertain sum; which will be available, if it can be justified to the full amount. Another is to adjudge in security, and to obtain decree, reserving objections *contra executionem*.⁴

4. Where the debt, though proved by written voucher or decree, is future or contingent, or where the sum is not ascertained, the proper proceeding is to adjudge in security, the legal of which adjudication never expires.⁵ An apprising in such a case would unquestionably have been illegal under the old law;⁶ and the lawfulness of adjudications in security was once doubted on this analogy of apprizings. But, 1st, An adjudication by a cautioner, in security of his relief, was found to have the same effect with an infeftment in relief;⁷ 2^d, An adjudication on a bond, payable on the granter's death, was also [742] held competent;⁸ and, 3^d, An adjudication in security, 'for a daughter's bond of provision, was found entitled to proceed and compete with the other creditors, though the term of payment was not till her age of eighteen years,' and posterior to the competition.⁹ The Court generally sustains an adjudication of this kind as a security, where there is no objection of *pluris petitio*, giving it the same force as if originally it had been restricted to that species of diligence.¹⁰

5. Where the debt is due, but is not at the time of adjudging vested in the adjudger, a distinction appears to be made between the case of a person succeeding to the debt, and whose titles are not completed till after the adjudication, and that of one who acquires right to the debt by assignation. In the latter of these cases the completion of the right is not held to validate the preceding diligence.¹¹ Nay, it has been held not enough that the adjudger was at the time in treaty for the debt.¹² But in the former case, where the right of the adjudger comes to him by succession, a more indulgent rule is followed.¹³

6. Where the creditor, though his debt be constituted by written voucher, has not that voucher at hand to produce as the ground of his adjudication, and has, in order to supply the defect, raised an action for constituting his debt, decree will be allowed to pass, reserving all objections to the debt when produced in the ranking. The production of the evidence in the ranking will, in consequence of this reservation, be admitted; but the adjudication will stand only if the precise amount of the debt has been decerned and adjudged for.¹⁴

¹ *Rankin v Rankin*, 1821, 1 S. 43, N. E. 47. A decree in absence, proceeding on a decree of constitution pronounced by the Commissary of Glasgow for a debt of £250, was held null and void. See cases of *Paterson v Ross*, 1696, M. 7579; *Keir v Calderwood*, 1706, M. 7556.

² See the case in the preceding note, a pupil without tutor, or a *curator bonis* for a pupil, not held able to prorogate.

³ *M'Turk and Curator v Marshall*, 7 Feb. 1815, 18 Fac. Coll. 212.

⁴ *M'Niel's Crs. v Sadler*, 1794, M. 122.

⁵ *Strachan v Strachans*, 1752, Elchies, *voce* Adjudication; *Sir T. Wallace Dunlop's Crs. v Brown & Collinson*, 1781, M. 62; *M'Kinnel's Crs. v Goldie*, 1797, M. 312.

⁶ *E. of Kinghorn v Strang*, 1631, M. 96, 97.

⁷ *Burnet v Veitch's Crs.*, 1685, M. 96.

⁸ *Blair*, 12 July 1771, Forbes 523.

⁹ *Lyon v Crs. of Easterogle*, 1724, M. 8150. See also *Crs. of Sir T. Wallace Dunlop*, 1781, M. 62.

¹⁰ *Sir Patrick Hepburn v Bruce*, 1684, 1 Fount. 256, M. Sup. vol. lviii. note.

¹¹ *Kennedy v Hamilton*, 1666, M. 13277; *Crs. of Forbes v Jordan*, 1724, M. 127; *Ranking of Crs. of Home of Eccles*, 1703, M. 13288.

¹² *Apparent Heir of Porteous v Sir James Naesmith*, 1784, M. 132; affirmed in the House of Lords, 4 April 1785.

¹³ *Anonymous*, 19 Feb. 1611, Had. See also particularly *Gun v Sinclair*, 1678, M. 13283.

¹⁴ This is the course which ought to have been followed in *Hay's case*, *supra*, p. 776, note 5.

7. Where the decree of constitution has been passed, reserving objections, the adjudger must, in supplying the defects in competition, support his action of constitution as libelled.¹

8. If the person adjudging be not himself the original creditor, he must connect himself by a proper title. 1. If the creditor be dead, the adjudger must be duly confirmed executor.² Partial confirmation is not enough, although it may be sufficient to make it safe for the debtor to pay the debt. 2. It is a good objection to an adjudication, that the adjudger has right only by a testament; and that the subject or claim is not testable. But [743] to such an objection it is a sufficient answer, that the conveying words are strong enough to assign.³

II.—WARRANTS OF DECREE OF ADJUDICATION.—PRELIMINARY PROCEEDINGS.

Many objections are incident to the various steps preliminary to adjudication.⁴

1. The special charge affords the only means by which, where the debtor succeeds to property without having made up titles, the adjudger connects his debtor with the land to be adjudged. It must therefore charge the debtor to enter to the person last infeft, and in that particular character in which the person charged is entitled to enter; otherwise it will not avail the creditor. Thus, a charge to enter heir to a grandfather, when the fee was truly vested in the father by the last infeftment, is null.⁵ While the creditor is not perfectly acquainted with the state of the titles, the charge ought to be kept general in its terms, to avoid objections on account of a mistake in the character of heir.

2. Where the debtor is a minor, it is a good objection that his tutors and curators were not charged on the special charge.⁶

3. It is also a good objection, that the special charge was blank in the name of the lands.⁷

4. If no special charge has been given, it cannot afterwards be supplied.⁸

5. The immediate warrant of an adjudication is a bill presented to the Lord Ordinary on the Bills, and which lies deposited in the signet office. Errors or defects in this warrant will be fatal to the adjudication; as misnomers of the debtor, errors or defects in narrating the debt, etc.⁹

Between GROUNDS and WARRANTS there is this distinction, that it is not necessary to produce the WARRANTS of an adjudication after the expiration of twenty years from the date of the decree of adjudication: ¹⁰ the GROUNDS of the adjudication, that is to say, the decree

¹ *Crs. of Maxwell v Brown*, 1737, M. 174; *Elch. Adjud.* Nos. 12 and 13. A decree of constitution was pronounced, reserving objections, in order to admit the creditor within year and day, but without any proof of passive titles. The adjudication being objected to, because the passive titles were not proved, and the creditor producing a general charge prior to the decree, the Lords would not sustain that general charge as a passive title, because it was not libelled in the process of constitution; but they allowed the creditor to support his decree by proving the other passive titles, though the defender in that decree is now dead (8th June 1737); and the creditor having passed from any further proof of the passive titles, the Lords reduced the adjudication entirely.

² *Park's Crs. v Maxwell*, 1785, M. 14382. Here an adjudication was objected to in competition led by a general disponee of the original creditor unconfirmed. The Court reduced the adjudication.

Arbuthnot v Cockburn, 1789, M. 14383. See *Black v Shand's Crs.*, 1823, 2 S. 118, N. E. 110.

³ *Lamont v Lamont's Crs.*, 1789, M. 10230.

⁴ *Supra*, p. 740 et seq., 746 et seq.

⁵ *M'Niel v Buchanan*, 1770, M. App. Adjud. No. 2, 1 Hailes 331, where a person who lived a short time was not known to have been infeft, and the charge should have been to enter as heir to her. *Robertson v Crs. of Robertson*, 31 Jan. 1805.

⁶ In the above case of *Maxwell v Brown*, 1737, M. 174, *Elchies, voce* Adjud. No. 12, this objection was sustained after the elapse of thirty years. The Court, however, did not annul the adjudication, but only restricted it to a security.

⁷ *Hunter v Hunters*, 1742, *Elchies' Adjud.* No. 34, notes, p. 14. This was sustained as a good defence against declarator of expiry of the legal, after possession for twenty years.

This also was sustained to annul an adjudication in competition. *Crs. of Sir G. Hamilton v Boys*, 1752, *Elchies' Adjud.* No. 42, notes, p. 15.

⁸ *Cunningham v Reid*, 30 June 1789.

⁹ [Bills for summonses are no longer in use.]

¹⁰ *Irvine of Drum v E. of Aberdeen*, 1771, M. 5187. Here letters of general and special charge, being warrants, were found not necessary to be produced after twenty years.

Mr. Tait adds: 'Adhered to, 24th July 1771, in respect that general and special charges are not parts of the pursuer's

of constitution, or bill, bond, or other document of debt, must be produced if called for any time within the years of the long prescription.

SUBSECTION III.—OBJECTIONS TO THE ADJUDICATION.

I. LIBEL OF ADJUDICATION.—1. The libel must bear the alternative of a general [744] and special adjudication,¹ unless it be an adjudication in security. An overcharge or *pluris petitio* in the libel furnishes no good ground of objection, provided the error has been corrected in the course of the proceedings, and the sum is correctly stated in the decree.²

2. Compensation or retention will avail the debtor against adjudication, where instantly verified, and will entitle the debtor to oppose even the motion for intimation in a first adjudication.³ But if no objection is stated in the course of the proceedings, the objection will avail, not by injuring the adjudication as incorrectly led, but by restraining its operation.

3. Where the creditor has adjudged for payment, in a case where he ought to have adjudged only in security, his adjudication will not be available. Thus, if the debt be illiquid, or future, or contingent, he cannot adjudge for payment.⁴

4. If, however, the constitution have been laid for a sum, for which, though it cannot be instantly proved, the creditor takes decree, reserving all objection *contra executionem*, the adjudication will be good, provided in the ranking the debt can be supported to that extent.⁵

5. No lands can be adjudged which are not the property of the debtor; but his property may stand in so peculiar a situation as to suggest difficulties respecting the form of adjudging. Where, for example, the debtor has conveyed his property in trust for certain uses and purposes, it may be doubted whether the adjudication should proceed against the debtor, against the trustee, or against both. In one case upon the election statutes, the opinion of the Court seemed to be, that the truster was utterly divested of his estate.⁶ But this error was corrected in another election case.⁷ And in a ranking it was decided, that the radical right of a trust estate is in the truster, and may be affected by adjudication against him or against his heir, as if the trust never had been granted.⁸

title, but produced as evidence of the passive title against the defender; and also in respect of the former decisions of the Court, and acquiescence of the nation therein.' 5 Br. Sup. 465.

¹ Lord Elchies reports the following case respecting special adjudication:—

'Strichan reported a question of adjudication, whether it was a good answer to the offer of a progress, that there were inhibitions against the debtor, though those inhibitions were after the pursuer's debt. The President, Royston, and Arniston, thought that the estate must be unencumbered; and that the creditor is not obliged to dispute the validity of that encumbrance, or his preference to it, because the inhibition is not in the field; and upon the question it carried to sustain the objection to the progress: *sed multi in contraria fuerunt opinione; inter quos ego*. 10 Nov. 1737.'

² 'If, when the decree comes to be pronounced,' says Lord Kilkerran, 'the error of *pluris petitio* be rectified, and decree only sought and obtained for the sums truly due, the error in the libel will be no nullity.' *Maxwell and Riddell v Maxwell*, 1743, M. 110.

³ *D. of Queensberry's Exrs. v Tait*, 11 July 1817, 19 Fac. Coll. 375. See above, p. 760.

⁴ *M'Niel's Crs. v Sadler*, 1794, M. 122, where the constitution and adjudication were for a random sum, which was not proved by any voucher, and afterwards established to a small extent. Found null.

⁵ See the above case.

⁶ *Muir v M'Adam*, 1781; Wight, p. 282; M. 8688.

⁷ *Sir A. Campbell v Spiers*, 1790, M. 8652; aff. in H. L. 5 March 1791, 3 Pat. 201.

⁸ *Ranking of Edderline, Campbell's Trs. v his Crs.*, 1801, M. App. Adjud. No. 13. Campbell of Edderline became insolvent, and conveyed his estate to trustees absolutely, for behoof of his creditors, with power to them to sell, etc., 1. For payment of debt; 2. For provision to younger children; and, 3. For entailing the remainder. The trustees were infert, and in possession; Edderline died; an action of sale was brought; most of the creditors adjudging in the common way, by charge against the heir. One creditor, conceiving Edderline to have been divested by the trust-deed, constituted his debt against the trustee, and thereon adjudged. He adjudged also, by way of precaution, against the heir of Edderline and the trustees jointly, but beyond the year and day. Lord Eskgrove, Ordinary, decided 'that Edderline was not completely divested of the real right and property of his estate by the trust-right and infertment thereon, the same having been a trust for the granter's behoof, though it contained a power to the trustees of selling the lands for the purpose of paying off the granter's debts; but which power the trustees never exercised, and still stood bound, in the event of a sale, to re-convey or settle the remainder for behoof of the granter and his heirs; which did not disable his lawful creditors, not acceding to the trust-deed, from doing diligence against himself while he lived, or against his apparent heir after his

[745] II. DECERNITURE.—If the accumulated sum include more than is justly due, the diligence is objectionable on the ground of a *pluris petitio*. But the decisions of the Court have not been uniform respecting the effect to be given to a *pluris petitio*. Lord Kilkerran, in reporting the case of the Creditors of Easterfearn, gives a history of the opinions of the Court on this subject, gradually relaxing from the rigid notions applicable to apprizings, and admitting adjudications containing *pluris petitio* as securities, unless where the *pluris petitio* was gross and fraudulent.¹ The Court went afterwards even further than this, and found an adjudication containing a *pluris petitio* 'plainly *mala fide*,' good as a security.² The doctrine seems at last to have settled at this point, that in cases of material *pluris petitio*, or culpable neglect, the adjudication is annulled;³ but where it is slighter, the only effect is to reduce the adjudication to a security for principal and interest, without expenses or penalties.⁴

The *pluris petitio* is judged of by the accumulated sum as it appears in the decree of adjudication. Though this part of the decree, however, seems thus to be rendered so [746] important, yet (inconsistent as it may appear) it seems not to be held essential to the subsistence of the adjudication that the sum should be filled up in the decree.⁵

Material omissions in the extract will annul the adjudication; as, where several steps of

death, for payment or security of their debts; and therefore repelled the objection to the adjudication led by the other creditors against the son and apparent heir of their debtor, after his decease: Found, that neither the decree of constitution obtained in absence, at the objector's instance, against the said trustees, nor the adjudication following thereon, can afford ground for preferring the objectors to the creditors who had before obtained adjudication against the heir of their debtor on special charges; the objector's adjudication against the trustees being an inhabile diligence, the trustee not being the real proprietor of the lands adjudged, nor the proper debtors in the debt adjudged for.' To this judgment the Court unanimously adhered, without an answer to the petition; holding it to be fixed that, notwithstanding a trust-deed, the radical right remains with the truster, and may be adjudged from him or his heirs by creditors; and that the law of M'Adam's case is quite exploded.

¹ Ross, and other Crs. of Easterfearn v Balnagown, 1747, M. 112.

Lord Elchies has the following note of this decision: 'The Lords, *nemine contradicente*, adhered to Drum's interlocutor, sustaining an adjudication as a security for the sums truly due, even in a ranking of creditors, though led for near eight times as much as was due, viz. £9540, though there was a fitted account before, making the sum due only £1284. My reasons were, that reducing it *in toto* was penal and contrary to equity; that a decree of constitution would be so restricted and sustained; and I saw no difference now betwixt a decree of constitution and adjudication; that when no more was apprizd than lands equal to the sum, and that by a sworn inquest, a *pluris petitio* behoved to be a total nullity, because not only the sum must be restricted, but some of the lands struck off, which could only be done by a new inquest; that, by regulation 1695, decrees were only to be reduced on nullities to restore against the injury done, and no further; and that this adjudication was a decree *in foro contentioso*, where every objection was either competent and omitted, or postponed and repelled, and we could repon against it only in equity; and that equity could not annul it altogether. Ar-niston added, that special adjudications must as to this point

be in the same case with apprizings of old; and that he always was against annulling such applications altogether, and against sustaining them for accumulations.'

² After this, says Lord Kames, 'there can scarce be any prospect of cutting down an adjudication *in toto* for a *pluris petitio*.' Rem. Dec. 271. A similar decision was pronounced in the Competition of Dunjop's Crs., 1759, M. 114. But see Ranking of Cairnton, 1760, M. 116; and Rutherford v Bell, 1769, M. 117, Hailes 287.

³ Common Agent in M'Kinnel's Ranking v Goldie, 1797, M. 312; M'Niel v Sadler, 1794, M. 122; M'Whinnie v Burton, 1796, M. 125; Edie & Laird, 20 June 1797; Common Agent in Edderline, 1801, M. App. Adjud. No. 13.

⁴ Park v Craig, 1771, M. App. Adjud. No. 6; Hart v Nasmiths, 1775, M. 119, Hailes 651.

⁵ The only case in which this question seems ever to have occurred, is the Ranking of the Crs. of Alison of Dunjop, where the judgment pronounced by the Court was, that 'the accumulate sum not being filled up, is no nullity in the adjudication.' 13 Jan. 1759, 2 Fac. Coll. 285, M. 114.

Though the judgment is there stated only in the way of narrative, it is quite correct. In a preceding part of the same volume of the Faculty Collection, this case is very incorrectly reported (as of date 18 Nov. 1757), for it is there made to appear that the Court restricted the adjudication on account of this objection. In the papers, I find that the Lord Ordinary (Woodhall) had found the objection 'relevant to restrict the decree to a security for principal, interest, and expenses of deducing the adjudication.' But when the question came into the Court, they pronounced this judgment: 'The Lords found that the accumulated sum not being filled up is no nullity in the adjudication, and that the adjudication can only subsist as a security for the principal sum, annualrents, and necessary expenses accumulate at the date of the same, and the interest thereafter, *in respect that no allowance is given for the rents possessed before the date of the adjudication*, and in respect it is proved,' etc.

It is to be observed that the error of the first report has been transcribed into the Dictionary, and the second report is represented as another judgment to the same effect.

procedure were omitted, and the decree was made as in absence, though there had been a debate, the Court held it to be a nullity.¹

III. ABBREVIATE AND RECORDING.—1. The recording of the abbreviate of adjudication is prescribed by the regulations 1695, art. 24, and additional regulations 1696, art. 3, in substitution of the recording of allowances of comprizings ordered by the statute 1661, c. 31. It must be recorded within sixty days after the decree has been pronounced. Where this has been omitted, the Court have granted warrant for recording after the sixty days.²

2. The effect of omitting to record was, by 1664, c. 31, declared to be the postponement of the apprizing to any other apprizing duly recorded. But such omission does not affect the *pari passu* preference.³

3. Where all the adjudications in competition are recorded in due time after their date, the preference (unless where the rule of *pari passu* preference applies) is according to the priority of registration.

4. Where sasine is taken and duly recorded, the omission to record the adjudication is of no consequence in a question with creditors posterior to the sasine.⁴

SUBSECTION IV.—EFFECT OF DILIGENCE BY THE CROWN.

In the adoption of the English revenue laws at the Union, an express exception was introduced respecting the operation of the Crown's diligence, so far as concerned the [747] real estate. As to such estates, the law of Scotland is left on its original footing.⁵

1. The term 'real estate' is English, not Scottish. The Scottish term which is the most nearly analogous to it, is 'heritable.' The real estate includes not only lands, but all tenements and hereditaments, and everything which is not strictly moveable or personal, as following the person wherever he goes.⁶ Even the statute of Queen Anne itself speaks of 'honours, manors, lands, tenements, or hereditaments,' as to be regulated and tried, in respect to the Crown's right, by the Court of Session and the law and practice of Scotland. There is therefore no doubt that the Crown's preference is restrained from operating not only against lands, but against all the proper heritable estate, rents, annuities, and so forth, which by the law of Scotland are adjudgeable. There are no cases

¹ *Crs. of Fallahill*, 1736, competing, M. 12185, Elch. Adj. No. 7. In this case the Court by consent admitted the adjudication to rank, but without consent it would have been held null. Lord Elchies reports it thus: 'Adjudication, if at all sustained, ought to be ranked according to known rules of preference of adjudgers; and therefore, a nullity being objected against an adjudication, and sustained by the Ordinary *ad effectum* to restrict the adjudication (which had the first infetment, and was year and day before all the rest), and the creditors' preference thereon, to a *pari passu* preference with the other adjudgers. The Lords adhered; but added the reason, viz. because the creditors did not insist to annul the adjudication, but only to be preferred *pari passu* with it.' *Voce* Adjudication.

In the 8vo MS. this note is entered: 'The Lords adhered, but added the reason, etc.; otherwise I and many others thought it would have been very dangerous to make it an arbitrary question whether adjudgers should be preferred *pari passu* or not? and that, if it had not been the creditors' omission, the adjudication must either have been found totally void and null, or otherwise it must have been allowed the preference the Act of Parliament gives it.' Notes, p. 2.

² *Smellome*, petitioner, 1774, M. 206. [In the case of a trustee on a sequestrated estate, the abbreviate must be re-

corded in twenty-one days. See the Bankruptcy Act, sec. 79.]

³ See above, p. 759.

⁴ See saving clause of 1661, c. 31; Ersk. ii. 12. 26.

⁵ 'And Her Majesty shall be preferred in all suits in the said Court, according to the said statute, and the practice of the Court of Exchequer in England; and as well the bodies, as the lands and tenements, debts, credits, and specialties, goods, and personal estates of all debtors or accountants to the Crown or their debtors in Scotland, shall be liable by extent, inquisition, and seizures, or by any other process, to the payment of such debts to the Crown, in the same manner as hath been used in the Court of Exchequer in England; provided that no debt to the Crown in Scotland shall affect any real estate in Scotland, further or otherwise than such real estate may be subject thereto by the laws of Scotland; and that the laws of Scotland shall in all such cases hold place.' 6 Anne, c. 26, secs. 7 and 8. And in a subsequent section it is provided, that 'the validity and preference of the title of the Crown to any honours, manors, lands, or hereditaments, or to casualties belonging to the Crown, shall continue to be tried in the Court of Session by the law and practice of Scotland, and not otherwise.' 6 Anne, c. 25, sec. 22.

⁶ See 2 Blackst. Comm. 16 et seq. and 384 et seq.

settling this point, the only one in which the exception came to be questioned being relative to lands.¹

2. The peculiar conception of one part of the statute left it doubtful whether the exception was not meant only to exclude the operation of *the English forms*, as not being equivalent to our sasine, etc. in heritable property, with the reservation to the Crown of a preference, where the Crown should be as far advanced as the subject in the legal diligence of the Scottish law. In deciding this question, however, the provision already alluded to, that the validity of the Crown's preference should be tried by the Court of Session, according to the laws of Scotland, and no otherwise, was held conclusive.² And therefore it is now settled, 1. That the Crown can attain no preference over the heritable estate by any sort of diligence, more than a subject; 2. That the Crown will be excluded from ranking on the heritable estate altogether, unless the Scottish diligence for attaching that estate be used; and, 3. That the Crown will come in *pari passu* with other adjudgers, without any preference.

SECTION VII.

OF ADJUDICATION IN IMPLEMENT.

[748] While apprising was the diligence by which land was attached for debt, there were two cases in which that method of proceeding was not deemed competent, and for which the Court of Session introduced a new form of judgment, interposing as a court of equity their authority to provide a remedy which the ordinary course of law did not supply. One of these cases was the renunciation of the heir after the ancestor's death, for which the remedy has already been described. The other was the case of an imperfect conveyance, or an obligation *ad factum præstandum*, for which the form of adjudication in implement was invented.³ The principle upon which this last was introduced, is well explained by Lord Stair. He says (iv. 51. 9): 'It is an adjudication for perfecting dispositions of rights of the ground which require infeftment, whether in fee or liferent, and whether in property or annualrent, where the disponent is either expressly or impliedly bound to infeft the acquirer, and oftentimes to infeft himself for that effect, yet hath not performed the same. Justice requiring some legal remedy to make such dispositions and obligations effectual, which would have been very tedious and expensive, if the acquirer had no other remedy but first to use personal diligence against him to liquidate the damage, and then to apprise thereupon (whereby the acquirer having a real right, if not complete, might easily be prevented by any creditor who had only a personal right); therefore the Lords, etc. did sustain process at the acquirer's instance against the disponent to fulfil, and against his superior to supply his place, and remove the acquirer in the same way as he might have done upon his vassal's charter of confirmation or procuratory of resignation.'

¹ See the case quoted in the next note; but the report is vague in respect to the point now in question, speaking only of an *adjudication of the real estate*.

² *Crs. of Burnet v Murray*, 1754, M. 7873. The receiver-general of the customs *adjudged* for the king the land estate of Burnet, on account of duties on tobacco. The other creditors followed with adjudications within year and day of the king, and claimed *pari passu* preference, as if the king's adjudication had been for a common debt. The Court found: 'That before the Union, the king, by the laws of Scotland, was entitled to no preference for revenue debts upon the real land estates of his subjects, but only according to his diligence, and that by the Act 6 Anne the laws of Scotland are saved and declared to hold place and be observed; and there-

fore that His Majesty is preferable only *pari passu* with the adjudgers within year and day of his adjudication.'

See Lord Elchies' note of this case, Notes, p. 16, and also p. 400.

³ Adjudication hath place in two cases: The first 'and most ordinary is, where the heir renounces to be heir, in which case adjudication is competent whether the debt to be satisfied be liquidate or not. The other is where the obligation to be satisfied consisteth *in facto*, and relateth to a disposition of particular things, which disposition or obligation not being fulfilled by the debtor or disponent, though all ordinary diligence be done, then adjudication taketh place to make the same effectual.' Stair iii. 2. 45. See also Ersk. ii. 12. 47.

Adjudication in implement differs from an adjudication for debt, 1. In being directed against a particular subject, in order to have an imperfect conveyance of it completed; 2. In having no alternative conclusion or reversion, unless such be the nature of the obligation to be implemented; and, 3. In being in its nature exclusive of other creditors, admitting of no *pari passu* preference.¹ And yet there may occur a competition of imperfect rights, of which it is not possible to dispose justly otherwise than by dividing the subject between the competitors.

Adjudication in implement may be defined a form of legal diligence, by which the want of a complete voluntary title to land or other heritage is judicially supplied to those who hold a disposition or other conveyance, without a precept or procuratory, or who hold an obligation entitling them to demand a full conveyance of any particular subject.² It is merely the completion of the *form* of a transference already constituted in part, and which the proprietor had bound himself to complete. And, like a voluntary transference [749] when followed by sasine, it bestows a real and preferable right from the date of the sasine.³

1. Adjudication in implement is led against the granter of the imperfect title himself, if alive, in the same manner as a common adjudication for debt.⁴ The summons recites the disposition or contract, or obligation to transfer, of which implement is demanded; and concludes for decree of the Court, adjudging the lands, etc. to the pursuer in implement. The decree adjudges the lands from the debtor, and declares, decerns, and ordains the same to belong to the pursuer; and decerns and ordains the superior to enter him accordingly.⁵

2. If the adjudication is to be led against the heir, the previous forms of a general charge,⁶ action of constitution, and either special charge or decree *contra hæreditatem jacentem*, must be observed, according as the heir shall renounce or be silent. The adjudication requires no intimation.

3. This adjudication is to be completed by an abbreviate recorded, and a charter from the superior followed by sasine. It was once doubted whether the superior was obliged to enter such an adjudger, but these doubts are now at an end. The effect of a charge to the superior, in a common adjudication for debt, depends entirely upon the force of the statute, and it has no effect as a preference except against co-adjudgers. It seems, therefore, extremely doubtful whether any effect should be given to a mere charge upon an adjudication in implement. It has indeed been found, that where no step was taken to complete the first adjudication in implement, a second, with a charge against the superior, was entitled to a preference;⁷ but this has always been held a doubtful judgment, and is not to be taken implicitly, as settling that a charge gives security to such an adjudger. It seems indisputable that, in competitions with voluntary securities, such a charge could be no bar to sasine, and would not entitle the adjudger to a preference. Neither could such a charge stand against an adjudication for debt, completed by infestment subsequently to its date. Neither does there seem to be any ground for holding that the second adjudger in implement, with the first infestment, would not be preferable to the first, who had only charged the superior.

¹ *Wright v Murray*, 1821, 1 S. 93, N. E. 95.

² Mr. Erskine seems to confine this remedy to the case of one holding a *disposition*. But he means to speak only of the prominent case, not restrictively. One who has bought a house by missive of sale, is entitled to a decree of adjudication in implement, as well as if the disposition had been granted. Ersk. ii. 12. 50; Dallas 231.

³ Sir George M'Kenzie, *Observ. 1 Parl. Chas. II. c. 62. Lady Fraser*, 1677, M. 233.

⁴ It is not now necessary (as once it seems to have been) that adjudication in implement should be preceded by personal diligence to enforce performance. Ersk. ii. 12. 50. See *Stair* iv. 5. 9.

⁵ [See *Macgregor v Macdonald*, 1843, 5 D. 888, where it was held that a decree of adjudication in implement was competent at the instance of a creditor claiming under an *ex facie* absolute personal title, to the effect that the lands should belong to him in security, and subject to the debtor's right of redemption. An action of adjudication in implement may proceed notwithstanding the dependence of a judicial sale. *Hutchison v Cameron's Trs.*, 1830, 8 S. 892; *Wood v Hutchison*, 1830, 8 S. 988; *Wood v Scott*, 1833, 11 S. 355.]

⁶ No *annus deliberandi* seems in these adjudications to be necessary. Ersk. ii. 12. 50.

⁷ *Sinclair v Sinclair*, 1704, M. 56.

In its nature, this sort of adjudication is not subject to *pari passu* preference. That belongs properly to adjudications for debt, each forming only a burden, of which many may subsist together without incongruity. But adjudication in implement being equivalent to a conveyance of the property itself, without reversion or alternative, is inconsistent with any similar right in another. At the same time, it must be remembered that, among the many dishonest methods of raising money, it is not unfrequent to procure money on the faith of sales to be afterwards completed. It may thus happen that two innocent persons may be deceived into a situation where equal hardship may be pleaded by both: both may be ready to adjudge in implement; the adjudications of both may stand in the roll together. Shall it then be held that the Lord Ordinary must adjudge to each, leaving them to run against each other in the race to obtain sasine, and making the preference depend on the many accidents by which they may be retarded or advanced? This, plainly, is a case which should be ruled by the principles of bankrupt law.¹

[750] 1. It seems to be consistent with that equity which first introduced the remedy of adjudication in implement, that two or more persons having equal pretensions to demand a complete transference, should be conjoined in one complex adjudication, and the subject either sold or divided for their benefit. Truly they are nothing more than creditors; for while no real right or *jus in re* has been constituted, the *jus ad rem* that each enjoys, resolving into a mere action, makes them proper personal creditors.

2. As there is in bankruptcy no true distinction among creditors who hitherto hold nothing but a mere personal obligation, whether that obligation be to pay money, or to convey land, or to perform any other specific act,—a creditor for a money debt being just as well entitled to have direct execution against the debtor's land, as one who holds an obligation from the debtor to convey his land to him; so a creditor obtaining an adjudication in implement will not have preference over a creditor for debt, who with a decree of adjudication in payment has previously completed his security by sasine. Neither ought the adjudger in implement to prevail over the other money creditors who come within year and day of a prior adjudication for debt, completed by infeftment, though subsequently to his adjudication in implement and sasine. The subject is already attached preferably for the benefit of all who come within the year, and the adjudger in implement may still adjudge as a common creditor for damages.

SECTION VIII.

OF THE JUDICIAL BURDEN BY JUDGE AND WARRANT.

It is doubtful whether an adjudger or creditor in possession of subjects, and repairing them without judicial authority, has, in accounting with other creditors adjudging, a claim for the expense so laid out. But whatever might be the determination in such a question, the judicial process of JUDGE and WARRANT creates a real burden on a burgage tenement, which will be effectual against creditors and purchasers.

This process begins by an application to the dean of guild, at the instance of any one having interest, in order to have the tenement examined and repaired. The dean of guild, after a citation of all parties interested, summons a jury to examine the subject; and their verdict on the necessity of the operation of rebuilding or repairing, authorizes the dean of guild to grant a warrant for having it done.

1. Where the subject is possessed by a creditor-adjudger or otherwise, and the person having right to the reversion or property either cannot be found, or takes no charge of the

¹ See Wright's case, *supra*, p. 783.

property, the possessor is safe to make the repairs required, the dean of guild 'pronouncing a decree,' cognoscing and declaring the amount of repairs, and costs of the proceedings, with interest, to 'be a real and preferable debt affecting the said tenement,' and granting a warrant to the applicant 'to set or possess the tenement until the sums expended, with interest, be repaid.' The extract of the decree is the ground and voucher of the debt and of the preference; and the recording of it in the dean of guild's books is held legal notice of the burden.

2. Where the tenement is ruinous, and has on that account been uninhabited for three years, a judicial procedure is authorized by statute,¹ in which the magistrates or dean of guild summon all concerned to repair or rebuild the house; and failing their doing so, the house or area may be valued by sworn valuers and sold. If the persons having right [751] to the subjects are known, the price is paid to them; if not, it is deposited or consigned with the magistrates, for the benefit of all having interest; and the purchaser gets a title from the magistrates, which is declared to be a perfect security to him and his successors. If no one buy the area or ruined tenement, the magistrates may order it to be rebuilt, and then sold; the price being disposed of as before, and the title declared perfectly secure to the purchaser.

Besides the proper diligence by which lands may be attached for debt, there is another judicial proceeding which may be productive of important consequences in competitions; I mean a DECREE OF DECLARATOR and ADJUDICATION.

DECLARATOR is one of those remedies unknown in England, in which the good sense and adaptation of the Scottish law to the occasions and business of life is distinguishable. Without intending to show the various uses to which this form of proceeding may be applied, it is obvious that on many occasions it is necessary, for the purposes of justice, that a form of action should be provided, by which the true interest of a party in heritable property may be ascertained, so as to prevent the creditors of one who has the apparent property from carrying it off. Thus, where a person has granted a security over his estate, by means of an absolute disposition, trusting to the honour of the donee; or where a company has purchased property which, in compliance with feudal rules, is disposed to one of the partners, or a third person, for behoof of the partnership, but without including the declaration of trust in the disposition; the creditors of the apparent proprietor, if there were no remedy, might by adjudication, judicial sale, or sequestration, carry off this as a fund of division among them, leaving the party to whom truly the right belongs as a mere creditor personally for the value. The remedy in such a case is by an action wherein a solemn judicial declaration can be made of the pursuer's right.

This action is brought into the Court of Session by a summons, stating the circumstances, and concluding that it should be found and declared that the property truly belongs to the pursuer. This is a REAL action, in which the object is not to have a decree against the defender as for a debt, but a judgment against the land or other property. And after the commencement of it, no voluntary act of the apparent proprietor is suffered to interfere with or defeat the right to be declared. This action may also admit a conclusion of adjudication for having the land declared and adjudged to belong to the pursuer, and the superior decerned and ordained to receive the pursuer as vassal, and grant to him a charter on which he may be infeft.

The effect of such a decree, followed by infeftment in the lands, will be to vest in the pursuer a right which, like that of an adjudication in implement, will not be subject to the *pari passu* preference.

There are certain other securities over the feudal estate which are referable to another

¹ 1663, c. 6.

principle,—not real rights, but personal prohibitions or embargoes on the power of alienation. These shall be considered hereafter, under the title of Securities by Exclusion.

CONCLUSION.

OF ACCESSORIES TO LAND, AND OTHER HERITABLE SECURITIES.

[752] In concluding concerning Securities on the Feudal Estate, it seems not unfit to consider the accessory effect of such securities on those parts of the subject which are in their own nature moveable. This is a question which has frequently occurred of late, in consequence of heritable bonds and other securities granted by the proprietors of cotton-mills and other valuable machinery. In such cases the general creditors contend, that while the land may be effectually burdened, although the possession of the owner be continued, provided sasine on the security have passed and been recorded, the moveable parts of the machinery (which are rather the dead stock in trade than by annexation a part of the heritage) ought to accompany the apparent ownership inferred from possession. The holder of the security, on the other hand, maintains that by accession the whole of a machine or mill, of which part is attached to the soil, must be held as a fixture comprehended within the security.

If the intention of parties were sufficient to determine the point, this would not probably be a frequent question; but it is necessary, in order to complete the security, that there should be an effectual tradition; and unless comprehended within the infestment, as a part of the subject, things which are moveable cannot be conveyed in security; for there is no effectual transfer of moveables *retenta possessione*. The machinery of every mill—whether a common corn-mill, a thrashing-machine, a cotton-mill, or even a steam-engine—may, without hazard of injury to the building or to the machinery, be removed. That of a cotton-mill may, without the least detriment: it is, indeed, intentionally made removeable; so that the great moving power, whether a water-wheel or a steam-engine, is all that remains fixed to its place.

Where a man dies and leaves an heir and an executor, the former takes the land and heritable property; the latter gets the moveables. If a contest arise between them, Whether by annexation to land, or by accession as part of an heritable subject, the heir is to have right to that which, taken apart, is properly moveable? it may not unreasonably be held that the whole machinery ought to go together, a point of succession being chiefly a *quæstio voluntatis*. In cases also of temporary occupation, as where a lessee or liferenter has for his own conveniency made additions to the subject of his temporary possession, and the question is raised between tenant and landlord, or between the fiar and the executors of the liferenter, on expiration of the term of possession, Whether the additions are to remain permanently annexed to the land, or to be subject to removal? the same criterion may seem fair and reasonable. But there is considerable difficulty in admitting the same rule to govern cases in which the contest is between the general creditors of a trader, possessed apparently of a valuable stock of machinery, as at once the instrument of his trade, and in part at least the foundation of his credit, and a particular lender of money, who takes his security over the ground or house in which the trader has fixed his establishment.

1. There is one point in which the several cases seem to coincide, and where the same determination must be given in all. If an addition has been made to land or houses, which cannot be dissevered without destruction or injury to the principal or to the accessory,

things so added, though in themselves moveable, become, as fixtures, part of the land. As such they descend to the heir; or, on the expiration of a temporary contract of possession, they accompany the land: and they will also, as part of the subject of security, be available to the holder of an heritable bond.¹

2. Houses, walls, etc., or what is so affixed to them for permanent use, that it cannot, without injury or destruction to the edifice or to the addition, be removed, accompany the property of the land, according to the rule, *Inædificatum solo cedit solo*.²

3. But it is not mere physical annexation which alone deserves to be considered in such questions. That sort of annexation which depends on the principle of accession, is frequently as strong a bond of connection as the mortar or iron by which a fixture is attached. Thus, the water-wheel and stationary parts of a mill are useless without the moveable machinery by which the working power produces its effect in manufacture. This sort of accession seems, as already observed, to afford a rational ground for carrying the whole parts of an engine, by implied will, to the heir who takes the land whereon it is erected. And accordingly this seems to have been settled as law in questions of succession.³

4. But lastly comes the great consideration, whether the above, which may be considered as the general rule, ought not to suffer exceptions from the various employments of stock in trade and manufactures. Engines and machinery have come in the mercantile world to be regarded in many cases rather as accessories to the trade in which they are used, than as accessories to the land; and in questions at least of temporary occupation, as between landlord and tenant, this consideration seems sufficient to control the ordinary rules of mere physical annexation, so as to entitle the tenant on expiration of his term to remove them, or his creditors on his bankruptcy to make them a subject of distribution. The machinery of a steam-engine or cotton-mill is undoubtedly moveable before it is put up. It cannot be used for the purposes of manufacture without being fixed in its place; probably built into the wall, or sunk in the ground, or connected by buildings of various forms with the ground on which it stands. But the engine is generally the principal subject; the ground whereon it stands of comparatively little worth. The engine is not erected for the purpose of enjoying the produce of the land; but the ground is taken merely to be a station for the engine, as employed in a separate manufactory. It in no shape can be supposed to have been intended to pass with the land, but to accompany the manufactory, if there should be occasion for removal to another station.

Cases of this sort have not occurred frequently in Scotland, which may proceed from the attention naturally bestowed, in the arranging of contracts of temporary occupation, to have this matter well settled by agreement. In England there have been several cases on the question, as untouched by special contract. The separation of machinery from the freehold, when first contended for in England, seems to have been held extremely questionable; afterwards it was admitted that a dyer making vats for the purposes of his occupation during the time of his possession might remove them. The same was held as to a baker. After some intermediate doubts, Lord Holt laid it down that a soap-boiler might remove the vats he had set up during the term for the purposes of carrying on his trade.⁴ [754] Here it was held that the machinery was, in all questions between landlord and tenant, to be

¹ *Niven v Pitcairn*, 6 March 1823, Fac. Coll., 2 S. 270, N. E. 239.

² *Hyslop's Trs. v Hyslop*, 18 Jan. 1811, F. C.; Stair ii. 2. 4; Ersk. i. 4. The great telescope erected by Short on the Calton Hill, Edinburgh, although it was affixed to the ground, and to a building erected to contain it, was held subject to poiding.

³ *Dirleton and Stewart* have carried this so far as even to make the horse and other *instrumenta mobilia* of a horse-mill

descend to the heir. *Voce Mill*. So the buckets, chains, and instruments of a coal-work go to the heir. *Dirleton and Stewart, voce Executry*. A similar view seems to have been taken in England. *Lawton v Salmon*, 1 Hy. Blackstone 259, notes.

[See *Dixon v Fisher*, 4 Bell App. Ca. 286, affirming 5 D. 775; *M'Knight v Irving*, 1805, Hume 412; *Begbie v Boyd*, 1837, 16 S. 232; *Sime v Harvey*, 1861, 24 D. 202.]

⁴ *Poole's case*, Salk. 368.

considered as real or personal, as it happened to be an accessory to the trade,¹ or to the possession and use of a particular subject.²

These are distinctions which equity and public expediency, as well as mercantile understanding, ought perhaps to recommend to adoption, even in the case of succession *ab intestato*; and they do not seem to be inconsistent with the common law of Scotland, in regulating the interests of the parties to a contract of temporary possession.

There is another point of view in which the question is of great importance. By the Scottish law, the Crown's process of extent gives no preference over heritable property. How, then, is a sheriff to conduct himself in executing a writ of extent over the property of a great manufacturer? Or how is the line to be drawn by the Court of Exchequer between the Crown and the general creditors?

Lastly, in determining on the extent and effect of a security specially constituted over heritable subjects, on which an engine or machinery has been erected, it will deserve very grave consideration, whether the rule by which the entire machine is held, by accession, to accompany the land or fixed part of the establishment, should not yield to that now so generally prevailing in the mercantile world, by which machinery is held to accompany the trade as an accessory. If this were to be considered as the rule, a cotton-machine or steam-engine may not be more capable of becoming the subject of a separate security for debt *retenta possessione*, than any other part of the stock in trade; and an infetment in the ground whereon the buildings stand would have no effect in securing the creditor over the machinery of a cotton-mill or steam-engine. This question does not seem to be at all settled in England. I am not, indeed, aware of any cases on this point; but in a case which occurred in Scotland, the opinions of two eminent English counsel were taken, and they were directly opposite to each other.³

¹ In *Lawton v Lawton*, 3 Atkins 13, a fire-engine to work a colliery was held by Lord Hardwicke to be an accessory to the trade of getting and vending coals, which was a matter of a personal nature. In another case determined by Lord Hardwicke, *L. Dudley v L. Ward*, Ambler 113, a fire-engine to work a colliery was held an accessory of the trade.

So Lord Chief Baron Comyns considered a cider-mill as accessory to the making of cider. Cited 3 Atk. 13, 16.

² In the case of *Lawton v Salmon* in 1792, 1 Hy. Blackstone 259, Lord Mansfield held salt-pans to be accessory to the salt spring, 'as the inheritance could not be enjoyed without them;' and therefore, in a case of succession, 'on the reason of the thing, and the intention of the testators, he held that they must go to the heir.' But he explained at large the distinction taken in questions between landlord and tenant as being a case in which, for the benefit of trade, there has been a relaxation of the strict rule, by which whatever is connected with the freehold goes to the heir. He admitted that, in this very case of salt-pans, the question would have been very different if the springs had been let, and the tenant had been at the expense of erecting these salt-works.

In *Elwes v Maw*, the Court of King's Bench (the judgment being delivered by Lord Ellenborough) held certain houses erected by a tenant for the more convenient possession of an agricultural farm as accessory to the reality, being for the mere purpose of better reaping the profits of the land, and as such not to be removeable at the end of the lease. 3 East 38.

³ In a case submitted to Mr. Moncreiff, Dean of Faculty, as arbiter, an inquiry into the English law was directed by him, and cases were laid before Sir Samuel Romilly and the present Master of the Rolls, Mr. Leach. The case put to Sir Samuel Romilly was this:—'1st, Whether, by the law of

England, a mortgage regularly executed over a piece of ground, upon which is erected a cotton-mill or factory, with a steam-engine and spinning machinery, would be effectual to the mortgagee, to the exclusion of the assignees of the grantor of the mortgage, in the event of his becoming bankrupt; or to what extent such mortgage could be set aside?

'2d, In the case of the proprietor of a cotton-mill or factory, with a steam-engine and machinery attached, devising his whole real estate generally to one person, and his personal estate to another, Under which of these descriptions of property could the steam-engine and machinery be considered as included?' The answer of that eminent lawyer was:—

'1st, That, by the law of England, a mortgage of a piece of ground on which a cotton-mill or factory was erected, and of a steam-engine and machinery upon it, would be valid as against the assignees as a mortgage not only of the land, but of the steam-engine, and of all the machinery which was affixed to the freehold; but it would not be valid with respect to utensils and machinery not affixed to the freehold, but used in the manufactory.

'2d, That this is a question of considerable difficulty; but the validity of the mortgage cannot in any degree, by the law of England, depend upon the answer to be given to it. Whether the steam-engine and machinery affixed to the freehold would, as between heir and executor, or devisee and residuary legatee, be considered as real or personal estate, it is perfectly clear that a mortgage of them would be good, as against the general creditors of a bankrupt.'

The case put to Mr. Leach was in these terms:—'A granted an heritable security or mortgage to B on a subject belonging to him, consisting of the buildings occupied as a cotton-mill, with the steam-engine thereto belonging, and the cotton

In one case, the Court of Session in some measure proceeded on the principle of [755] accession of the machinery to the land, as a part of an engine of which the great moving power was a fixture. The security of an heritable bond was there held to cover not merely the ground and house, and great moving power, or steam-engine, but also the whole of the smaller machinery essential to the completeness of the mill.¹ But this ground of the decision did not satisfy the bar at the time; and it has been in some measure disclaimed by the judges in a subsequent case, so as to leave the question entirely open.²

machinery. Infeftment in the heritable subjects followed on the mortgage. A continued in possession of the whole premises. Having become bankrupt, a question has arisen between B and the trustee for A's creditors, upon which your opinion is requested, viz.—

‘Whether in these circumstances the security extends over

the steam-engine and machinery?’ The answer was this:— ‘I am of opinion that the security will not extend to the steam-engine and machinery; but I speak altogether upon the principle of the law of England.’

¹ *Arkwright v Billinge*, 3 Dec. 1819, Fac. Coll.

² See the case of *Niven*, *supra*, p. 787, note 1. [The following list of fixtures and non-fixtures, with the decisions applicable to them, is taken from the eighth edition of *Chitty on Contracts*, pp. 336 et seq. :—

1. *Things held not to be Removeable.*

Agricultural erections. ¹	Dressers. ⁹	Locks. ¹⁹
Alehouse bar. ²	Flowers. ¹⁰	Millstones. ²⁰
Barns fixed in the ground. ³	Foldyard walls. ¹¹	Partitions. ²¹
Beast-house. ³	Fruit-trees. ¹²	Pigeon-houses. ²²
Benches. ⁴	Fuel-house. ¹³	Pinerics substantially affixed. ²³
Box-borders. ⁵	Glass windows. ¹⁴	Pump-house. ²⁴
Carpenter's shop. ⁶	Hearth. ¹⁵	Racks in stables. ²⁵
Cart-house. ⁷	Hedges. ¹⁶	Strawberry-beds. ²⁶
Chimney-pieces (in general). ⁷	Improvements (permanent). ¹⁷	Trees. ²⁷
Conservatories. ⁸	Jibs. ¹⁸	Waggon-house. ²⁸
Doors. ⁹	Keys. ¹⁹	Windows. ²⁹

2. *Things held to be Removeable (not being Trade Fixtures).*

Arras-hangings. ³⁰	Blinds. ³⁴	Chimney-backs. ³⁸
Barn set on blocks, etc. ³¹	Bookcases. ³⁵	Chimney-glasses. ³⁹
Beds fastened to ceiling. ³²	Buildings set on blocks, rollers, pillars, etc. ³⁶	Chimney-pieces (ornamental). ⁴⁰
Bells. ³³	Cabinets. ³⁷	Cider-mills. ⁴¹
Binns. ³³		Cisterns. ⁴²

[¹ *Elwes v Maw*, 3 East 38.

² 2 Bl. 1111.

³ *Elwes v Maw*, *supra*.

⁴ *Amos and F. on Fixtures*, 68, 151, 156.

⁵ *Empson v Soden*, 4 B. and Ad. 655.

⁶ *Elwes v Maw*, *supra*.

⁷ *Poole's case*, 1 Salk. 368; *Am. and F. on Fixtures*, 81, n. a; and see *Leach v Thomas*, 7 C. and P. 327.

⁸ *Buckland v Butterfield*, 2 B. and B. 54.

⁹ 2 Bl. 1111; *Am. and F. on Fixtures*, 5, n. 183.

¹⁰ *Per Littledale, J., Empson v Soden*, *supra*.

¹¹ *Elwes v Maw*, *supra*.

¹² *Windham v Way*, 4 Taunt. 316.

¹³ *Elwes v Maw*, *supra*.

¹⁴ 4 Co. 64.

¹⁵ *Poole's case*, 1 Salk. 368.

¹⁶ *Per Parke, J., Empson v Soden*, *supra*.

¹⁷ *Buckland v Butterfield*, 2 B. and B. 54.

¹⁸ *Davis v Jones*, 2 B. and Ald. 165.

¹⁹ *Lady St. John v Pigot*, 2 Balst. 103; *Liford's case*, 11 Co. 50; *Amos* 183-4.

²⁰ *Am. and F. on Fixtures*, 6, n.

²¹ 2 Bl. 1111.

²² *Elwes v Maw*, 3 East 38.

²³ *Buckland v Butterfield*, 2 B. and B. 54.

²⁴ *Elwes v Maw*, 3 East 38.

²⁵ 2 Vent. 214.

²⁶ *Wetherell v Howells*, 1 Camp. 227.

²⁷ *Per Parke, J., Empson v Soden*, 4 B. and Ad. 655, 657.

²⁸ *Elwes v Maw*, *supra*.

²⁹ *Co. Lit.* 53 a; 4 Co. 64.

³⁰ *Roll* 216.

³¹ *Wansbrough v Maton*, 4 A. and E. 884; *Cullens v Tuffnell*, B. N. P. 34; *Elwes v Maw*, *supra*.

³² *Ex parte Quincey*, 1 Atk. 477.

³³ *Am. and F. on Fixtures*, 278, n.

³⁴ *Colegrave v Dias Santos*, 1 B. and C. 77.

³⁵ *Am. and F. on Fixtures*, 278, n.

³⁶ *Elwes v Maw*, *supra*.

³⁷ *Am. and F. on Fixtures*, 278, n.

³⁸ *Harvey v Harvey*, Str. 1141.

³⁹ *Beck v Rebow*, 1 P. Wms. 94.

⁴⁰ *Bishop v Elliott*, 11 Exch. 113, 121; *Elwes v Maw*, *supra*; *Am. and F.* 81, n. a; 6 Bing. 439—per Tindal, C. J.

⁴¹ *Lawton v Lawton*, 3 Atk. 12.

⁴² *Am. and F. on Fixtures*, 278, n.

2. *Things held to be Removeable (not being Trade Fixtures)*—continued.

Clock-cases. ¹	Iron ovens. ¹⁵	Rails. ²⁹
Coffee-mills. ²	Jacks. ¹⁵	Ranges. ³⁰
Cooling-coppers. ³	Lamps. ¹⁶	Sheds. ³¹
Coppers. ⁴	Looking-glasses. ¹⁷	Shelves. ³²
Cornices (ornamental). ⁵	Malt-mills. ¹⁸	Sinks. ³²
Cupboards. ⁶	Marble slabs. ¹⁹	Slabs of marble. ³³
Dutch barns. ⁷	Mash-tubs. ²⁰	Stable on rollers. ³⁴
Furnaces. ⁸	Mills on posts. ²¹	Stoves. ³⁵
Furniture (fixtures put up as). ⁹	Mills laid on brick foundations. ²²	Tapestry. ³⁶
Granary on pillars. ¹⁰	Ovens. ²³	Tubs. ³⁷
Grates. ¹¹	Pattens, erections on. ²⁴	Turret-clocks. ³⁸
Hangings. ¹²	Pier-glasses. ²⁵	Vessels, etc. on brickwork. ³⁹
Iron backs to chimneys. ¹²	Posts. ²⁶	Wainscot fixed by screws. ⁴⁰
Iron chest. ¹³	Presses. ²⁷	Water-tubs. ⁴¹
Iron malt-mills. ¹⁴	Pumps slightly attached. ²⁸	Windmill on posts. ⁴²

3. *Trade Fixtures decided or said to be Removeable.*

Accessory buildings—that is, accessory to a removeable utensil. ⁴³	Counters. ⁴⁸	Furnaces. ⁵²
Brewing vessels and pipes. ⁴⁴	Cranes. ⁴⁸	Gas-pipes. ⁵³
Cider-mills. ⁴⁴	Desks. ⁴⁸	Glass fronts. ⁵³
Cisterns. ⁴⁵	Drawers. ⁴⁸	Iron safes. ⁵³
Closets. ⁴⁵	Dutch barns. ⁴⁹	Machinery let into caps or steps of timber; ⁵⁴ or fixed with screws to the floor, or to sockets of lead let into the stonework of the building. ⁵⁵
Colliery machines. ⁴⁶	Engines. ⁵⁰	
Coppers. ⁴⁷	Fire-engines. ⁵⁰	
	Fruit-trees planted by nurserymen. ⁵¹	

¹ 4 Burn's Eccl. Law, 7th ed. 301.² *Rex v Inhab. of London Thorpe*, 6 T. R. 379.³ *Colegrave v Dias Santos*, 1 B. and C. 77.⁴ *Per Tindal, C. J.*, 6 Bing. 439.⁵ *Avery v Cheslin*, 3 A. and E. 75.⁶ *Rex v Inhab. of St. Dunstan*, 4 B. and C. 686.⁷ *Dean v Allalley*, 2 Esp. 11; but see *Elwes v Maw*, 3 East 55; *Amos* 32.⁸ Am. and F. 69.⁹ Am. and F. 67.¹⁰ Am. and F. 146, n.; *Wittsbeare v Cottrell*, 1 E. and B.

674.

¹¹ *Case of St. Dunstan*, *supra*.¹² *Harvey's case*, *supra*.¹³ Am. and F. 278, n.¹⁴ *London Thorpe case*, *supra*.¹⁵ *Barn*, *supra*.¹⁶ Am. and F. 278, n.¹⁷ *Beck v Rebow*, 1 P. Wms. 94.¹⁸ *London Thorpe case*, *supra*.¹⁹ Am. and F. 277.²⁰ *Colegrave v Dias Santos*, *supra*.²¹ *Ward's case*, 4 Leon. 241.²² *Rex v Inhab. of Otley*, 1 B. and Ald. 161.²³ 4 Burn's Eccl. Law, 7th ed. 301. See *Winn v Ingleby*, 5 B. and Ald. 625.²⁴ *Naylor v Collinge*, 1 Taunt. 19.²⁵ *Beck v Rebow*, 1 P. Wms. 94.²⁶ *Fitzherbert v Shaw*, 1 H. Bl. 258. But see *Elwes v Maw*, 3 East 38.²⁷ Am. and F. on Fixtures, 278, n.²⁸ *Grymes v Boweren*, 6 Bing. 437.²⁹ *Fitzherbert v Shaw*, *supra*. But see *Elwes v Maw*, 3 East 55.³⁰ Am. and F. 278; *Winn v Ingleby*, 5 B. and Ald. 625.³¹ *Fitzherbert v Shaw*, *supra*. But see *Elwes v Maw*, 3 East 55.³² Am. and F. 278, n.³³ Am. and F. 277.³⁴ *Fitzherbert v Shaw*, *supra*.³⁵ *St. Dunstan's case*, *supra*.³⁶ *Harvey v Harvey*, Str. 1141.³⁷ *Colegrave v Dias Santos*, 1 B. and C. 77.³⁸ Am. and F. 278, n.³⁹ *Horn v Baker*, 9 East 215.⁴⁰ *Lawton v Lawton*, 3 Atk. 12; *Elwes v Maw*, 3 East 38; Roll. R. 216. See Am. and F. 79, n.⁴¹ *Colegrave v Dias Santos*, *supra*.⁴² *Rex v Inhab. of London Thorpe*, 6 T. R. 379.⁴³ *Elwes v Maw*, 3 East 38; 3 Y. and I. 333; *Amos* 37, 42, 114.⁴⁴ *Lawton v Lawton*, 3 Atk. 13.⁴⁵ Am. and F. on Fixtures, 276, n. a.⁴⁶ *Lawton v Lawton*; *Elwes v Maw*, *supra*.⁴⁷ *Poole's case*, 1 Salk. 368; *Lawton v Lawton*, *supra*; *Amos* 296, n. a.⁴⁸ Am. and F. on Fixtures, 276, n. a.⁴⁹ *Dean v Allalley*, 3 Esp. 11. But see *Elwes v Maw*, 3 East 55, *Amos* 32.⁵⁰ *Dudley v Warde*, Amb. 113; *Lawton v Lawton*, 3 Atk. 12; *Amos* 276, n. a.⁵¹ *Wardell v Usher*, 3 Scott N. R. 508.⁵² Am. and F. on Fixtures, 69. But see *id.* 276.⁵³ Am. and F. on Fixtures, 276, n. a.⁵⁴ *Davis v Jones*, 2 B. and Ald. 165.⁵⁵ *Hellawell v Eastwood*, 6 Exch. 295, 20 L. J. Exch. 164.

CHAPTER III.

OF REAL SECURITIES OVER PROPERTY SIMPLY HERITABLE.

THIS subject divides, of course, like that of real securities over the feudal estate, into two heads,—Voluntary Securities, and Legal Diligence.

SECTION I.

VOLUNTARY SECURITIES.

The completion of voluntary conveyances and securities, where the subject is simply heritable, not feudal, is either by actual possession or by intimation, unless where the right conveyed is a portion or mere accessory of a feudal subject transferred by sasine as an accompanying right.

1. LEASES OF LANDS OR OF HOUSES are completed by possession.¹ They may be transferred by assignation (where there is no excluding clause), completed in like manner by possession.² Where lands are under sublease, so that the right to be transferred truly is

3. *Trade Fixtures decided or said to be Removeable*—continued.

Partitions. ¹	Salt-pans. ⁵	Tram-plates fastened to sleepers, not let into the ground, but only resting thereon. ¹¹
Plant and pipes of brewers, distillers, etc. ²	Shelves. ⁶	Trees planted for sale. ¹²
Presses. ³	Shrubs planted for sale. ⁷	Varnish-house. ¹³
Pumps. ⁴	Soap-works (fixtures in). ⁸	Vats. ¹⁴
Reservoirs. ⁴	Steam-engines. ⁹	
	Still. ¹⁰	

4. *Doubtful Cases, but which have been the Subject of Discussion.*

Brick-kilns. ¹⁵	Hot-houses. ¹⁸	Storehouses. ²³
Frames in nursery grounds. ¹⁶	Lime-kilns. ¹⁹	Tables fixed or dormant. ²⁴
Furnaces in smelting-houses and glass-houses. ¹⁷	Malting-floors, stoves, etc. ²⁰	Verandahs. ²⁵
Glasses in nursery grounds. ¹⁸	Pavements. ²¹	Wind or water mills. ²⁶
Green-houses. ¹⁸	Sheds. ²²	Workshops. ²⁶

¹ 1449, c. 17. See above, p. 63 et seq. Stair iii. 2. 6.

² It has been laid down by Erskine (ii. 6. 27), that possession is not good to complete a lease of an urban tenement as a real right effectual against singular successors. But the question was tried lately, and the lease sustained. *Waddell v Brown*, 1794, M. 10309. In this case, a lease having been constituted by missive for seventeen years of a dwelling-house and shop in Glasgow, of which the tenant took possession, the Court held that the missive of lease, being clothed with possession, was effectual against a purchaser.

¹⁵ Amos 276, n. a.

² *Lawton v Lawton*, *supra*.

³ Am. and F. on Fixtures, 276, n. a.

⁴ Am. 276, n. a.; 6 Bing. 437; 3 Y. and L. 333-4.

⁵ *Lawton v Salmon*, 1 H. Bl. 259, note.

⁶ Am. and F. on Fixtures, 276, n. a.

⁷ *Penton v Robart*, 2 East 88, 90; *Lee v Risdon*, 7 Taunt. 191.

⁸ Poole's case, 1 Salk. 368.

⁹ *Lawton v Lawton*, *supra*.

¹⁰ *Horn v Baker*, 9 East 215.

¹¹ *Duke of Beaufort v Bates*, 31 L. J. Ch. 481.

¹² See *Penton v Robart*, *supra*; *Empson v Soden*, 4 B. and Ad. 655.

¹³ *Penton v Robart*, 2 East 88.

¹⁴ Poole's case, *supra*; *Davis v Jones*, 2 B. and Ald. 165.

¹⁵ See Amos 276.

¹⁶ *Id.* 66.

¹⁷ *Id.* 276.

¹⁸ See Amos 66.

¹⁹ See Amos 276; *Thresher v East London Waterworks Co.*, 2 B. and C. 608.

²⁰ Amos 276.

²¹ *Id.* 35.

²² *Id.* 33, 37.

²³ *Id.* 276.

²⁴ *Id.* 67, 68, 156.

²⁵ *Penry v Brown*, 2 Stark. 503.

²⁶ Amos 276.

Reference is made to Smith's Leading Cases, *voce Elwes v Maw*, 6th ed. vol. ii. p. 169, for a comprehensive discussion of the subject as understood in England.]

[756] that of levying the surplus rents, intimation to the subtenant seems the legitimate completion.¹ Whether intimation to the landlord is, in the ordinary case of a lease assigned, an effectual transfer of the tenant's right, is a question already discussed.²

2. A right to **STANDING TIMBER**, by a conveyance in satisfaction or security of debt, requires actual possession by the creditor or his workmen in cutting down the timber; or at least constructive delivery, by marking out the trees as sold. Whether this be sufficient as actual delivery to bar the privilege of stopping the purchaser's operations on his insolvency, is another question. But a creditor who receives in satisfaction or security right to his debtor's woods, is to be considered as having paid the price; so that if his right is not challengeable on the Bankrupt Acts, constructive delivery will be enough.

3. A right to a **QUARRY, COAL WORK, or other MINE**, when not transferred by sasine as a feudal subject, must be completed by possession, in order to constitute a preference in favour of the purchaser or creditor. Such right is in the nature of a lease, and can be effectually constituted only on the principles of that contract.³

4. A **LIFERENT RIGHT** in lands is constituted by sasine, but it cannot be so transmitted; for the liferenter cannot infeft another. 'There can' (as Lord Stair says) 'be no subaltern or renewed infeftment of a liferent, which is only personal to the liferenter; the right is incommunicable.'⁴ The use or right to the rents is transmitted or assigned in security by assignation, followed by actual possession;⁵ or by intimation to the tenants; or by legal process against them in the character of assignee.⁶

The benefit of the legal liferents of terce or courtesy may be assigned, and the right of the assignee will be completed by possession, or by intimation to the tenants.

The right of an heir of entail under strict prohibitions is similar in effect to a liferent; but it is in its nature a fee under restraint. The conveyance of the right, therefore, is not like that of liferent by assignation and possession, but by disposition and sasine.⁷

5. Under the statute for redeeming the land-tax,⁸ provision is made for the sale of entire farms of entailed estates in Scotland, when they exceed in value the sum required to be raised, under the condition, 1. That the surplus shall be bestowed in the purchase of land to be entailed on the same heirs, and under the same limitations; and, 2. That in the meanwhile the surplus shall be lodged in one of the public banks for reinvestment, either permanently on the purchase of lands to be entailed, or in the meanwhile on good security upon interest, 'such clauses to be inserted in the bond, or other security to be taken for the money, as shall be effectual to secure the person who would for the time being have been entitled to the rents and profits of the said lands, etc., in case such sale, etc. had not been made; and to the succeeding heirs, etc., the enjoyment of the interest of the said money; and to preserve the capital until the money shall be employed as aforesaid.' [757] The right which is in such cases vested in the heir of entail for the time, is an heritable estate in the nature of an annuity. It is assignable, and the conveyance seems to be by assignation intimated to the trustees, where such money is taken payable to them; or to the proprietors and tenants of the land, if ever in such a case the interest be taken directly payable to the heir in possession. Whether such a right may be effectually assigned by a deed executed abroad, and according to the forms of the country where it is made, is a question on which doubts have been entertained, but which will form a subject of inquiry more properly in the last book of these Commentaries.

¹ See below, Of Assignation of Rents, next page.

² Lord Stair lays down very strongly the necessity of possession to complete the transference of a lease. Stair iii. 2. 6, p. 400.

See this subject discussed above, pp. 64, 65.

³ [See *Paul v Guthbertson*, 1840, 2 D. 1286.]

⁴ Stair ii. 6. 7, also iii. 1. 16, and iii. 2. 6; *id.* iii. 3. 15.

⁵ 'Though liferents be more properly real rights, because

constitute by infeftment, yet, seeing a liferenter cannot infeft another as a fiar can, assignation or disposition is sufficient; but it must be clad with possession.' Stair iii. 2. 6. See also Ersk. ii. 9. 41.

⁶ *Stevenson v Craigmillar*, 1624, M. 836.

⁷ See above, p. 50.

⁸ 42 Geo. III. c. 116, secs. 63, 65, 101.

6. By the entail improving Act of 10 Geo. III. c. 51, sec. 9 et seq., provision is made for assigning to executors or others a claim by the heir of entail in possession, who shall make improvements, for a proportion of the expense defrayed. This claim is in the nature of a personal debt against the succeeding heir, but accompanied by a declaration that the claimant shall have a preference for the rents of the entailed estate over all the other creditors of the heir of entail. This right is completed by the forms laid down in the Act of Parliament.

7. SERVITUDES, when of a positive nature, require possession to complete them; but negative servitudes are effectual without possession or registration.¹

8. A RIGHT OF REVERSION, or a DEBT HERITABLE, either by destination or by the use of diligence, etc., may be transferred, and the conveyance completed by intimation; and this is indeed necessary to the completion.

9. RENTS payable by tenants or by subtenants are frequently assigned in security, either by a simple assignation, or by disposition or heritable bond, containing assignation to rents. 1. Where the assignation is by personal deed, possession must be taken either by intimation or by decree of mails and duties; which proceeds on an action against the tenant, founding on the assignation, and concluding for decree adjudging the rents to be paid to the assignee. Erskine denies that such assignations have effect against singular successors,² and his doctrine seems to be law. 2. Where the conveyance is by disposition or heritable bond, the sasine is a sufficient completion of the creditor's right to the rents,³ upon this principle, that the rents are an accessory of the real right to the lands. The same principle leads to this consequence, that personal assignations of rents, although effectual while the feudal right continues in the cedent, or common debtor, lose their force when the real right is transferred to another. The purchaser of lands, therefore, or an heritable creditor, completing a real right to the lands, carries the rents in competition with assignations, however completed.⁴ The only security over rent, effectual against sasine in the lands, is one which [758] is not confined to the rents themselves, but takes them as an accessory to the feudal right.

SECTION II.

JUDICIAL SECURITIES.

Rights which are heritable, but not feudal, may be attached judicially by decree of adjudication duly recorded, without any further completion. Adjudication in implement is also a competent form of diligence, where subjects of this description have been imperfectly conveyed; or where an obligation to convey has been granted, which has not yet been ful-

¹ *Gray v Ferguson*, 1792, M. 14513; *Ogilvie v Ogilvie*, 1681, M. 863; *Mutrie*, 26 June 1810, 15 Fac. Coll. 725.

² Ersk. iii. 5. 5. The decisions by which assignation to subleases has been sustained, on intimation to subtenants, touch not Erskine's doctrine.

³ *Lady Kelhead v Wallace*, 1748, M. 2785. In a competition between a widow holding an infeftment in security of an annualrent or annuity of 2000 merks and an arrestor of the rents, the latter contended that possession, or a decree of pointing the ground, was necessary to complete the right to the rents; but the Court preferred the annuitant.

Webster v Donaldson, 1780, M. 2902. Here, in competition between an arrestor of rents and a creditor by heritable bond, on which infeftment followed, but neither possession of rents, nor even intimation to the tenants, the Court considered the infeftment on the heritable bond as equal to an intimation of

the assignation to the mails and duties; and that the heritable creditor was preferable to the arrestor, not only for the annualrents, but for his principal sum also.'

⁴ Ersk. iii. 5. 5. *Huntly v Hume*, 1628, M. 2764. The above was found against an assignee to rents in competition with an appriزر infest, although the former had, in consequence of his assignation to the rents, been some years in possession.

Morrison v Tenants of Orchardson, 1635, M. 2815. It was found also against creditors named expressly in the lease, as the persons to whom the rent was to be paid.

Mactavish v MacLachlin, 1748, M. 15248. Where the tack contains a power of retention in payment of debt due by the landlord, it is held ineffectual against singular successors.

Lady Borthwick v Tenants of Catkine, 1632, M. 2815. A factory granted to a creditor to uplift rents for his payment is not effectual against singular successors.

filled. The difference of the remedies lies in the former being subject to *pari passu* preference, while the latter confers at once a preference on the creditor entitled to it.

In general, it may be observed, relative to adjudications of the estate simply heritable:

1. That a decree of adjudication, of which the abbreviate has been duly recorded within the sixty days, as prescribed by the statute,¹ is effectual and preferable upon the estate simply heritable.² 2. That by the rule of *pari passu* preference (as applicable to these adjudications, as well as to the adjudications of feudal subjects), all adjudgers share in the preference of the first effectual adjudication, whose decrees of adjudication are prior, or posterior, and within year and day of the decree; and that under this rule the Crown comes without any preference.³ Although the intention of the Legislature in passing the statute of 1661 was to prevent, by a general law, any individual creditor from acquiring, by the mere accident of better information, or by collusion, an unfair preference over his fellow-creditors; so unhappily is the statute expressed, that serious doubts were entertained whether it did not apply exclusively to apprizings of complete feudal rights, leaving those estates which were not feudally vested to the unequal rule of the old common law. But it has long been settled, that the rule applies to all cases of appricing and adjudication for debt.⁴ 3. That the rules for abridging proceedings—the intimation of the first adjudication, the power of demanding a conjunction, etc.—are applicable to these adjudications, as well as to those against the feudal property. 4. That the creditors of the ancestor are entitled to preference over those of the heir, if they have used the proper diligence within the three years.

In adjudging particular subjects, it is to be considered whether the adjudication proceeds on an imperfect conveyance, or obligation to convey a subject; or on a debt; and whether, in consequence of the death of the debtor, or of his successors, the proceedings are to be regulated by the statutes relative to the charges to enter, and by the law introducing a preference to creditors of the ancestor. In the former case, adjudication in implement is as competent as in the case of feudal subjects. In the latter, the following observations, applicable to different subjects, may be attended to:—

[759] 1. That to subjects in their nature heritable, but not feudal, as well as to feudal subjects of which the right to be carried is merely personal, the completion of the heir's title is by general service, and the charge to be given a general special charge.⁵ 2. That leases and other rights which run out by the course of time, vest in the heir *ipso jure*, and so may be directly adjudged without a charge.⁶ 3. That in rights which, though moveable as to succession, are adjudgeable, as BANK STOCK,⁷ it would seem that the adjudication must be preceded by a charge, in terms of the Act 1695, c. 41, to confirm executors within twenty days;⁸ and that the certification of the Act 1540, c. 106, would take place on such a charge. 4. That in rights having a tract of future time, as ANNUITIES, a general special charge is to be given, and general service carries the right. 5. In the adjudication of LIFERENTS, it is to be remembered that it is not the liferent itself which is to be attached, but the beneficial use or possession merely; and that therefore no sasine or charge is necessary or competent, the diligence being completed by the recorded decree of adjudication.⁹ 6. In the attachment of RENTS and INTERESTS, a competition frequently arises between creditors by heritable bond or disposition, adjudgers with sasine or a charge, simple adjudgers, and arrestors. The rules for determining those cases seem to be: *First*, That where the feudal property has been adjudged, and the adjudication completed into a real right, it carries, as accessories,

¹ 1661, c. 31.

² Ersk. ii. 12. 30.

³ See above, p. 754.

⁴ *Stewart of Pardovan v Stewart*, 1705, 2 Fount. 278, M. 2767; *Sir T. Moncreiff v Moncreiff's Crs.*, 1725, M. 242; *Falconer's Widow v Crs.*, 1734, M. 243; *Jackson v Drummond*, 1734, M. 281, as correctory of *Sir J. Sinclair v Gibson*, Feb. 1729, Ersk. ii. 12. 30.

⁵ See above, p. 750.

⁶ *Stair* iii. 5. 6; *Ersk.* iii. 8. 77. *Boyd v Sinclair*, 1671, M. 14375; *Rule v Hume*, 1635, M. 14374.

⁷ See above, p. 792 et seq.

⁸ See below, Of Diligence against Moveables after Death.

⁹ See above, p. 792.

the rents of the subjects either in arrear or in future ; or the interests of heritable bonds from the date of the infeftment or charge ; although they should have been assigned, and the assignee's right completed by intimation and possession ; or although they should have been arrested *currente termino*, and before the adjudication.¹ *Secondly*, That a decree of adjudication, even without a sasine or charge, carries, as a judicial or legal disposition, a right to the rents falling due after the date of the decree ; and, as a legal conveyance, it requires no intimation to complete the right. The rents are thus carried to the adjudger, preferably to posterior arrestees or assignees.² *Thirdly*, That, in the common case, adjudication carries no arrears of rent due prior to its date ; but an adjudication for the debt of the ancestor, *contra hæreditatem jacentem*, carries all rents from the ancestor's death, as being the only diligence that can be used by the ancestor's creditors. And this rule, which had long been fixed, was in 1740 found applicable also to the case of an adjudication on a special charge ;³ and in 1760 it was extended to the case of arrears of interest on an heritable bond, posterior to the death of the person last infeft.⁴ But, *Fourthly*, If a competition arise between the creditors of the ancestor adjudging the *hæreditas jacens*, and those of the apparent heir attaching the arrears of rent as part of their debtor's moveable estate, it would seem that the creditors of the heir would be preferable on their arrestments, on the principles adopted in the decision of the cases of Lord Banff, and Hamilton against Hamilton.⁵

¹ *Huntly v Hume*, 1628, M. 2764.

² Ersk. ii. 12. 17, and Ersk. iii. 5. 7.

³ *Dooly v Dickson*, 1740, Kilk. 4, M. Sup. vol. 9.

⁴ *Anderson and Others*, 23 July 1760, claimants on the forfeited estate of Strowan.

⁵ See above, p. 94.

END OF THE FIRST VOLUME.